

POLLUTION CONTROL HEARINGS BOARD
FOR THE STATE OF WASHINGTON

PUGET SOUNDKEEPER ALLIANCE,)
) PCHB NO.
 Appellant,)
)
 vs.) NOTICE OF APPEAL
)
 WASHINGTON STATE DEPARTMENT OF)
 ECOLOGY and WASHINGTON STATE)
 DEPARTMENT OF TRANSPORTATION,)
)
 Respondents.)
)

1. Identity of Appealing Parties and Representatives.

The appealing party is:

Puget Soundkeeper Alliance
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The representatives of the appealing parties are:

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1 2. Identification of Other Parties.

2 The respondents in this appeal are the Washington State Department of Ecology and
3 Washington State Department of Transportation.

4 3. The Decision Under Appeal.

5 This is an appeal of the Washington State Department of Transportation Municipal
6 Stormwater Permit issued on February 4, 2009 (“WSDOT Permit”). A copy of this permit is
7 attached.

8 4. Short and Plain Statement Showing Grounds for Appeal.

9 The WSDOT Permit is contrary to law because it is inconsistent with the requirements of
10 the federal Clean Water Act and governing regulations promulgated by the U.S. Environmental
11 Protection Agency (“EPA”), the Washington State water pollution control laws and governing
12 regulations promulgated by the Washington State Department of Ecology (“Ecology”), and other
13 governing law and precedent.

14 5. Statement of Facts.

15 Stormwater—rain and snowmelt that collects pollutants as it flows across roofs, roads,
16 and other surfaces into waterways—is the most significant source of pollution threatening the
17 ecological integrity of Puget Sound and the rivers, streams, estuaries, and bays in Western
18 Washington. Stormwater carries heavy loads of contaminants such as dissolved metals,
19 polycyclic aromatic hydrocarbons (“PAHs”), pesticides, fecal coliform, and nutrients. It scours
20 water bodies and destroys the physical, chemical, and biological integrity of streams and rivers.
21 It alters the natural hydrologic cycle of healthy watersheds by increasing peak flows and
22 diminishing base flows that can harm stream ecology and undermine water quality.

23 The Washington State Department of Transportation (“WSDOT”) operates and maintains

1 a highway system of over 7,000 miles which carries approximately 60% of the traffic in the state.
2 In the 2007-09 biennium, WSDOT had an operating budget of \$1.2 billion and a capital budget
3 of \$4.2 billion. It employs approximately 7,200 staff. Stormwater from WSDOT's roads,
4 highways, and other transportation facilities is particularly toxic and harmful to water quality in
5 Western Washington. WSDOT's highways are built along or cross a large number of
6 waterbodies, many of which support sensitive species like salmon. Most highway facilities in
7 western Washington were constructed decades ago with the goal of quickly removing stormwater
8 from road surfaces for safety, and were not engineered to reduce the environmental impacts of
9 stormwater. Accordingly, much of the highway runoff generated in Western Washington is
10 discharged directly into streams, rivers, and Puget Sound with no or substandard flow control or
11 treatment. The primary threats to water quality from highway projects include heavy metals
12 (including copper, zinc, cadmium, and chromium, which are acutely toxic to aquatic life at very
13 low levels), polyaromatic hydrocarbons (byproducts of the combustion of fossil fuels), and
14 elevated temperatures.

15 Stormwater from WSDOT facilities represents a significant threat to the survival and
16 recovery of fish and wildlife in western Washington. In some streams, scientists have observed
17 concentrations of stormwater-related pollutants high enough to kill, injure, and disable returning
18 adult salmon within minutes of their entry into fresh water, preventing spawning. Stormwater
19 also imposes a broad array of economic costs to the region including property damage; habitat
20 degradation; loss of fisheries and shellfish harvesting; harm to drinking water supplies; clean-up
21 of polluted sites; cultural and economic impacts to tribes; and loss of tourism, recreation, and
22 other business revenues.

23 WSDOT was previously covered under the terms of Phase I general municipal

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1 stormwater permits issued in 1995. Although such permits are normally renewed every five
2 years, Ecology delayed issuance of the revised Phase I municipal permits until January of 2007.
3 During the process of writing the new Phase I municipal permits, Ecology decided to issue a
4 separate permit specific to WSDOT. That permit—which is not a general permit but applies
5 only to WSDOT—was not issued until February of 2009, nine years after the expiration of the
6 previous permit. The new WSDOT Permit regulates stormwater discharges from state highways
7 and other transportation facilities within jurisdictions regulated under the Phase I and Phase II
8 municipal stormwater general permits. It also covers any stormwater discharges from WSDOT
9 facilities for which there is an Environmental Protection Agency (“EPA”)-approved total
10 maximum daily load specifying actions for WSDOT stormwater discharges.

11 The WSDOT Permit incorporates by reference WSDOT’s Stormwater Management
12 Program (“SWMP”) and Highway Runoff Manual (“HRM”), both of which set standards and
13 provide guidance for managing stormwater from WSDOT facilities and complying with permit
14 requirements. These documents require WSDOT to implement an illicit discharge detection and
15 elimination program; prevent stormwater pollution at construction sites; implement a technical
16 manual for new transportation facilities; implement limited retrofits to existing facilities which
17 do not have adequate stormwater controls when such facilities are expanded; operate and
18 maintain its facilities to reduce runoff; and provide for public involvement and education. The
19 permit also requires WSDOT to develop and implement a monitoring program, with its first
20 report due in 2011, and requires annual reporting to Ecology on its implementation of the permit
21 and SWMP.

22 The permit, as well as the HRM and SWMP, suffer from several serious flaws that make
23 the permit inadequate to meet its goals of protecting and recovering the waters of Western
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1 Washington and complying with state and federal water pollution control laws. For example, the
2 technical standards adopted in the HRM are not adequate to protect water quality and listed
3 species—new highway construction consistent with the terms of the HRM can and likely will
4 degrade water quality and harm protected species. The HRM does not require that any specific
5 water quality standard be achieved for new facilities. Instead, it authorizes WSDOT to select
6 from among various BMPs that may achieve differing standards of treatment in different
7 situations. However, it is technically and financially feasible for WSDOT to achieve much more
8 rigorous levels of control of stormwater pollutants like copper and zinc in virtually all situations.
9 WSDOT has achieved such performance standards (for example, no net increase of stormwater
10 permits, or specific parts per billion of copper and zinc in stormwater discharges) when
11 necessary to ensure compliance with the federal Endangered Species Act (“ESA”). Achieving
12 those standards in all places where water quality is at risk is both reasonable and practicable.
13 Without meeting such standards, new expanded facilities that contribute highway runoff to
14 streams inhabited by ESA-listed species such as Puget Sound chinook and steelhead are in
15 violation of the ESA’s prohibition on “take” of such species and, as a result, violate governing
16 regulations. New facilities are also authorized to discharge polluted stormwater from new or
17 expanded facilities to streams already listed as impaired for contaminants associated with
18 highway runoff, like metals and high temperatures. The permit violates the law because it
19 contains no restrictions for discharges to such streams.

20 Even more deficient are the standards adopted in the WSDOT Permit, SWMP, and HRM
21 to control stormwater runoff from existing highways and facilities. Data show runoff from
22 existing roads to contain concentrations of metals and other pollutants far in excess of levels
23 known to adversely affect water quality and beneficial uses like salmon. Because most existing
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1 facilities were built without adequate protection for water quality, the only way to reduce the
2 pollutant loads from WSDOT's ongoing operation of these facilities (outside of reducing the
3 number of automobiles traveling on them) is to retrofit them to meet updated standards.
4 However, the permit's requirements for retrofitting existing highways are insufficient, and leave
5 most critical decisions with respect to retrofitting to the discretion of WSDOT or appropriation
6 decisions from the legislature. The HRM only requires minimal retrofitting of existing highways
7 when significant new work is planned; those requirements impose arbitrary limits and are
8 inadequate to satisfy the mandates of the federal and state water pollution control laws.
9 Weakening these standards even further, the HRM exempts substantial categories of highway
10 work, such as repaving, from the retrofitting requirements. Under the terms of the permit, it will
11 take centuries, if not millennia, to retrofit the state's highway system to eliminate ongoing
12 degradation of water quality.

13 Separately, the permit's illicit discharge detection and elimination provisions call for
14 WSDOT to only make "field observations" to document, identify, and remediate illicit
15 discharges to the WSDOT stormwater system. There is no requirement that WSDOT actually
16 seek out such illicit discharges or take any specific action at all under this program. Instead, the
17 permit violates the governing regulations by leaving entirely within WSDOT's discretion the
18 extent to which it will seek to eliminate illicit discharges.

19 Overall, the WSDOT Permit is not based on Ecology's determination of the maximum
20 amount of stormwater control that is "practicable"—i.e. technically feasible—for WSDOT to
21 achieve. Instead, the permit is based almost entirely on whatever funding the legislature was
22 willing to provide to WSDOT for stormwater pollution remediation projects. Under this
23 approach, if the legislature provides no or almost no funding, as is the case for the current
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1 biennium, the WSDOT Permit's requirements are almost nonexistent and fail to satisfy the
2 mandates of federal and state law.

3 7. Relief Requested.

4 Appellant requests that the Board order the Department of Ecology to modify the
5 WSDOT Permit to comply with applicable legal requirements and to correct the defects
6 identified below.

7 8. Copies of this notice were sent to the respondents via email and U.S. mail on
8 March 3, 2009.

9 Respectfully submitted this 3rd day of March, 2009.

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