



STATE OF WASHINGTON  
ENVIRONMENTAL HEARINGS OFFICE

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April 14, 2009

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Re: PCHB No. 09-023  
**PUGET SOUNDKEEPER ALLIANCE v. DOT and ECOLOGY**

Dear Parties:

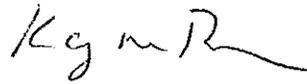
Enclosed please find the Second Pre-Hearing Order. Please review the order carefully in order to understand the details of what the process requires. For ease of reference, the key deadlines are as follows:

1. **Discovery:** Discovery should be complete by **October 16, 2009**.
2. **Motions:** File motions on any issue that would be dispositive on or before **August 10, 2009**. Opposing parties shall file a response 14 days from the date received. The Reply must be made within 10 days from receipt of the response.
3. **Joint Status Report** shall be filed by **October 1, 2009**.
4. **Witness and Exhibit Lists:** Expert witness lists by **October 16, 2009**.  
Final witness lists by **December 4, 2009**.  
Final exhibit lists by **December 23, 2009**.
5. **Briefs:** Pre-Hearing Briefs shall be filed by **January 11, 2010**.
6. **Pre-Filed Testimony:** must be filed and served by **January 11, 2010**.
6. **Hearing:** The hearing date is set for **January 21 – 29, 2010**.



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

Sincerely,



Kay M. Brown  
Administrative Appeals Judge, Presiding

KMB/dj/P09-023

Enc.

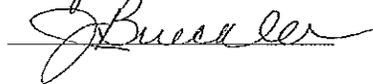
Cc: Kathleen Emmett, Ecology

**CERTIFICATION**

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

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

DATED April 14, 2009 at Lacey, WA.



1  
2 BEFORE THE POLLUTION CONTROL HEARINGS BOARD  
3 STATE OF WASHINGTON

4 PUGET SOUNDKEEPER ALLIANCE,

5 Appellant,

6 v.

7 STATE OF WASHINGTON,  
8 DEPARTMENT OF ECOLOGY, and  
9 STATE OF WASHINGTON,  
10 DEPARTMENT OF TRANSPORTATION,

11 Respondents.  
12

PCHB NO. 09-023

SECOND PRE-HEARING ORDER

13 Appellant Puget Soundkeeper Alliance (PSA) is appealing the Washington State  
14 Department of Transportation Municipal Stormwater Permit (Permit) issued by Washington  
15 State Department of Ecology (Ecology) to Washington State Department of Transportation  
16 (WSDOT). A pre-hearing conference in the case was held by telephone on March 24, 2009.  
17 Based on the conference, a Pre-Hearing Order was entered. In compliance with that Pre-Hearing  
18 Order, PSA submitted a revised issues list including section references on April 10, 2009. The  
19 purpose of this second pre-hearing order is to include that revised issues list:<sup>1</sup>  
20

21 <sup>1</sup> In addition, issue 13, which was inadvertently left out of the first pre-hearing order, is included in the issues list,  
and a correction has been made in Section IX ¶ 3 of this order.

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## I. HEARING

The hearing in this matter is set for **January 21 through January 29, 2010**, commencing at 9:00 a.m. at the Board's office in Lacey, WA.

## II. MEDIATION AND SETTLEMENT

Parties are encouraged to engage in mediation or settlement discussions with each other at any time without the presence of the presiding officer of the Board or with his or her presence if all parties and the presiding officer agree. If the parties wish to engage the services of an administrative appeals judge for mediation, they shall contact the Board's office. The parties shall file a joint status report with the Board, setting forth settlement possibilities in the case, by **October 1, 2009**.

## III. LEGAL ISSUES

### PSA's issues

1. Does S.5.A of the Permit and Section 5 of Appendix 7 authorize WSDOT to discharge stormwater from new and expanded highway facilities without reducing the discharge of pollutants to the maximum extent practicable (MEP)?
2. Does S.5.A of the Permit and Section 5 of Appendix 7 authorize WSDOT to discharge stormwater from new and expanded highway facilities without using all known, available, and reasonable methods of treatment (AKART) to control and prevent pollution of waters of the state?
3. Does S.5.A of the Permit and Section 5 of Appendix 7 authorize stormwater discharges from new and expanded highway facilities that unlawfully degrade water quality and/or violate water quality standards?
4. Does S.5.A of the Permit and Section 5 of Appendix 7 unlawfully authorize stormwater discharges from new and expanded highway facilities into waterbodies identified as impaired under section 303(d) of the Clean Water Act?
5. Does S.5.A of the Permit and Section 5 of Appendix 7 unlawfully authorize WSDOT to discharge stormwater from new and expanded highway facilities that will result in harm to ESA listed species, including Chinook salmon and steelhead?

- 1 6. Does S.5.A of the Permit and Sections 5 and 6 of Appendix 7 authorize WSDOT to  
2 discharge stormwater from existing highway facilities without reducing the discharge  
of pollutants to the MEP?
- 3 7. Does S.5.A of the Permit and Sections 5 and 6 of Appendix 7 authorize WSDOT to  
4 discharge stormwater from existing highway facilities without using AKART to  
5 control and prevent pollution of waters of the state?
- 6 8. Do the retrofit requirements in S.5.A of the Permit and Sections 5 and 6 of Appendix  
7 7 unlawfully fail to require retrofitting of existing WSDOT facilities to meet water  
8 quality standards and protect beneficial uses?
- 9 9. Do the retrofit requirements in S.5.A of the Permit and Sections 5 and 6 of Appendix  
10 7 create an unlawful self-regulatory system?
- 11 10. Are the illicit discharge detection and elimination (IDDE) provisions in S.5.A of the  
12 Permit and Section 3 of Appendix 7 inconsistent with governing law and do they  
13 create an impermissible self-regulatory system?
- 14 11. If Ecology drafted the Permit based on the amount of available funding, does the  
15 permit as a whole fail to reduce stormwater pollution to the MEP and/or fail to  
16 require AKART?
- 17 12. Does the Permit as a whole unlawfully fail to control stormwater runoff from  
18 WSDOT facilities to the MEP, and/or fail to require application of AKART to  
19 stormwater runoff from WSDOT facilities, by failing to require WSDOT to  
20 investigate, advocate for, and/or require methods to limit the source of runoff  
21 pollutants?
- 13 13. Does Section 6 of the Permit unlawfully fail to require compliance with total  
maximum daily loads ("TMDLs") that are issued subsequent to the date of issuance  
of the permit?

#### 14 WSDOT's issues

- 15 1. Does PSA have standing to appeal the Permit, the Stormwater Management Plan  
16 (SWMP), the Highway Runoff Manual (HRM), or the application thereof in areas  
outside the Puget Sound Basin?
- 17 2. Did Ecology act unlawfully or abuse its discretion when it approved the HRM as  
equivalent to Ecology's stormwater management manuals?
- 18 3. Does the Board have jurisdiction to review and overrule funding decisions for  
WSDOT and its stormwater system made by the Washington State Legislature?

#### 19 IV. DISPOSITIVE MOTIONS

20 Motion deadline: The parties shall file and serve motions on any issue that would be  
21 dispositive of all or part of the case on or before August 10, 2009. An original and four (4)

1 copies of the motion and supporting documents shall be filed with the Board. Opposing parties  
2 shall have 14 days from receipt of the motion to file a response, and then the moving party will  
3 have an additional 10 days from receipt of the response for reply to the motion. (Original and  
4 four (4) copies for the Board).

5 Motions will be decided based on the written record, unless oral argument is requested by  
6 a party and granted by the Board. At the parties' request, argument may be held by telephone.

7 **V. WITNESSES AND EXHIBITS**

8 The parties shall file and serve a list designating all expert witnesses on **October 16,**  
9 **2009** (Original and one). This designation should include all experts expected to provide direct  
10 expert testimony at the hearing. Testimony will not be allowed from any expert who is not so  
11 designated, unless a party shows good cause for its failure to designate and obtains a ruling  
12 granting leave to call the additional expert. Any expert identified for the first time on the list  
13 filed on October 16, 2009, may be deposed after the discover cut-off date.

14 Both parties have filed preliminary witness and exhibit lists. The parties shall file and  
15 serve final lists of witnesses by **December 4, 2009** (Original and one). Any witness listed in  
16 final lists may be called by any party. The party calling a witness has the responsibility to ensure  
17 his/her attendance at the hearing.

18 A witness's expertise shall be established by resume offered as an exhibit.

19 The parties shall serve final exhibit lists on the parties by **December 14, 2009**. After the  
20 exchange of final exhibit lists, the parties shall confer to reach any agreement on exhibits'

1 authenticity and admissibility and to eliminate duplicate exhibits. The parties shall file and serve  
2 final exhibit lists (original and one copy) with the Board on **December 23, 2009**.

3 All exhibits must be introduced in connection with a witness's testimony or referred to in  
4 argument. Parties are asked to submit into evidence only those portions of voluminous  
5 documents actually being referred to or relied upon by a witness.

6 When meeting with the Presiding Member on the first hearing day, each party shall have  
7 available for the Board, an original and four (4) copies of its exhibits and exhibit lists which shall  
8 identify those stipulated to by the parties. An original or one copy of any exhibit, which cannot  
9 be conveniently copied due to size, bulk, reproduction difficulty, etc., should be available for the  
10 Board at the hearing.

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

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

#### 15 VI. PREFILED TESTIMONY

16 Pre-filed direct testimony of expert witnesses is encouraged, but not required. The  
17 testimony is limited to 20 pages (double spaced) per witness. If testimony is to be pre-filed, it  
18 must be filed and served no later than **January 11, 2010**.

#### 19 VII. DISCOVERY

20 The parties have agreed to complete discovery by **October 16, 2009**. If formal discovery  
21 is pursued, parties should pay particular attention to the time requirements imposed by the

1 superior court civil rules with regard to interrogatories, depositions, etc. Discovery requests shall  
2 be served sufficiently ahead of the discovery deadline so that the opposing party has the response  
3 time allowed by these rules. (For example, responses to interrogatories are typically due thirty  
4 (30) days after service. See CR 33).

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

8 An original and one (1) copy of discovery motions and supporting documents must be  
9 filed with the Board.

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

### 13 **VIII. BRIEFS**

14 Pre-Hearing Briefs are optional. If submitted, they shall be filed and served no later than  
15 **January 11, 2010**, with an original and four (4) copies for the Board.

16 Briefs are limited to 20 pages in length, absent an order granting a motion to lengthen. If  
17 a citation is made to other than a Wn.App. or Wn.2d case, a complete copy of the referenced  
18 citation must be filed.

### 19 **IX. COMMUNICATION**

20 All correspondence and filings with the Board shall be sent to the attention of the  
21 Presiding member with copies sent at the same time to all other parties.



1 SO ORDERED this 14<sup>th</sup> day of April, 2009.

2 **POLLUTION CONTROL HEARINGS BOARD**

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5 Kay M. Brown  
6 Administrative Appeals Judge, Presiding

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