

1 **POLLUTION CONTROL HEARINGS BOARD**
2 **STATE OF WASHINGTON**

3 PIERCE COUNTY; SNOHOMISH
4 COUNTY, a political subdivision of the State
5 of Washington; CLARK COUNTY,
6 WASHINGTON; KING COUNTY, a
7 political subdivision of the State of
8 Washington; and BUILDING INDUSTRY
9 ASSOCIATION OF CLARK COUNTY,

Appellants,

and

9 CITY OF SEATTLE, a municipal
10 corporation; and CITY OF TACOMA, a
11 municipal corporation, and STATE OF
12 WASHINGTON, DEPARTMENT OF
13 TRANSPORTATION,

Intervenors,

v.

14 STATE OF WASHINGTON,
15 DEPARTMENT OF ECOLOGY,

Respondent,

and

17 PUGET SOUNDKEEPER ALLIANCE,
18 WASHINGTON ENVIRONMENTAL
19 COUNCIL, and ROSEMERE
20 NEIGHBORHOOD ASSOCIATION,

Respondent Intervenors.

And

PCHB No. 12-093c
PCHB No. 12-097c

ORDER ON SUMMARY JUDGMENT

Phase I Issues Nos. 3, 17(a) and 20; and
Phase II Issues Nos. 2(a) and 3(a)

1 COALITION OF GOVERNMENT
2 ENTITIES: CITY OF AUBURN, CITY OF
3 BAINBRIDGE ISLAND, CITY OF
4 BURLINGTON, CITY OF DES MOINES,
5 CITY OF EVERETT, CITY OF KENT,
6 CITY OF ISSAQUAH, CITY OF MOUNT
7 VERNON, CITY OF RENTON, CITY OF
8 SEATAC, CITY OF SNOQUALMIE, CITY
9 OF SUMNER, all municipal corporations of
10 the State of Washington; COWLITZ
11 COUNTY; and KING COUNTY, political
12 subdivisions of the State of Washington,

Appellants,

and

9 CITIES OF KIRKLAND, KELSO,
10 SAMMAMISH, CAMAS, LONGVIEW,
11 LYNNWOOD, POULSBO, BREMERTON,
12 BOTHELL and FERNDALE; and STATE
OF WASHINGTON, DEPARTMENT OF
TRANSPORTATION

Appellant Intervenors,

v.

15 STATE OF WASHINGTON,
16 DEPARTMENT OF ECOLOGY,

Respondent.

and

18 PUGET SOUNDKEEPER ALLIANCE,
19 ROSEMERE NEIGHBORHOOD
ASSOCIATION,

Respondent Intervenors.

1 INTRODUCTION

2 This case involves numerous consolidated appeals by various local governments
3 (Appellants or municipalities) that are permittees under the 2013-2018 Phase I or Western
4 Washington Phase II Municipal Stormwater National Pollution Discharge Elimination System
5 (NPDES) Permits and State Waste Discharge General Permits issued by the Department of
6 Ecology (Ecology) in 2012. Although the appeals of the Phase I and Phase II Permits are
7 proceeding as two separate cases, the Board ordered several specific issues from the Phase II
8 appeal to be consolidated with the Phase I proceeding, as these issues have common questions of
9 fact or law (Joint Order of Consolidation of Issues, January 16, 2013). This Order addresses
10 Motions for Summary Judgment filed by various parties¹ on the following consolidated issues:

11 PHASE I ISSUES

- 12 1. [Legal Issue 3] Whether Special Condition S5.C.5.a of the Permit contains
13 requirements that are unlawful, unjust, unreasonable, impracticable, vague,
14 ambiguous and/or beyond the authority of Ecology to impose due to the following
15 reasons:
- 16 a. Said requirements conflict with or are inconsistent with Washington’s vested
17 rights law;
 - 18 b. Said requirements conflict with or are inconsistent with Washington law
19 regarding the finality of land use permitting decisions;
 - 20 c. Said requirements in effect require Permittees to regulate in a manner that
21 could expose Permittees to liability for violating the rights accorded to
property owners by Washington and federal law;
 - d. Said requirements define and use terms related to land use permitting and
development; and/or

¹ Snohomish County filed a Motion for Partial Summary Judgment on Phase I Issue No. 3. Puget Soundkeeper Alliance et. al. (PSA) filed a Motion for Partial Summary Judgment on Phase I Issue Nos. 3, 17(a), and 20 and Phase II Issues Nos. 2(a) and 3(a). Auburn et. al. aka. The Coalition of Governmental Entities (Coalition) filed a Motion for Partial Summary Judgment on Phase II Issue Nos. 2(a) and 3(a).

1 e. Said requirements purport to govern, regulate or otherwise control the actions
2 of the Permittees after the expiration of the Permit;

3 2. [Legal Issue 17] Whether certain Low Impact Development (“LID”) provisions
4 contained in the Permit, Appendix 1, the Manual, and/or documents that are
5 referenced by or incorporated into the Permit, Appendix 1 and/or the Manual, are
6 unlawful, unjust, unreasonable, impracticable, vague and/or ambiguous for the
7 following reasons:

8 a. The provisions interfere or conflict with land use planning, Growth
9 Management Act (chapter 36.70A RCW) and/or vesting;

10 3. [Legal Issue 20] Whether MR 7, set forth in Appendix 1 of the Permit, is contrary to
11 the constitutions of the United States and/or Washington State and/or violates RCW
12 82.02.020 because it requires the owners or developers of private land to mitigate for
13 stormwater impacts that were not caused by the owners or developers of the land, and
14 to mitigate to an extent that is not roughly proportional to the impacts of the present
15 and proposed development of the land.

16 PHASE II ISSUES

17 1. [Legal Issue 2] Whether Special Condition S5.C.4 of the 2013-18 Phase II NPDES
18 Municipal Stormwater Permit for Western Washington (the “Permit”), and references
19 in those conditions to Appendix 1 and the 2012 Stormwater Management Manual for
20 Western Washington (“the Manual”) contain requirements that are unlawful, unjust,
21 unreasonable, and/or impracticable for one or more of the following reasons:

a. Said provisions interfere or conflict with land use planning, the Growth
Management Act (chapter 36.70A RCW), vesting, and/or other governmental
functions;

2. [Legal Issue 3] Whether Low Impact Development (“LID”) provisions contained in
Conditions S5, S5.C.1, S5.C.2, S5.C.3, S5.C.4, and/or S5.C.5 of the Permit,
Appendix 1, the Manual, and/or documents referenced by or incorporated into the
Permit, Appendix 1 and/or the Manual, are unlawful, unjust, unreasonable, and/or
impracticable for one or more of the following reasons:

a. The provisions interfere and/or conflict with land use planning, the Growth
Management Act (chapter 36.70A RCW), vesting and/or other governmental
functions;

1 Board Chair Tom McDonald, and Kathleen D. Mix and Joan Marchioro, Members,
2 reviewed and considered the written record before the Board on the motions, without oral
3 argument. The record before the Board is provided in Appendix A to this Order.

4 BACKGROUND –PHASE I and PHASE II PERMITS

5 1. The Municipal Stormwater Problem

6 Ecology issued the Phase I Municipal Stormwater Permit on August 1, 2012, with an
7 effective date of August 1, 2013 through July 31, 2018 (2013 Phase I Permit). The permit covers
8 discharges from large and medium municipal separate storm sewer systems (MS4s) as
9 established by 40 CFR 122.26. 2013 Phase I Permit, Condition S1.A. The cities of Seattle and
10 Tacoma, and Clark, King, Pierce, and Snohomish Counties are among the municipalities covered
11 under the 2013 Phase I Permit. 2013 Phase I Permit, Condition S1.B. The Phase II permit,
12 issued at the same time, with the same effective dates, covers discharges from small municipal
13 separate storm sewers in western Washington, which are defined in the Phase II Permit as those
14 that are not “large” or “medium” pursuant to federal regulation (2013 Phase II Permit). Phase II
15 Permit Condition S1.A-B.

16 The 2013 Phase I and Phase II Permits are NPDES and State Waste Discharge permits
17 that authorize discharges of stormwater, and limited discharges of non-stormwater flows from
18 MS4s owned or operated by each municipality covered under the permits (collectively, 2013
19 Permits). *Id.*, Condition S2.A and B. An MS4 itself can be described as all the conveyances or
20 systems of conveyances that are designed or used for collecting or conveying stormwater,
21 including roads with drainage systems, municipal streets, catch basins, curb gutters, ditches,

1 manmade channels or storm drains. *See Puget Soundkeeper Alliance v. Wash. Dep't of Ecology*,
2 PCHB Nos. 07-021, 07-26 through -30, and 07-039, Findings of Fact, Conclusions of Law, and
3 Order, (Aug. 8, 2008) (2008 Phase I Decision) at 9, n 9. The 2013 Permits replaced the permits
4 that were effective from 2007 through 2012 (2007 Permits), and which Ecology had reissued
5 without modification for an additional year. See RCW 90.48.260(3) (a) and (b).

6 The Board has addressed multiple issues related to municipal stormwater and the
7 permitting scheme applicable to municipalities in several earlier cases.² In these decisions, the
8 Board recognized that municipalities have numerous challenges in managing stormwater due to
9 the diverse and dispersed nature of stormwater pollutant sources, and the commingling of
10 polluted water from many sources. It is relevant to refer to earlier decisions to understand the
11 scope of the pollution problem that the Phase I and Phase II Permits are designed to address. We
12 stated in an earlier decision:

13 Stormwater in general is difficult to manage because discharges are intermittent
14 and weather-dependent (i.e. from rainfall and snowmelt). Municipal stormwater
15 is even more difficult to manage than other types of stormwater because it is
collected and discharged from such a vast diversity of inputs and outfalls, and
involves such a large volume of water. Most existing MS4s were not built with

16 ²Phase I: *Puget Soundkeeper Alliance v. Wash. Dep't of Ecology*, PCHB Nos. 07-021, 07-26 through -030, and 07-
17 039, Findings of Fact, Conclusions of Law, and Order, 2008 WL 5510413 (Aug. 8, 2008) (2008 Phase I Decision);
Puget Soundkeeper Alliance v. Wash. Dep't of Ecology, PCHB Nos. 07-021, 07-026 through -030, and 07-039 Order
18 on Summary Judgment, 2008 WL 5510410 (April 8, 2008) (2009 Phase I Order on Summary Judgment).
Phase II: *Puget Soundkeeper Alliance v. Wash. Dep't of Ecology*, PCHB Nos. 07-022,
19 -023, Findings of Fact, Conclusions of Law, and Order, 2009 WL 434836 (Feb. 2, 2009) (2009 Phase II Decision);
Puget Soundkeeper Alliance v. Wash. Dep't of Ecology, PCHB Nos. 07-022, -023, Order on Summary Judgment,
September 29, 2008) (2008 Phase II Order on Summary Judgment)
20 Consolidated Issues: *Puget Soundkeeper Alliance v. Wash. Dep't of Ecology*, PCHB Phase I Nos. 07-021, 07-026
through -030, and 07-039, and Phase II Nos. 07-022, -023, Findings of Fact, Conclusions of Law, and Order
21 Condition S4 (August 7, 2008) (2008 Consolidated Issues S4 Decision); *Puget Soundkeeper Alliance v. Wash. Dep't*
of Ecology, PCHB Phase I Nos. 07-021, 07-026 through -030, and 07-039, and Phase II Nos. 07-022, -023, Order on
Dispositive Motions : Condition S4 (April 2, 2008) (2008 Consolidated Issues S4 Order on Summary Judgment).

1 water quality protection in mind, but instead were built for the purpose of
2 draining water as efficiently as possible, managing peak flows, and protecting
the public from flooding and disease.

3 2008 Consolidated Issues S4 Decision, at FF 27, p. 23

4 While understanding the challenge to address municipal stormwater, the Board has also
5 found that stormwater is the leading contributor to water quality pollution in the state's urban
6 waterways, and is considered to be the state's fastest growing water quality problem as
7 urbanization spreads throughout the state. *Id.* at FF 30, p. 25

8 Common pollutants in stormwater include lead, zinc, cadmium, copper,
9 chromium, arsenic, bacterial/viral agents, oil & grease, organic toxins,
10 sediments, nutrients, heat, and oxygen-demanding organics. Municipal
stormwater also causes hydrologic impacts, because the quantity and peak flows
of run off are increased by the large impervious surfaces in urban areas.
11 Stormwater discharges degrade water bodies and, consequently, impact human
health, salmon habitat, drinking water, and the shellfish industry.

12 *Id.* at FF 30, p. 25.

13 The Ninth Circuit Court of Appeals, in review of issues related to the Phase II
14 municipal stormwater rules stated the problem as follows:

15 Stormwater runoff is one of the most significant sources of water pollution in
16 the nation, at times "comparable to, if not greater than, contamination from
industrial and sewage sources." Storm sewer waters carry suspended metals,
17 sediments, algae-promoting nutrients (nitrogen and phosphorus), floatable trash,
used motor oil, raw sewage, pesticides, and other toxic contaminants into
streams, rivers, lakes, and estuaries across the United States. In 1985, three-
18 quarters of the States cited urban stormwater runoff as a major cause of
waterbody impairment, and forty percent reported construction site runoff as a
19 major cause of impairment. Urban runoff has been named as the foremost cause
of impairment of surveyed ocean waters. Among the sources of stormwater
20 contamination are urban development, industrial facilities, construction sites,
and illicit discharges and connections to storm sewer systems.

1 Env'tl. Def. Ctr., Inc. v. U.S. E.P.A., 344 F.3d 832, 840-41 (9th Cir. 2003)(footnotes omitted).

2 In developing the Phase I and Phase II Permits, Ecology recognized the typical impacts
3 of stormwater included dangers to human health and drinking water from untreated stormwater,
4 degradation of salmon habitat through the effects of hydrologic flows and toxicity (referencing
5 surveys that very high percentages of Coho salmon were dying before they could spawn, likely
6 due to stormwater pollution in urban streams in Puget Sound), economic threats to the shellfish
7 industry resulting from stormwater contamination, and overall degradation of water bodies
8 affecting beneficial uses of Washington's waters. See, Fact Sheets, Phase I and Phase II
9 Municipal Stormwater Permits, pp.10-12 (November 4, 2011).

10 The Board has recognized it will take many years, and more than one of the five-year
11 municipal general permit cycles, before municipalities can address the pollutant levels in their
12 stormwater discharges. In the meantime, it is likely that municipal stormwater discharges will
13 not comply with state water quality standards at all times, at all outfalls within their systems,
14 even when implementing the Phase I and Phase II Permits. 2008 Consolidated Issues S4
15 Decision, supra at FF 31, pp. 25-26.

16 2. Conditions of the 2013 Phase I and Phase II Permits

17 Ecology continues to target the mixture of pollution and hydrologic impacts caused by
18 municipal stormwater with the conditions of the 2013 Phase I and Phase II Permits. Consistent
19 with federal and state law, the permits authorize the discharge of stormwater, including polluted
20 stormwater, to the waters of the State of Washington. The permits can be described as a set of
21 requirements imposed directly on the municipalities, as well as a set of standards that the

1 municipalities are, in turn, required to implement within their jurisdictions. Unlike other general
2 permits issued by Ecology, such as the Industrial or Construction Stormwater General Permits,
3 the Phase I and Phase II Permits contain neither effluent limitations nor benchmarks for specific
4 pollutants. The permits are, instead, “programmatic” in nature, requiring implementation of
5 area-wide stormwater management programs to address pollution in stormwater.

6 Condition S4 of the 2013 Phase I and Phase II Permits set out the legal standards each
7 municipality covered by the permits must comply with. Among these standards is the
8 requirement to “reduce the discharge of pollutants to the maximum extent practicable (MEP).”
9 Phase I and Phase II Permit Conditions S4. This standard reflects the federal requirement
10 contained at 33 U.S.C. §1342(p)(3)(B)(iii), which provides:

11 Permits for discharges from municipal storm sewers...shall require controls to
12 reduce the discharge of pollutants to the **maximum extent practicable**,
13 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. (emphasis added)

14 The municipality must also comply with the standard under state law that requires the use
15 of “all known, available, and reasonable methods of prevention, control and treatment (AKART)
16 to prevent and control pollution of waters of the State of Washington.” RCW 90.48.520; WAC
17 173-201A-020; Phase I and Phase II Permit Conditions S4.D. AKART applies to both point and
18 nonpoint sources of pollution, and with regard to nonpoint sources such as municipal
19 stormwater, the term "best management practices," (BMP) is typically applied as “a subset of the
20 AKART requirement.” WAC 173-201A-020. A BMP is defined as “physical, structural, and/or
21 managerial practices approved by the department that, when used singularly or in combination,

1 prevent or reduce pollutant discharges.” *Id.* Permit Condition S4 also sets out the adaptive
2 management response required of the municipality when a discharge from a MS4 is causing or
3 contributing to a violation of the state’s water quality standards.

4 As with the 2007 Phase I and II Permits, the 2013 Permits require each municipality
5 covered under the permit to implement a Stormwater Management Program (SWMP) during the
6 term of the permit. The SWMP is a set of actions and activities designed to protect water quality
7 and reduce the discharge of pollutants from MS4s to the federal MEP and state AKART
8 standards. Permit Conditions S5.A-B. The SWMP consists of a number of components, many
9 of which were included in the 2007 Phase I and II Permits. Although there are some differences
10 between the requirements for the Phase I and Phase II Permits, the SWMP must include
11 requirements for mapping and documentation of the MS4, control of runoff from new
12 development, redevelopment, and construction sites, a structural stormwater control program,
13 source control for existing development, a program to prevent, detect, characterize, and eliminate
14 illicit connections and discharges into the MS4, operation and maintenance programs, and public
15 education and outreach programs. Permit Conditions S5.

16 The Phase I Permit requires each municipality to demonstrate that it can implement the
17 permit pursuant to ordinances or similar means, which legally authorizes or enables the
18 municipality to control discharges to and from its MS4s. The legal authority, which may be a
19 combination of statute, ordinance, permit, contracts, orders, interagency agreements, or similar
20 means, must authorize or enable the municipality to control the contribution of pollutants to
21 MS4s from stormwater discharges associated with industrial activity, and control the quality of

1 stormwater discharged from sites of industrial activity. The legal authority must also allow the
2 permittee to prohibit through ordinance or similar means, illicit discharges, the discharge of
3 spills and disposal of materials other than stormwater into the MS4s, and require compliance
4 with conditions in ordinances and other similar legal authority. Phase I Permit Condition S5.C.1.
5 Similarly, the Phase II Permit has various requirements for implementation of an “ordinance or
6 other enforceable mechanism” to address aspects of the required stormwater management
7 program, including the requirement to control runoff from new development, redevelopment, and
8 construction sites. Phase II Permit Condition S5.C.

9 Both the Phase I Permit Condition S5.C.5, and the Phase II Permit Condition S5.C.4
10 address control of runoff from new development, redevelopment, and construction sites. The
11 details of this condition are at the heart of the controversy before the Board on the current
12 motions. Condition S5.C.5 sets a minimum performance measure that requires the adoption of a
13 local program that meets the Minimum Technical Requirements set out in Appendix 1 to the
14 Phase I and Phase II Permits. Permittees are instructed to consult with the Appendix to
15 determine which of the minimum requirements apply to a given project. There may be both
16 adjustments, and variances or exceptions to the Minimum Requirements of the Appendix.³

17 _____
18 ³ The minimum requirements for a project within a particular jurisdiction are summarized as follows:

- 19
- #1: The permittee must require a Stormwater Site Plan from all projects that meet certain thresholds.
 - #2: All new development and redevelopment projects are responsible for preventing erosion and discharge of sediment and other pollutants into receiving waters, and the permittee must require a Stormwater Pollution Prevention Plan for all projects of a certain size. Permittees may allow compliance with the Minimum Requirement for an SWPPP for those sites covered under Ecology’s General NPDES Permit for stormwater associated with construction sites and fully implementing the requirements of that permit. SWPPP elements are prescribed (e.g. installing sediment controls, stabilizing soils, protecting slopes).
 - #3: Source control of pollution is required of all projects by implementing all known, available and reasonable source control BMPs, consistent with the SWMMWW, or equivalent.
- 21

1 The Phase I Permit provides that by June 30, 2015, municipalities must “adopt
2 and make effective” a local program that meets the requirements in S5.C.5.a.i through ii.
3 Further, the Permit provides that adopted local program “shall apply to all applications
4 submitted after July 1, 2015 and shall apply to projects approved prior July 1, 2015 (sic),
5 which have not started construction by June 30, 2020”. (footnotes defining “application”
6 and “started construction” omitted.) Phase I Permit Condition S5.C.5.a.iii.

7 The Phase II Permit provides that no later than December 31, 2016, municipalities
8 must “Implement an ordinance or other enforceable mechanism that addresses runoff
9 from new development, redevelopment, and construction site projects. . . . The local
10 program adopted to meet the requirements of S5.C.5.a(i) through (iii) . . . shall apply to all
11 applications submitted on or after January 1, 2017 and shall apply to projects approved
12 prior to January 1, 2017, which have not started construction by January 1, 2022.” Phase
13 II Permit, Condition S5.C.4.a (footnotes omitted).

-
- 14 • #4: To the maximum extent practicable (MEP), natural drainage systems are to be maintained, and
 - 15 discharges shall occur at the natural location; outfalls require energy dissipation.
 - 16 • #5: The permittee must require on-site stormwater management BMPs, consistent with other standards, and
 - 17 “to the extent feasible.” Stormwater discharges are to match a specified Low Impact Development
 - 18 Performance Standard, and projects are informed to consider the BMPs in the order listed for the type of
 - 19 surface, using the first BMP that is considered feasible.
 - 20 • #6: This minimum requirement for Runoff Treatment describes how to assess a project for construction of
 - 21 any needed stormwater treatment facility, discussing treatment-type thresholds, facility sizing, and related
 - 22 matters.
 - #7: The permittee must require all projects provide flow control to reduce the impacts of stormwater runoff
 - from hard surfaces and land cover conversions. Thresholds are set out for achievement of the standard
 - flow control requirement, which is described in greater detail.
 - #8: This sets out the Wetland Protection requirements, which are applicable to projects where stormwater
 - discharges into a wetland, either directly or indirectly through a conveyance system.
 - #9: Permittees must require an Operation and Maintenance manual that is consistent with the provisions of
 - Ecology’s Stormwater Management Manual for Western Washington for proposed stormwater facilities
 - and BMPs.

1 In addition to the stormwater management programs required in Condition S5, with the
2 associated effective dates, both the Phase I and Phase II Permits also have specific provisions
3 that require the permittees to make effective local development-related codes, rules, standards, or
4 other enforceable documents to incorporate and require Low Impact Development (LID)
5 principles and LID BMPs as part of the requirements that must be applied to control runoff from
6 new development, redevelopment and construction sites. Both permits state that it is the intent
7 of such revisions “to make LID the preferred and commonly-used approach to site development.
8 The revisions shall be designed to minimize impervious surfaces, native vegetation loss, and
9 stormwater runoff in all types of development situations.” Phase I jurisdictions must do so by
10 July 1, 2015, while Phase II jurisdictions (with several exceptions) must do so by December 31,
11 2016. Phase I Permit Condition S5.C.5.b.i-ii; Phase II Permit Condition S5.C.4.f.i-ii.

12 Finally, the 2013 Phase I and Phase II Permits include several definitions of “LID,” each
13 of which explain LID as a strategy that strives to minimize impervious surfaces and native
14 vegetation loss and that attempts to mimic predevelopment hydrologic processes by use of
15 distributed stormwater management practices:

16 “LID Principles” means land use management strategies that emphasize
17 conservation, use of onsite natural features, and site planning to minimize
impervious surfaces, native vegetation loss, and stormwater runoff.

18 “Low Impact Development” means a stormwater and land use management
19 strategy that strives to mimic pre-disturbance hydrologic processes of
20 infiltration, filtration, storage, evaporation and transpiration by emphasizing
conservation, use of on-site natural features, site planning, and distributed
stormwater management practices that are integrated into a project design.

1 “Low Impact Development Best Management Practices” means distributed
2 stormwater management practices, integrated into a project design, that
3 emphasize pre-disturbance hydrologic processes of infiltration, filtration,
4 storage, evaporation and transpiration. LID BMPs include, but are not limited to,
5 bioretention/rain gardens, permeable pavements, roof downspout controls,
6 dispersion, soil quality and depth, vegetated roofs, minimum excavation
7 foundations, and water re-use.

8 2013 Phase I Permit at 70; Phase II Permit at 62.

9 3. Appellant/Municipalities Challenge to the Terms of the Permits.

10 The various municipal Appellants challenge Condition S5 in each permit asserting that it
11 requires the municipalities to adopt development regulations that are uniquely the province of
12 local government, and to do so in a manner that violates certain doctrines of land use law.
13 Specifically, the motions before the Board address two aspects of the requirements imposed by
14 the terms of Condition S5 on Phase I and Phase II jurisdictions—the timing by which the new
15 stormwater requirements apply to projects that are in the development process, and the scope of
16 LID that must be part of the stormwater programs. The Snohomish County motion challenges
17 that portion of Condition S5 that requires the local program to be adopted by June 30, 2015, to
18 apply to projects approved prior to a certain date (July 1, 2015), but which have not started
19 construction by a later date (June 20, 2020). The Coalition motion challenges a similar
20 requirement in the Phase II Permit that states the ordinances or other enforceable mechanisms the
21 permittees are required to implement by December 31, 2016, apply to applications submitted “on
or after” January 1, 2017 (and July 1, 2017, and July 1, 2018, depending on the jurisdiction), but
do not start construction by January 1, 2022 (or June 30, 2022 or June 30, 2023, again depending
on the jurisdiction). This condition presents an issue for projects that submitted an application

1 before January 1, 2017 (or the other relevant dates), but which have not started construction by
2 the later dates (see, Ecology Reply at p. 9). Additionally, the Coalition challenges the required
3 implementation of LID as part of the stormwater management plan that the Phase II jurisdictions
4 must implement under the permit. The arguments of the parties are summarized further below,
5 raising both state statutory and constitutional claims.

6 4. Board Decisions on the Appeal of the 2007 Municipal Permits.

7 To address the issues raised by the parties, it is important to first review the appeals of the
8 2007 Phase I and Phase II Permits. The previous version of the Phase I Permit, which was
9 effective from 2007 through 2012, was developed through an eight year process. *Puget*
10 *Soundkeeper Alliance v. Wash. Dep't of Ecology*, PCHB Nos. 07-021, 07-026 through -030, and
11 07-039, Findings of Fact, Conclusions of Law, and Order, 2008 WL 5510413 (Aug. 8, 2008)
12 (2008 Phase I Decision). Multiple parties, including Puget Soundkeeper Alliance (PSA) and a
13 number of the Phase I permittees appealed the terms of the permit to this Board. *Id.* After an
14 evidentiary hearing, the Board entered a lengthy ruling on numerous aspects of the 2007 Phase I
15 Permit. *Id.* Among the issues before the Board in that appeal was the question of whether the
16 permit did not meet the state AKART or federal MEP standards because it failed to require
17 maximum on-site dispersion and infiltration of stormwater through the use of “low impact
18 development” techniques, basin planning, and other appropriate technologies, with resultant
19 degradation or failure to meet water quality standards.

20 In the 2008 Phase I Decision, the Board made extensive findings of fact regarding LID,
21 including how it is defined, how it can be designed and employed at the parcel or subdivision

1 level, the cost of use or non-use of this technique, and the feasibility of use in relation to other,
2 more traditional BMPs to control stormwater. Noting that definitions of LID vary, the Board
3 found that the concept of LID was well-established, and the basic BMPs that constitute LID are
4 well-defined. The Board found that:

5 While specific definitions of LID may vary, the concept of LID is well-
6 established, and the basic BMPs that constitute LID are well-defined. LID
7 techniques emphasize protection of the natural vegetated state, relying on the
8 natural properties of soil and vegetation to remove pollutants. LID techniques
seek to mimic natural hydraulic conditions, reducing pollutants that go into
stormwater in the first instance, by reducing the amount of stormwater that
reaches surface waters. *Citing* testimony of Horner, Booth, Holz.

9 2008 Phase I Decision, at FF 42, p. 31.

10 The Board found that use of LID methods, in combination with best conventional
11 engineering techniques and other actions to preserve native land cover offer “the best available,
12 known and tested methods to address stormwater runoff.” *Id.* at FF 57. The Board concluded its
13 Findings of Fact on LID issues by stating that LID methods were a known and available method
14 to address stormwater runoff at the site, parcel, and subdivision level; that these methods are
15 technologically and economically feasible; that application of LID methods at the basin and
16 watershed level involved additional cost and practical considerations, such that Ecology should
17 be ready to address the issue in future iterations of the municipal permits. Based on the great
18 weight of testimony before the Board on LID-related issues, the Board concluded that both the
19 state AKART standard and the federal MEP standard required greater use of LID techniques,
20 where feasible, in combination with conventional engineered stormwater management
21 techniques. *Id.* at CL 16. The Board recognized that LID, like all stormwater management

1 techniques, is subject to limitation in its practical application by site and other constraints. The
2 Board remanded the permit to Ecology for appropriate modifications.

3 In the appeals of the 2007 Phase II Permit, the Board recognized that there are sufficient
4 distinctions between the Phase I and Phase II permittees, specifically in regard to resources and
5 experience in implementing a stormwater management program. *Puget Soundkeeper Alliance v.*
6 *Wash. Dep't of Ecology*, PCHB Nos. 07-022, -023, Findings of Fact, Conclusions of Law, and
7 Order, 2009 WL 434836 (Feb. 2, 2009) (2009 Phase II Decision) at CL 4, p. 46. The Board
8 concluded the 2007 Phase II Permit condition requiring the permittees to adopt ordinances or
9 other enforceable mechanism to allow for LID methods is permissible, but it also requires
10 Ecology to take further steps to advance LID methods including requiring the permittees to
11 identify both the barriers to the implementation of LID methods and the actions taken to remove
12 the barriers, to establish goals to identify, promote and measure LID use, and to include a
13 reasonable and flexible schedule to require implementation of the LID techniques on a broader
14 scale. *Id.* The Board concluded that LID represents AKART and is necessary to reduce
15 pollutants in the state's waters, and deferred to Ecology to implement its decision through permit
16 modification and the development of technical guidance or LID performance standards. *Id.* at
17 CL 6, p. 48.

18 No party appealed the Board's decisions on the 2007 Phase I and Phase II Permits. Thus
19 the decisions became final and binding on Ecology. Although the Board had ordered changes to
20 the 2007 Phase I and II Permits related to the requirements for LID, Ecology undertook further
21

1 1. Snohomish County, Clark County and Building Industry Association of Clark County

2 Snohomish County argues that the second sentence of Condition S5.C.5.a.iii impermissibly
3 requires the County to apply Phase I Permit-driven “development regulations” to pre-existing
4 development permits that have already been approved and issued by the County. Such a
5 requirement, the County reasons, conflicts with principles of state land use and real property law,
6 including: 1) the vested rights doctrine; 2) the doctrine of finality in land use decisions; and 3)
7 constitutional protections of development rights.

8 The County asserts that in creating such a conflict, Ecology has exceeded its authority
9 under chapter 90.48 RCW and enacted an invalid and ultra vires administrative rule. Snohomish
10 County, as well as other Appellants, asserts that the contested condition of the Phase I Permit
11 meets neither the state AKART standard, nor the federal MEP standard because it is not
12 reasonable, nor practicable for the local governments to comply with the requirement when it
13 will require them to violate state vesting or land use laws. The County asserts that approved and
14 vested project permits are real property rights affected by implementation of the Phase I Permit,
15 and thus both regulatory takings and substantive due process issues are presented for resolution.
16 The County asks the Board to find the second sentence of Condition S5.C.5. invalid, and delete it
17 from the Phase I Permit. Snohomish County Motion for Partial Summary Judgment at 7-8.

18 Clark County and Building Industry Association of Clark County (BIA) join with and
19 adopt in its entirety the Snohomish County motion. BIA additionally urges the Board to address
20 the constitutional issues that are raised by the parties.

1 2. Puget Soundkeeper Alliance, et al.

2 In its response briefing and its own motion for summary judgment, PSA argues that the
3 Phase I and Phase II Permits are not land use ordinances or regulations, but rather are
4 requirements imposed by the federal Clean Water Act (CWA or Act) and state Water Pollution
5 Control Act (WPCA). PSA asserts that the permits serve a very different purpose and public
6 interest than the land use regulations discussed by the County. Relying on the 2008 Phase I
7 Decision, the 2009 Phase II Decision, and state court decisions, PSA argues that the vesting
8 doctrine does not extend to environmental laws and requirements, which do not exist to control
9 land use and are not in the nature of zoning laws, but rather exist to reduce and control pollution.
10 PSA asserts that the municipal permits do not dictate land use, but rather dictate an
11 environmental result, with a variety of preferred and alternative methods for achieving that
12 result. PSA notes that SEPA allows conditions to be imposed that are outside the reach of
13 vesting laws, evidencing the balance that is to be struck between vesting laws and the need to
14 protect the environment through requirements such as those in the 2013 Permits. If the Board
15 perceives a collision between these two areas of the law, PSA asserts that the conflict must be
16 resolved by preemption of state law that is an obstacle to the accomplishment of the full purposes
17 and objectives of the CWA.

18 Finally, PSA points out the Board's limited jurisdiction over constitutional claims, and as
19 a result, such claims are not reviewable by the Board. PSA also argues that Snohomish County's
20 position that it may be subject to possible future claims related to vesting is hypothetical and
21

1 unripe, and that the County lacks standing to assert the property interest of third parties who may
2 be affected by application of the terms of the permit at a future time.

3 3. Department of Ecology

4 In its response to the Snohomish County motion, Ecology asserts that the County’s
5 position “is based on the false premise that municipal stormwater discharge permits issued by
6 Ecology to implement the federal Clean Water Act (“CWA”) and the state Water Pollution
7 Control Act (“WPCA”) are restrained by the limitations imposed on local government under the
8 state’s land use control statutes.” Ecology’s Response to Snohomish County’s Motion For
9 Partial Summary Judgment Re Phase I Issue No. 3 at 2. Ecology asks the Board to adhere to
10 prior rulings, and reject the County’s effort to expand the vested rights doctrine to apply to
11 environmental regulations. Ecology argues that the Phase I Permit is not an “administrative
12 rule,” nor does the Permit require the local governments to impose “land use control ordinances.”
13 Rather, Ecology points out that the issue before the Board does not involve the authority of local
14 governments to unilaterally determine the content of their development regulations, but rather
15 the obligation to implement Ecology required, reviewed, and approved technical stormwater
16 requirements, that are necessary to comply with state and federal water quality laws. Ecology
17 cites *Citizens for Rational Shoreline Planning v. Whatcom Cnty.*, 172 Wn.2d 384, 258 P.3d 36
18 (2011) and *Westside Business Park v. Pierce Cnty.*, 100 Wn. App. 599, 5 P.3d 713 (2000), to
19 support its arguments. Ecology also asserts that in addition to the Board’s lack of authority to
20 address constitutional claims, such claims are speculative and not ripe for review.

1 4. City of Seattle

2 Intervenor City of Seattle (Seattle) neither joins nor opposes Snohomish County’s
3 motion, but agrees with the relief requested—deletion (and modification) of the second sentence
4 in Condition S5.C.5. Seattle does not agree with the County’s characterization of Washington
5 law, but suggests that the cited and disputed portion of Condition S5.C.5 “when applied to
6 certain factual situations in the future, could create needless tension with statutory land use
7 definitions and Washington’s law of land use permit finality and vested rights.” Seattle’s
8 Response at 3-4. Seattle points out that Washington’s vested rights doctrine is not sweeping, and
9 that the Supreme Court has recently held that the doctrine is triggered only by a limited set of
10 permit applications at the local level, and perhaps only by a building permit application (citing
11 *Abbey Road Group, LLC v. City of Bonney Lake*, 167 Wn.2d 242, 218 P.3d 180 (2009)). Seattle
12 suggests a modification to the offending sentence, in an effort to accommodate the interests of
13 several parties. However, Seattle also goes on to assert that the Phase I Permit requires local
14 jurisdictions to use their “land use regulatory authority” in ways that cannot be squared with the
15 vested rights doctrine and the law of permit finality.

16 5. Coalition of Governmental Entities

17 The Coalition opposes the motion filed by PSA and filed its own motion for summary
18 judgment on the related issues from the Phase II Permit appeal (Issues 2.a and 3.a). Consistent
19 with the arguments of several other Appellants in this case, the Coalition characterizes the
20 conditions of the Phase II Permit, which require implementation of certain LID practices, as land
21 development practices, and argues there is “no distinction” in Washington law between

1 environmental regulation and local land use development regulations. The Coalition sees the
2 Phase II Permit requirements as venturing into the arena of “land use policy,” and argues that is
3 the sole and unique province of local government. The Coalition asserts that the Legislature,
4 through statutes such as the GMA, required local planning and development regulation to be
5 undertaken by local governments and that Ecology’s exercise of authority under the WPCA
6 “must be carried out consistent with, an on equal footing with, related state statutes, including
7 chapters 58.17 and 19.27 RCW, and with the common law.” Coalition’s Opposition at 11.

8 The Coalition further asserts that the authority for at least some of the Permit’s terms,
9 specifically the “vesting and LID provisions” is ch. 90.48 RCW, not the federal CWA, thereby
10 rejecting any assertion that there is preemption of state law through application of the CWA, and
11 bolstering its argument that state vesting laws take precedence over water quality concerns.
12 While agreeing that the Permit itself is not subject to state vesting principles, the Coalition
13 asserts that the local regulations the permittees must impose in order to comply with the permit
14 will violate state vesting law. The Coalition asserts that “[N]o Washington court decision has
15 questioned the applicability of vesting doctrine to environmental regulations of land
16 development.” Coalition Motion at 16. The Coalition also asserts that the Permit requirements
17 that require local governments to adopt LID regulations raise constitutional takings concerns,
18 and violate substantive due process because they are not “reasonably necessary” to advance a
19 legitimate public interest in light of available alternatives, and are unduly oppressive. Coalition
20 Motion at 27-28.

1 ANALYSIS

2 1. Standard of Review

3 The party moving for summary judgment must show there are no genuine issues of
4 material fact and the moving party is entitled to judgment as a matter of law. *Magula v. Benton*
5 *Franklin Title Co., Inc.*, 131 Wn.2d 171, 182, 930 P.2d 307 (1997). A material fact in a
6 summary judgment proceeding is one that will affect the outcome under the governing law.
7 *Eriks v. Denver*, 118 Wn.2d 451, 456, 824 P.2d 1207 (1992). In a summary judgment, all facts
8 and reasonable inferences must be construed in favor of the nonmoving party. *Jones v. Allstate*
9 *Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). Summary judgment may also be granted to
10 the non-moving party when facts are not in dispute. *Impecoven v. Department of Revenue*, 120
11 Wn.2d 357, 365, 842 P.2d 470 (1992).

12 The Board will review the terms of a General Permit to determine if it is “invalid in any
13 respect,” and whether it is consistent with applicable legal requirements. WAC 371-08-540(2);
14 *Copper Development v. Ecology*, PCHB No. 09-135 through 09-141, (Order on Summary
15 Judgment, January 5, 2011); *PSA v. Ecology*, PCHB No. 02-162, (Order Granting Summary
16 Judgment, June 6, 2003).

17 2. The General Permit is not an Administrative Rule

18 As an initial matter, the Board will address Snohomish County’s assertion that the Phase
19 I Permit is an “administrative rule,” citing RCW 34.05.010(16), and that Ecology cannot adopt a
20 rule that conflicts with state law. The County repeatedly refers to the permit as a “rule” in
21 various arguments.

1 This Board has squarely held that municipal stormwater general permits are not “rules”
2 subject to rulemaking requirements under the Administrative Procedures Act (APA). *Puget*
3 *Soundkeeper Alliance v. Wash. Dep’t of Ecology*, PCHB Nos. 07-022, -023, Order on Summary
4 Judgment, September 29, 2008) (2008 Phase II Order on Summary Judgment). The development
5 and application of general permits to specified sectors is governed by permit procedures
6 contained in chapters 173-220 and 173-226 WAC (State Waste Discharge General Permit
7 Program and NPDES Permit Program), which provide a process for notice, comment and appeal,
8 separate from the APA rulemaking requirements. *Id.* The Phase I Permit is not an
9 administrative rule.

10 3. The Phase I and Phase II Permits implement environmental laws, and are not subject
11 to state vesting laws (Phase I Issues 3.a and 17.a; Phase II Issues 2.a and 3.a).

12 a. Overview of statutory authority for municipal stormwater permits.

13 Ecology issues the Phase I and Phase II Permits to implement the federal CWA and the
14 WPCA. Because the appealing municipalities assert that state land use laws constrain the terms
15 Ecology may require in NPDES permits, a short review of the authority under which the
16 municipal permits are issued is necessary.

17 The CWA is the nation’s primary water pollution control law. The Act’s purpose is “to
18 restore and maintain the chemical, physical, and biological integrity of the Nation’s waters. 33
19 U.S.C. § 1251(a). To serve those ends, the Act prohibits the discharge of any pollutant by any
20 person unless done in compliance with some provision of the Act and/or in compliance with an
21 NPDES permit. 33 U.S.C. §§ 1311(a) and 1342. Under the CWA, MS4s fall under the

1 definition of “point sources” and as such must obtain an NPDES permit which will place limits
2 on the type and quantity of pollutants that can be released into the Nations’ waters. 33 U.S.C.
3 §1362(14); *South Florida Water Management Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95,
4 102, 124 S.Ct. 1537 (2004); *Puget Soundkeeper Alliance v. Ecology*, 102 W. App. 783, 788, 9
5 P.3d 892 (2000).

6 Prior to 1987, there was much controversy over whether municipalities were subject to
7 NPDES permitting requirements under federal law. *See e.g., Natural Resources Defense Council*
8 *v. Costle*, 568 F. 2d 1369, 1374-1377 (D.C. Cir. 1977)(invalidating EPA regulation exempting
9 MS4 discharges from NPDES permitting). This controversy was resolved in 1987 when
10 Congress enacted the Water Quality Act amendments to the CWA. Pub. L. No. 100-4, 101 Stat.
11 7 (1987)(codified throughout 33 U.S.C.). At the core of the 1987 amendments was 33 U.S.C.
12 §1342 (p)(3), which resolved the question of whether municipal storm sewer systems required
13 NPDES permits and established the federal standards for municipal stormwater discharges. That
14 section provides as follows:

15 Permits for discharges from municipal storm sewers . . . shall require controls to
16 reduce the discharge of pollutants to the maximum extent practicable, including
17 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.

18 33 U.S.C. §1342(p)(3)(B)(iii).

19 This provision required an NPDES permit for municipal storm sewer discharges and
20 directed that municipal stormwater dischargers must reduce the discharge of pollutants “to the
21 maximum extent practicable,” which was a lesser standard than had previously been in federal

1 law for all other industrial or other stormwater dischargers. *Defenders of Wildlife v. Browner*,
2 191 F.3d 1159, 1166 (9th Cir. 1999), *amended by* 197 F.3d 1035 (9th Cir. 1999).

3 Ecology is given complete authority to establish and administer a comprehensive permit
4 program in order to allow Washington to participate in the federal NPDES program. RCW 90.
5 48.260(1)(a). The Environmental Protection Agency (EPA) has delegated authority to Ecology
6 to administer the NPDES permit program in Washington. Ecology’s authority under the NPDES
7 program extends to issuing municipal stormwater permits. RCW 90.48.260(3). Like the broad
8 goals of the CWA, the State’s WPCA declares the public policy of the State is “to maintain the
9 highest possible standards to insure the purity of all waters of the state consistent with public
10 health and public enjoyment thereof. . . .” RCW 90.48.010. The WPCA goes on to state the
11 required AKART standard:

12 In order to improve water quality by controlling toxicants in wastewater, the
13 department of ecology shall in issuing and renewing state and federal
14 wastewater discharge permits review the applicant's operations and *incorporate*
15 *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.

16 RCW 90.48.520 (emphasis added).

17 General permits issued by Ecology are to ensure compliance with AKART, water
18 quality-based effluent limitations, and any more stringent limitations or requirements, including
19 those necessary to meet water quality standards. WAC 173-226-070. The Board has previously
20 held that MS4s, like other waste dischargers, must comply with water quality standards adopted
21 by Ecology. *Puget Soundkeeper Alliance v. Wash. Dep’t of Ecology*, PCHB Phase I Nos. 07-

1 021, 07-026 through -030, and 07-039, and Phase II Nos. 07-022, -023, Findings of Fact,
2 Conclusions of Law, and Order Condition S4 (August 7, 2008) (2008 Consolidated Issue S4
3 Decision). State law also makes it unlawful for any person to discharge into the waters of the
4 state, or to permit or allow the discharge of any organic or inorganic matter that shall cause or
5 tend to cause pollution of such waters. RCW 90.48.080.

6 To the extent any of the parties argue that the authority for provisions of the Phase I and
7 Phase II Permits lies solely in state law, the argument is erroneous (*see e.g.*, Coalition motion at
8 p. 7). The Permits represent a comprehensive effort, based in the authority of both federal and
9 state law, to address the problem of stormwater pollution from MS4s.

10 b. Phase I and Phase II Permits are not land use control ordinances governed
11 by the state's vested rights doctrine.

12 The success of the arguments advanced by the municipalities on summary judgment rises
13 or falls on their characterization of the requirements of the permit that they must implement
14 locally, and the LID provisions in particular as “land use control ordinances” subject to the
15 state’s vested rights doctrine, codified at RCW 58.17.033. Snohomish County’s motion, and the
16 supporting memoranda from other counties and cities, rest on the premise that the permit
17 requires them to adopt and apply such land use restrictions to applications and projects that have
18 “vested” to earlier requirements, and which cannot be changed at a later time. Similarly, the
19 Coalition characterizes the Phase II Permit, and in particular required LID provisions, as an
20 effort “to prescribe specific land development regulations that the local governments must
21 adopt.” The Board rejects these arguments on four bases: 1) the Phase I and Phase II Permits

1 implement state and federal laws to address water quality, not to control land use; 2) the Board
2 will not judicially expand the vested rights doctrine; 3) the Legislature has directly addressed the
3 inclusion of LID requirements in the Permits; and 4) the municipalities must comply with state
4 water quality laws and require those they regulate to do so as well.

5 The Board is cognizant of the “vested rights doctrine” as it has been applied to
6 subdivisions and short subdivisions, zoning and related land use control ordinances, and as
7 codified at RCW 58.17.033. The Board recognizes that in Washington, “vesting” refers
8 generally to the notion that a land use application, under proper conditions, will be considered
9 only under the land use statutes and ordinances in effect at the time of the application’s
10 submission. *Noble Manor Co. v. Pierce County*, 133 Wn.2d 269, 943 P.2d 1378 (1997).
11 Through this doctrine, developers are provided a measure of certainty to protecting against
12 fluctuating land use policy. *Id.* at 278.

13 However, the Board has consistently ruled that the requirements imposed by NPDES
14 stormwater permits are not land use control ordinances that are subject to state vesting laws.
15 *Rosemere Neighborhood Ass’n. v. Dep’t of Ecology and Clark Cnty.*, PCHB No. 10-103 (Order
16 Denying Summary Judgment, August 26, 2010), *affirmed*, *Clark County v. Rosemere*
17 *Neighborhood Ass’n.*, 170 Wn. App. 859, (2012).⁴ In *Rosemere*, the Board reaffirmed a prior
18 ruling which held that a requirement to obtain coverage under the Construction Stormwater
19 General Permit is not an “applicable zoning or other land use ordinance subject to the vested
20 rights doctrine.” *Cox v. Dep’t of Ecology*, PCHB No. 08-077 (Order Granting Summary

21 ⁴ While affirming the Board’s decision in *Rosemere*, the Court of Appeals did not directly address the Board’s
vesting decision, which was one of many issues in the appeal. *Rosemere*, 170 Wn. App at 875-76.

1 Judgment, Feb. 26, 2009). The Board has consistently rejected arguments that state law
2 doctrines of vested rights and finality of land use decisions control and limit the application of
3 water quality requirements developed under both state and federal law. *Id.*; *Rosemere v.*
4 *Ecology, supra.*

5 In *Rosemere* the Board stated “it is the application of the federal Clean Water Act and
6 state water pollution control laws that require municipal permittees to adopt updated stormwater
7 controls for the purpose of controlling water pollution and protecting water quality. To that end,
8 the Phase I Permit is an environmental regulation which does not dictate particular uses of land
9 but requires only that, however the land is used, damage to the environment is kept within
10 prescribed limits.” *Rosemere* (Summary Judgment at 14) (citing *California Coastal Com’n v.*
11 *Granite Rock Co.*, 480 U.S.572, 587, 107 S. Ct. 1419 (1987) (“[T]he line between environmental
12 regulation and land use planning will not always be bright. . . [H]owever, the core activity
13 described by each phrase is undoubtedly different.”). The Board’s decision also rested on the
14 recognition by our State Supreme Court that “[a] proposed development which does not conform
15 to newly adopted laws is, by definition, inimical to the public interest embodied in those laws.”
16 *Abbey Road Group, LLC v. City of Bonney Lake, supra*, 167 Wn.2d at 251.

17 The conditions that are imposed pursuant to the Phase I and Phase II Permits exist and are
18 designed to address pollution, not to control the use of land. The authority for these conditions is
19 contained in state and federal environmental laws, not any land use-related statute. The
20 requirement to use various best management practices to control stormwater runoff from new
21 development or redevelopment, including the LID BMPs, does not change the type of use the

1 land may be put to (residential, commercial, etc), nor is it a tool to regulate the subdivision of
2 land. Rather, the requirements of the Phase I and II Permits are, by their nature, aimed at
3 improving the quality of the environment and the beneficial uses of the state's waters for the
4 public at large. The requirements the municipalities must impose locally are technical, current
5 state of the art pollution control approaches, developed to control pollution in increasingly
6 effective ways for the public benefit, and do not resemble a zoning law or other development
7 regulation, even in the loosest definition of that term. See, *New Castle Invs. v. City of LaCenter*,
8 98 Wn. App. 224, 232, 989 P.2d 569 (1999)(transportation impact fees, placed in tax statutes,
9 may have some land-use related objectives, but do not fall within the vesting statute as a land use
10 control ordinance).

11 This analysis does not change simply because under the terms of the permits the
12 municipalities must adopt programs or locally enforceable provisions that require further
13 implementation of these water quality control measures by construction or industrial sources in
14 the community. In considering both the authority and public purpose behind the permits,
15 application of the vested rights doctrine would thwart the public, and legislatively stated interest
16 of enhanced environmental quality. The Permits advance these environmental goals by
17 ultimately providing developers a large menu of pollution-controlling traditional BMPs, as well
18 as LID BMPs (*e.g.*, water harvesting, bioretention, retained natural vegetation, rain gardens,
19 pervious materials or porous pavement) to consider and utilize at the point a project proceeds to
20 disturb the environment and create potentially polluted discharges. The BMPs ultimately
21 required by the permits, including the low impact development BMPs, are under the

1 requirements of the CWA and state law, necessary to ensure MS4s comply with state water
2 quality standards. Ultimately, applying the vested rights doctrine as requested by the Appellants
3 would allow developments to violate the state and federal water quality laws.

4 In applying the vested rights doctrine, the State Supreme Court has stated that it will not
5 extend the vested rights doctrine by judicial expansion, but only where there has been legislative
6 extension of the doctrine to a specific land use action. *Noble Manor v. Pierce County*, supra, 133
7 Wn.2d at 280. The Court reasoned that there are competing policy concerns regarding vested
8 rights for land use, and that “[I]f a vested right is too easily granted, the public interest is
9 subverted.” *Id.* (citing *Ericksen & Assocs., Inc. v. McLerran*, 133 Wn.2d 518, 872 P.2d 1090
10 (1994)). Here, there is no legislative extension of the vested rights doctrine to the broad scope of
11 environmental and water quality actions driven by the state WPCA and the federal law CWA.
12 The law is simply not structured in the manner advanced by the municipalities, as the state’s
13 environmental laws, as well as federal clean water laws, stand separate from land use laws. The
14 Legislature has never defined the broad array of environmental regulations administered by
15 Ecology, either directly or through a federally delegated program such as the NPDES program,
16 as “land use controls” within the purview of vested rights. Neither has the Legislature defined
17 low impact development as a land use control ordinance. RCW 58.17.033. The Phase I and
18 Phase II Permits respond and attempt to regulate the leading contributors to water quality
19 pollution in the state’s urban waters—pollution that has resulted in loss of habitat, the listing of
20 salmon species under the Endangered Species Act, among other problems. Indisputably, there

1 are competing and overriding policy concerns embodied in state and federal environmental laws
2 that require the state vested rights doctrine to give way.⁵

3 Indeed, in giving Ecology direction to issue updated Phase I and Phase II municipal
4 NPDES permits, the 2012 Legislature expressly recognized that provisions “relating to new
5 requirements for low-impact development and review and revision of local development codes,
6 rules, standards, or other enforceable documents to incorporate low-impact development
7 principles must be implemented simultaneously.”⁶ Chapter 1 §313, Laws of 2012 (2012 1st
8 Special Session), codified in RCW 90.48.260(3)(b)(i). Consistent with the Legislative directive,
9 the low-impact development requirements go into effect on December 31, 2016 for most
10 Western Washington permittees.⁷ In addition to the substantive amendments to Ch. 90.48 RCW
11 related to low impact development, the Legislature, in both 2012 and 2013, has included budget
12 provisos directing significant appropriations to technical training for Phase I and II jurisdictions
13 regarding the benefits of low-impact development (when its use is appropriate and feasible, and
14

15 ⁵ We find it irrelevant that the Permits and other documents may occasionally use terms such as “land use controls”
in describing pollution control measures that the permittees must implement.

16 ⁶ The recent legislation specifically provides:

17 (3) By July 31, 2012, the department shall:

18 (a) Reissue without modification and for a term of one year any national pollutant discharge elimination
system municipal storm water general permit applicable to western Washington municipalities first issued on
January 17, 2007; and

19 (b) Issue an updated national pollutant discharge elimination system municipal storm water general permit
applicable to western Washington municipalities for any permit first issued on January 17, 2007. An updated
permit issued under this subsection shall become effective beginning August 1, 2013.

20 (i) ***Provisions of the updated permit issued under (b) of this subsection relating to new requirements for
low-impact development and review and revision of local development codes, rules, standards, or other
enforceable documents to incorporate low-impact development principles must be implemented
simultaneously.*** These requirements may go into effect no earlier than December 31, 2016, or the time of the
scheduled update under RCW 36.70A.130(5), as existing on July 10, 2012, whichever is later. (emphasis
21 added)

⁷ Some Phase II permittees have dates later than the 2016 date.

1 the design, installation, maintenance and best practices of low-impact development). Engrossed
2 Third Substitute S.B.5034, 63rd Leg., 2nd Spec. Sess., at 118-19 (§ 302(3))(Wash. 2013);
3 Engrossed Third Substitute H.B. 2127, 62nd Leg., 2nd Spec. Sess., at 136 (§ 302(14)) (Wash.
4 2012). Thus, the Legislature has affirmatively acknowledged that low impact development
5 requirements will become part of the environmental regulatory structure imposed by the Phase I
6 and II Permits.

7 The argument of the Coalition that there is no legislative authority for Ecology to impose
8 low impact development requirements in the Phase II Permit is simply not well-founded. In
9 passing the legislation noted above, the Legislature is presumed to be familiar with judicial
10 interpretation of statutes, and the Legislature's knowledge of Ecology's interpretation of ch.
11 90.48 RCW can be reasonably inferred. *Estate of Bowers*, 132 Wn. App 334, 342-343, 131 P.3d
12 916 (2006). Since the Board's decision requiring greater implementation of LID (and its related
13 rejection of the application of the vesting doctrine) in the appeal of the last iteration of the
14 municipal permit, the legislature has not taken action to define the stormwater general permits as
15 land use controls under the vesting doctrine. The Legislature's inaction in this regard, especially
16 in light of direct action addressing the implementation of LID in 2012 and 2013, indicates
17 legislative approval of the methods Ecology has included in the municipal stormwater general
18 permits for protection of the state's water quality. *Hangman Ridge Training Stables, Inc. v.*
19 *Safeco Title Ins. Co.*, 105 Wn.2d 778, 789, 719 P.2d 531 (1986).

20 The positions advanced by Snohomish County, the Coalition, and other municipalities
21 also frustrate the underlying policies and requirements of the CWA and state water pollution

1 control statutes. In advancing the primacy of state vesting laws over the requirements of the
2 Phase I and Phase II Permit, the municipalities do not mention that the continued stormwater
3 discharges from MS4s are in violation of the water quality statutes and RCW 90.48.080, which
4 prohibit the continued discharge, or allowance of the discharge of, polluted water from their
5 MS4s to the waters of the State. There is no basis upon which to set aside the prohibitions of
6 state water quality laws in favor of application of the vested rights statute. To do so would
7 require the Board to convert the very means used to implement the water quality statutes into
8 land use ordinances, allowing projects to go forward for years, and possibly decades, without
9 compliance with the requirements of water pollution laws designed to protect and restore the
10 quality of the state's waters.

11 Moreover, as the Board concluded in the 2008 Phase I Decision, the WPCA must be
12 harmonized with the language of the GMA. 2008 Phase I Decision at CL 18, 24, pp. 60-63.
13 This conclusion applies equally to the other statutes cited by the Coalition, chapters 58.17 and
14 19.27 RCW. Ecology can, consistent with the GMA and these other statutes, require use of LID
15 as a water quality management tool. *Id.* at CL 27, p. 65. In sum, we must harmonize these
16 various laws, and given the clear and competing policy objectives of the water pollution control
17 statutes, the source of authority for the Phase I and Phase II Permits, and the limitation on the
18 vested rights doctrine as expressed by our courts, this Board will not engage in an expansion of
19 the vested rights doctrine as proposed by the municipalities.

20 Finally, both Appellants and Respondents cite to the *Westside Business Park* case to
21 support their arguments that the vesting doctrine either is or is not an obstacle to implementation

1 of the requirements of the Phase I and Phase II Permits. *Westside Bus. Park v. Pierce County*,
2 100 Wn. App. 599, 5 P.3d 713 (2000). We find that case of limited assistance, as the facts that
3 were before the appellate court are not the same as those presented by implementation of the
4 Phase I and Phase II Permits. Also, the Board has previously rejected the applicability of that
5 case to another general permit question, concluding that the requirement to obtain coverage
6 under the Construction Stormwater General Permit is not a mandatory prerequisite to the
7 approval of a plat or subdivision, and was not an applicable zoning or other land use ordinance
8 subject to the vested rights doctrine. *Cox v. Ecology, supra*. Similar to our analysis in the *Cox*
9 case, the requirements imposed by the municipalities under the Phase I and II Permits are not
10 related to subdivision approvals, but rather are the methods by which environmental quality
11 controls and best management practices for stormwater management are implemented by a
12 project, sometimes long after the approval of the plat or subdivision of land at the local level.
13 Finally, we note that the *Westside Business Park* case left open the question of whether state
14 vesting laws are preempted by the CWA, or otherwise frustrate the purposes and objectives of
15 water quality laws. Based on the discussion below we need not address that issue further.

16 Based on the foregoing analysis, the Board grants summary judgment to PSA and
17 Ecology on Phase I Issues 3.a and 17.a and Phase II Issues 2.a and 3.a.⁸

18
19 ⁸PSA argues that if the Board concludes there is a conflict between the state's vesting and other land use laws and
20 the requirements of the Phase I and II Permits, the conflict must be resolved by finding that federal law preempts
21 state law. PSA reasons that Washington vesting law cannot contradict or limit the scope of the CWA, which creates
a widespread federal system of regulation, and state efforts must satisfy the requirements of federal water quality
laws and regulations (citations omitted). Because we find there is no such conflict, and that the water quality laws
and regulations embodied in, and implemented through the Phase I and II Permits are valid and not subject to state
vesting and other land use concepts, we need not reach PSA's preemption argument.

1 4. The Doctrine of Finality in land use decisions is not violated (Phase I Issue 3.b).

2 The “finality” doctrine in land use is closely related to the vesting doctrine, and stands for
3 the proposition that there should be administrative finality in land use decisions. *Chelan County*
4 *v. Nykreim*, 146 Wn.2d 904, 52 P3d 1 (2002); *Skamania County v. Columbia River Gorge*
5 *Com’n*, 144 Wn.2d 30, 26 P.3d 241 (2001). Finality in land use decisions, such as rezones or
6 boundary line adjustments, allows the land owner or developer to safely proceed with
7 development of the property.

8 For the same reasons discussed above, the Board concludes the terms of the Phase I and
9 II Permits, and the requirements the municipalities must impose, presents no conflict with the
10 principal that land use decisions are entitled to finality. Again, application of environmental
11 regulations to development—even updated and more advanced environmental regulations—is
12 not in the nature of a land use decision. The developer may proceed with the use of the property
13 as originally disclosed in applications to the county or city, but does not have a legitimate
14 expectation that pollution control measures will be frozen in time to outdated or ineffective
15 measures. Contrary to Snohomish County’s assertion, the municipality is not required to amend
16 or revoke permits earlier issued in order to comply with the Phase I or II Permit. The Board
17 denies Snohomish County’s request for summary judgment on Phase I Issue 3.b.

18 5. Ecology has the authority to define the terms of the Permit and require ongoing
19 compliance with stormwater permits (Phase I Issues 3.d and 3.e).

20 Snohomish County argues that the Phase I Permit purports to define, for purposes of the
21 County’s development regulations, the terms “application” and “started construction.” The

1 Permit does not do so. Rather, the Phase I Permit defines these terms only in the context of the
2 local stormwater program required by the Permit. Ecology has the authority to appropriately
3 define terms necessary to carry out its obligations under the WPCA. RCW 90.48.030.

4 The County also argues that Ecology may not require the municipalities to apply the new
5 local program for controlling discharges into the MS4s to new development, redevelopment and
6 constructions sites that have not started construction by June 30, 2020, because the Phase I
7 Permit expires in July 2018. Condition S5.C.5.a.iii. The Board agrees with Ecology's analysis
8 of this issue. County actions implementing this requirement will likely take place well before the
9 July 31, 2018 expiration date of the permit, as the project approvals the County issues after June
10 30, 2013 will need to comply with the local stormwater ordinance the County later adopts (by
11 June 30, 2015). As Ecology states, even if the County's concern with the timing were accurate,
12 it is reasonable to assume and expect that the next municipal stormwater permit will be at least as
13 stringent as the current permit (or the current permit will be extended for a period of time). 40
14 C.F.R. § 122.44(1)(1). If this remains an issue at the expiration of the 2013 Permit, it will be
15 resolved by the terms of the next permit.

16 The Board concludes that the permit terms are valid and Ecology acted reasonably in
17 each instance. The Board denies Snohomish County's motion for summary judgment and
18 dismisses Phase I Issues 3.d and 3.e.

1 6. The Board does not have jurisdiction to hear constitutional claims raised by
2 Appellants, and such claims are speculative and unripe (Phase I Issues 3.c and 20).

3 Snohomish County, the Coalition, and others assert that the Phase I and II Permits require
4 new or different conditions on project permits after the local government has approved a local
5 permit and/or there is a vested permit application. The Appellants assert that any attempt to
6 place “new or different conditions” on a project permit, based on the requirements of the Phase I
7 or Phase II Permit would constitute a regulatory taking and violate substantive due process. The
8 Appellants reason that because of this, the local government cannot lawfully comply with the
9 Phase I or Phase II Permit, and Ecology has acted contrary to law. Despite Board precedent to
10 the contrary, both the Coalition and BIA advance the proposition that the Board has authority to
11 decide whether the challenged permit provisions require local governments to violate
12 constitutional rights of property owners. Coalition Opposition and Motion at 25-28. BIA
13 Response to PSA Motion at 5-7.

14 The Board rejected similar arguments regarding the constitutionality of the prior Phase II
15 Permit and declined to rule on any constitutional issues. Phase II Order on Summary Judgment,
16 at 7-9, September 29, 2008. In that Order we relied on our decision in *Cornelius v. Ecology*,
17 PCHB No. 06-099 (Order on Summary Judgment (As Amended on Reconsideration)), Jan. 18,
18 2008). In *Cornelius* we observed that the Board’s jurisdiction to hear and decide appeals of
19 Ecology orders and penalties necessarily included the authority to determine whether Ecology’s
20 action (there a water right change) complied with applicable laws. The Board does not have
21 jurisdiction over a facial challenge to the constitutionality of a statute, but will construe a statute

1 in a manner that presumes it is constitutional. When ruling on an “as applied” challenge, the
2 Board has limited its jurisdiction to addressing procedural defects or issues that arise in particular
3 cases. *PSA v. Ecology*, PCHB Nos. 07-022, 07-023 (Order on Summary Judgment, Sept. 29,
4 2008); *First Romanian Pentecostal Church of Kenmore v. Ecology*, PCHB Nos. 08-098 & 08-
5 099 (Order on Summary Judgment Motions May 22, 2009). The Board also has jurisdiction over
6 whether a challenged agency action complied with the applicable laws. *Cornelius*, at pp. 8-9.
7 Our consideration of the agency’s compliance with statutes and regulations may, accordingly,
8 also dispose of procedural due process claims which assert noncompliance with those laws. *See*
9 *First Romanian Pentecostal Church of Kenmore v. Ecology*, PCHB Nos 08-098 & 08-099 (Order
10 on Summary Judgment Motions May 22, 2009)(Board addressed alleged due process violations
11 related to notice).

12 Here, the takings claim advanced by the municipalities is not “mostly procedural” as
13 discussed in our earlier cases and does not call on the Board to review or apply a particular
14 statute or regulation to the facts of this case. The Board has previously analyzed a takings claim
15 as one of substantive due process, and as such, outside the Board’s jurisdiction. *First Romanian*
16 *Pentecostal Church of Kenmore v. Ecology*, PCHB Nos 08-098 & 08-099 (Order on Summary
17 Judgment Motions May 22, 2009). In the previous Phase II appeal, we also held these very
18 claims were not ripe for review and more appropriately addressed in superior court at another
19 time, stating as follows:

20 At this point in time, the Board has before it the Western Phase II Permit, but
21 no facts or context about the application and regulation of individual properties
or projects pursuant to the permit. The Board agrees with Ecology that

1 liability for regulation of property, and a takings claim such as the Coalition
2 attempts to present, are fact-specific inquiries that involve consideration of
3 numerous factors must be considered in the context of a specific case.

4 Phase II Summary Judgment Order at 9.

5 We conclude that the same analysis is applicable to the takings claim advanced in this
6 appeal. See also, *Patrick O'Hagan v. State*, PCHB No. 95-25 (1995) (COL II); *PSA v. Ecology*
7 at pp. 8-9.⁹

8 Accordingly, the Board concludes that it is without jurisdiction over the takings and
9 substantive due process claims raised in the summary judgment motions of Snohomish County,
10 the Coalition, and others who join in the motions. We are also without jurisdiction over such a
11 claim because we are without authority to fashion any remedy responsive to such a claim, such
12 as an award of monetary damages. Accordingly, summary judgment is denied to Snohomish
13 County on Phase I Issues 3.c and 20.

14 7. Ecology Requested Clarification of Permit Language

15 As a result of our conclusions related to the vesting and finality arguments advanced by
16 the Appellants, the Board concludes that Condition S5 of the Phase I and Phase II Permit is
17 valid, and the requirements of the Permits can be lawfully applied consistent with the effective
18 dates set out in that Condition of the respective Permits.

19 Ecology has pointed out that the Phase I Permit fails to contain the correct language to
20 address the situation where an application is submitted before July 1, 2015, but the municipality

21 ⁹ We also note that a related environmental board, the Shorelines Hearings Board, has also held it is without jurisdiction over a claim that a permit denial deprived an applicant reasonable use of property. *Fladseth v. Mason County*, SHB No. 05-026 (2007)(COL C2).

1 approves the application after July 1, 2015. Ecology suggests a remand to address this issue by
2 changing the language of the second sentence of Condition S5.C.5.a.iii to say “application
3 submitted” instead of “projects approved.” Moore Decl. To make the permit consistent with
4 Ecology’s intent, and clear to the parties, the Board enters a limited remand of the Phase I Permit
5 for purposes of that correction.

6 ORDER

7 The Board **GRANTS** summary Judgment to PSA and Ecology on Phase I Issues 3, 17.a,
8 and 20, and Phase II Issues 2.a and 3.a.

9 The Board **DENIES** summary judgment to Snohomish County on Phase I Issue 3. The
10 Board **DENIES** summary judgment to the Coalition of Governmental Entities on Phase II Issues
11 2.a and 3.a.

12 Condition S5.C.5.a.iii of the Phase I Permit is REMANDED to Ecology for modification
13 consistent with the request of the Agency. (to modify/replace the term “projects approved” to
14 “applications submitted” in the second clause of the second sentence of that Condition).

15 SO ORDERED this 2nd day of October, 2013.

16 **POLLUTION CONTROL HEARINGS BOARD**

17
18 Tom McDonald, Presiding

19
20 Kathleen D. Mix, Member

21
Joan M. Marchioro, Member

1 APPENDIX A (RECORD ON MOTIONS)

- 2 1. Snohomish County's Motion for Partial Summary Judgment Regarding Phase I Issue No. 3
3 with Appendices A-Z.
- 4 2. Intervenor City of Seattle's Response to Snohomish County's Motion for Partial Summary
5 Judgment Regarding Phase I Issue No. 3.
- 6 3. Combined Response of Intervenors Puget Soundkeeper Alliance et al. to Snohomish County
7 Motion for Partial Summary Judgment on Phase I Issue No. 3 and Puget Soundkeeper
8 Alliance Motion for Summary Judgment on Phase I Issue Nos. 3, 17(a), and 20 and Phase II
9 Issue Nos. 2(a) and 3(a).
- 10 A. Declaration of Janette K. Brimmer; together with:
- 11 i. Exhibit A: Select portions of the 2013 Phase I and Phase II Stormwater
12 NPDES permits as follows:
- 13 1. A-1: Section S5.C.5 of the Phase I Permit;
- 14 2. A-2: Appendix 1 to Phase I Permit;
- 15 3. Section S5.C.4 of the Phase II permit; and
- 16 4. Appendix 1 to Phase II Stormwater NPDES Permit
- 17 ii. Exhibit B: Copies of parties' responses to select interrogatories promulgated
18 by Puget Soundkeeper Alliance.:
- 19 1. B-1: Pierce County responses to Phase I Interrogatory Nos. 3 and 28;
- 20 2. B-2: Clark County responses to Phase I Interrogatory Nos. 3 and 28;
- 21 3. B-3: King County responses to Phase I Interrogatory Nos. 3 and 28;
4. B-4: Snohomish County responses to Phase I Interrogatory Nos. 3 and
28;
5. B-5: City of Seattle responses to Phase I Interrogatory Nos. 5 and 11;
6. B-6: Building Industry Association of Clark County responses to
Phase I Interrogatory Nos. 3 and 28;
7. B-7: King County responses to Phase II Interrogatory Nos. 5 and 11;
8. B-8: Phase II Coalition responses to Phase II Interrogatory Nos. 5 and
11.
4. Appellant Clark County's Response in Support of Snohomish County's Motion for Partial
Summary Judgment Regarding Phase I Issue No. 3.
5. State of Washington, Department of Ecology's Response in Opposition to Snohomish
County's Motion for Partial Summary Judgment Regarding Phase I Issue No. 3.
- A. Declaration of Bill Moore in Support of State of Washington, Department of
Ecology's Response in Opposition to Snohomish County's Motion for Partial
Summary Judgment Regarding Phase I Issue No. 3.

- 1 i. Exhibit A: Cover page and pages 130-141 of Ecology’s Response to
2 Comments on the Municipal Stormwater Permits.
- 3 6. Snohomish County’s Combined Reply to Ecology’s and PSA’s Responses to Snohomish
4 County’s Motion for Partial Summary Judgment Regarding Phase I Issue No. 3 and
5 Response to PSA’s and Ecology’s Motion for Summary Judgment Regarding Phase I Issues
6 Nos. 3, 17(a), and 20, and Phase II Issues Nos. 2(a) and 3(a).
- 7 7. Intervenor City of Seattle’s Response to Puget Soundkeeper Alliances’ Motion for Partial
8 Summary Judgment Regarding Phase I Issues 3, 17(a) and 20, and Phase II Issues 2(a) and
9 3(a).
- 10 A. Second Declaration of Theresa R. Wagner (Phase I and Consolidated Phase II).
- 11 i. Exhibit A: Volume I (Minimum Technical Requirements and Site Planning) –
12 Table of Contents, Section 1.5.5 (MR #5; On-Site Stormwater Management)
13 and Chapter 3 (Preparation of Stormwater Site Plans);
- 14 ii. Exhibit B: Volume III (Hydrologic Analysis and Flow Control BMPs) –
15 Table of Contents, Section 3.3 (Infiltration Facilities for Flow Control and
16 Treatment) and Section 3.4 (Stormwater-related Site Procedures and Design
17 Guidance for Bioretention and Permeable Pavement);
- 18 iii. Exhibit C: Volume V (Runoff Treatment BMPs) – Table of Contents and
19 Chapter 5 (On-Site Stormwater Management);
- 20 iv. Exhibit D: City of Seattle’s responses to PSA’s interrogatories Nos. 4 and 28
21 (which incorporates by reference the response to No. 4).
8. Appellant Clark County’s Combined Reply in Support of Snohomish County’s Motion for
Partial Summary Judgment Regarding Phase I Issue No. 3 and Response in Opposition to
PSA’s and Ecology’s Motions for Summary Judgment Regarding Phase I Issues Nos. 3,
17(a) and 20.
9. Notice of Clark County’s Joinder in Snohomish County’s Motion for Partial Summary
Judgment on Phase I, Issue No. 3
10. [BIA’s] Response to Puget Soundkeeper Alliance’s, et al. Motion for Summary Judgment
and Response to Snohomish County.
11. [BIA’s] Motion to Join Snohomish County’s Motion for Summary Judgment on Phase I
Issue No. 3.
12. Coalition of Governmental Entities’ Opposition to Puget Soundkeeper, et al.’s Motion for
Summary Judgment on Phase II Issues 2(a) and 3(a) and Coalition’s Motion for Summary
Judgment on Phase II Issues 2(a) and 3(a).

- 1 A. Declaration of Lori Terry Gregory in Support of Coalition of Governmental Entities’
2 Opposition to Puget Soundkeeper Alliance, et al.’s Motion for Summary Judgment on
3 Phase II Issues Nos. 2(a) and 3(a) and Coalition’s Motion for Summary Judgment on
4 Phase II Issues 2(a) and 3(a);
5 i. Exhibit A: Excerpts of the redlined version of the 2013-18 Phase II MS4
6 Permit for Western Washington and Appendix I;
7 ii. Exhibit B: Excerpts of the redlined version 2012 Stormwater Management
8 Manual for Western Washington.
9 B. Errata to Coalition of Governmental Entities’ Opposition to Puget Soundkeeper, et
10 al.’s Motion for Summary Judgment on Phase II Issues 2(a) and 3(a) and Coalition’s
11 Motion for Summary Judgment on Phase II Issues 2(a) and 3(a).

12 13. Puget Soundkeeper Alliance, et al. Reply in Support of Motion for Summary Judgment on
13 Phase I Issue Nos. 3, 17(a), and 20 and Phase II Issue Nos. 2(a) and 3(a)

- 14 A. Errata to Puget Soundkeeper Alliance, et al. Reply in Support of Motion for Summary
15 Judgment on Phase I Issue Nos. 3, 17(a), and 20 and Phase II Issue Nos. 2(a) and
16 3(a).

17 14. Respondent State of Washington, Department of Ecology’s Reply in Support of Puget
18 Soundkeeper Alliance’s Motion for Summary Judgment on Phase I Issue Nos. 3, 17(a), and
19 20 and Phase II Issue Nos. 2(a) and 3(a).

- 20 A. Exhibit A: Excerpts from Engrossed Third Substitute S.B. 5034, 63rd Leg. 2nd Spec.
21 Sess.
22 B. Exhibit B: Excerpts from 2012 Supplemental Operating Budget, Engrossed Third
23 Substitute H.B. 2127, 62nd Leg. 2nd Spec. Sess.
24 C. Exhibit C: Excerpts from 2007 Phase II Permit.

25 15. Coalition of Governmental Entities’ Reply in Support of Coalition’s Motion for Summary
26 Judgment on Page II Issues 2(a) and 3(a).