POLLUTION CONTROL HEARINGS BOARD
FOR THE STATE OF WASHINGTON

PUGET SOUNDKEEPER ALLIANCE,
Appellant,

vs.
WASHINGTON STATE DEPARTMENT OF ECOLOGY and WASHINGTON STATE DEPARTMENT OF TRANSPORTATION,
Respondents.

1. Identity of Appealing Parties and Representatives.

The appealing party is:
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2. Identification of Other Parties.

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

3. The Decision Under Appeal.

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

4. Short and Plain Statement Showing Grounds for Appeal.

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

5. Statement of Facts.

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

The Washington State Department of Transportation ("WSDOT") operates and maintains
a highway system of over 7,000 miles which carries approximately 60% of the traffic in the state.

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

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

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

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

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

Even more deficient are the standards adopted in the WSDOT Permit, SWMP, and HRM
to control stormwater runoff from existing highways and facilities. Data show runoff from
existing roads to contain concentrations of metals and other pollutants far in excess of levels
known to adversely affect water quality and beneficial uses like salmon. Because most existing
facilities were built without adequate protection for water quality, the only way to reduce the
pollutant loads from WSDOT’s ongoing operation of these facilities (outside of reducing the
number of automobiles traveling on them) is to retrofit them to meet updated standards.
However, the permit’s requirements for retrofitting existing highways are insufficient, and leave
most critical decisions with respect to retrofitting to the discretion of WSDOT or appropriation
decisions from the legislature. The HRM only requires minimal retrofitting of existing highways
when significant new work is planned; those requirements impose arbitrary limits and are
inadequate to satisfy the mandates of the federal and state water pollution control laws.
Weakening these standards even further, the HRM exempts substantial categories of highway
work, such as repaving, from the retrofitting requirements. Under the terms of the permit, it will
take centuries, if not millennia, to retrofit the state’s highway system to eliminate ongoing
degradation of water quality.
Separately, the permit’s illicit discharge detection and elimination provisions call for
WSDOT to only make “field observations” to document, identify, and remediate illicit
discharges to the WSDOT stormwater system. There is no requirement that WSDOT actually
seek out such illicit discharges or take any specific action at all under this program. Instead, the
permit violates the governing regulations by leaving entirely within WSDOT’s discretion the
extent to which it will seek to eliminate illicit discharges.
Overall, the WSDOT Permit is not based on Ecology’s determination of the maximum
amount of stormwater control that is “practicable”—i.e. technically feasible—for WSDOT to
achieve. Instead, the permit is based almost entirely on whatever funding the legislature was
willing to provide to WSDOT for stormwater pollution remediation projects. Under this
approach, if the legislature provides no or almost no funding, as is the case for the current
biennium, the WSDOT Permit’s requirements are almost nonexistent and fail to satisfy the mandates of federal and state law.

7. Relief Requested.

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

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

Respectfully submitted this 3rd day of March, 2009.

[Signature]

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