

RECEIVED

DEC 16 2005

DEPARTMENT OF ECOLOGY
OFFICE OF DIRECTOR

cc: Enf. Database Coord.
 Rev/Rec - Cost Recovery

orig: File - Fax to ATG

ATG Docket Clerk

Jeff Killelea

initial: *Burdale 12/19/05*

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
OF THE STATE OF WASHINGTON

SNOHOMISH COUNTY, a political
subdivision of the State of Washington,

Appellant,

vs.

WASHINGTON STATE DEPARTMENT OF
ECOLOGY AND ITS DIRECTOR,

Respondents.

PCHB NO. _____

NOTICE OF APPEAL OF THE NPDES
AND STATE WASTE DISCHARGE
CONSTRUCTION STORMWATER
GENERAL PERMIT

I. NATURE OF THE ACTION

1.1 Snohomish County, a political subdivision of the State of Washington, hereby provides notice of appeal of the "Construction Stormwater General Permit, a National Pollutant Discharge Elimination System and State Waste Discharge General Permit for Stormwater Discharges Associated With Construction Activities" (hereinafter "Construction Stormwater General Permit" or "Permit") that was issued by the Washington State Department of Ecology ("Department") on November 16, 2005. A copy of the Permit is attached hereto as Exhibit A.

II. NAME AND ADDRESS OF THE APPELLANT

2.1 For purposes of this appeal, contact information for the County is as follows:

Gary Nelson, Chair
Snohomish County Council
3000 Rockefeller Avenue, M/S 609
Everett, WA 98201
Phone: (425) 388-3494 Fax: (425) 388-3496

The County is represented in this appeal by the Office of the Prosecuting Attorney. Contact information for co-counsel is as follows:

Millie Judge, Asst. Chief Civil Deputy
Office of the Prosecuting Attorney
Civil Division, Snohomish County
3000 Rockefeller Ave, M/S 504
Everett, WA 98201-4060
Phone: (425) 388-6330 Fax: (425) 388-6333

Elizabeth Anderson, Deputy Prosecuting Attorney
Office of the Prosecuting Attorney
Civil Division, Snohomish County
3000 Rockefeller Ave, M/S 504
Everett, WA 98201-4060
Phone: (425) 388-6330 Fax: (425) 388-6333

III. JURISDICTION

3.1 The Pollution Control Hearings Board has the authority to hear appeals of the requirements of the subject Permit pursuant to RCW 43.21B.110-310 and WAC 371-08-315(2).

IV. GROUND FOR APPEAL

4.1 The Department erred in issuing the Construction Stormwater General Permit that is inconsistent with applicable provisions in federal and state water quality laws and regulations, it imposes terms that are unreasonable and unattainable, it exceeds the authority

1 of the department and that is otherwise contrary to law including, but not limited to, the
2 following terms and conditions:

3 A. Special Condition S1.B 1 b is unreasonably vague so as to require construction
4 operators to guess as to whether they are required to seek coverage under this permit. It is
5 not reasonably possible for a construction operator to know whether they need to seek
6 coverage under the plain terms of the permit.
7

8 B. Special Condition S3 requires a permit holder to apply all known, available, and
9 reasonable methods of prevention, control, and treatment (AKART) prior to a discharge of
10 stormwater and non-stormwater to waters of the state. Assuming a permit holder fully
11 implements all required measures and technologies, the Department has unreasonably
12 required permit holders to comply with water quality standards in S3.A, even where there
13 exists no available means to reach compliance. Such a permit condition exceeds the
14 authority to the Department, imposes terms that are unreasonable and unattainable, and is
15 arbitrary and capricious.
16
17

18 C. Special Condition S4.B.1, 5, S4.C.5, and S9.B2 require review and revision to
19 Stormwater Pollution Prevention Plans within 7 days of certain inspections and sampling
20 events and further require that source control and treatment best management practices be
21 fully implemented within 10 days. These requirements are unreasonable and inconsistent
22 with applicable law because (1) the terms of the conditions are vague and conflict with other
23 relevant provisions in the permit; (2) the conditions impose unreasonable and potentially
24 unattainable timelines; and (3) the conditions subject the permit holder to excessive liability.
25
26 It is not reasonably possible for a covered discharger to know whether they are in
27 compliance with these conditions in the CSGP.
28
29

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29

D. Special Condition S4.C.5 sets a benchmark for turbidity of 25 NTU. The 25 NTU benchmark for turbidity, when combined with other permit requirements, constitutes a de facto numeric effluent limitation in violation of RCW 90.48.555.

E. Special Condition S8 sets numeric effluent limitations for discharges to certain 303(d) listed water bodies in violation of RCW 90.48.555 where the Department has not completed a Total Maximum Daily Load analysis or assigned waste load allocations for stormwater discharges associated with construction activities.

F. Special Condition S8.D.2 provides for the inclusion in the permit of TMDLs adopted after the permit's effective date. This provision exceeds the Department's authority and violates the due process rights of permittees in the absence of permit modification or administrative order. Such a provision is also unreasonable, arbitrary and capricious.

G. Special Condition S8 sets numeric effluent limitations for certain discharges to 303(d) listed water bodies in violation of RCW 90.48.555 by failing to consider existing controls on point and non-point sources of pollution, the variability of the pollutant, or pollutant parameter in stormwater and, as appropriate, the dilution of stormwater in receiving waters.

H. General Condition G1 states that any discharge at a level in excess of that identified and authorized by the general permit shall constitute a violation of the terms and conditions of this permit. This condition is vague, contrary to court interpretations of the Clean Water Act, exceeds the authority of the Department, and is arbitrary and capricious.

I. General Condition G17 states that any permit noncompliance constitutes a violation of the Clean Water Act. This condition is vague, contrary to court interpretations of

1 the Clean Water Act, exceeds the authority of the Department, and is arbitrary and
2 capricious.

3 J. General Condition G18 states that the permittee must comply with later-enacted
4 standards or prohibitions in Section 307(a) of the Clean Water Act. Although permittees
5 must comply with the law, the Department exceeds its authority and violates the due process
6 rights of permittees when it makes later-enacted regulations a permit conditions in the
7 absence of permit modification or administrative order. Such a provision is also
8 unreasonable, arbitrary and capricious.
9

10 K. General Condition G24.C attempts to limit the applicability of board or court
11 decisions arising out of appeals of the Permit to only the appellant(s), rather than to all
12 construction operators under the permit. This provision is contrary to law, exceeds the legal
13 authority of the Department, and is arbitrary and capricious.
14

15 **V. DESCRIPTION OF THE PERMIT APPEALED**

16
17 5.1 Snohomish County is a discharger of stormwater from construction sites
18 throughout the county under State and Federal law.

19 5.2 The Department of Ecology is the agency of the State of Washington that
20 issued the Permit for which review is sought in this matter.
21

22 5.3 The terms and conditions of the Construction Stormwater General Permit
23 provide coverage for and authorize discharges of stormwater from certain construction sites
24 which would otherwise be prohibited by law. A discharge permit is necessary to meet the
25 requirements of the Clean Water Act for discharges to surface water. The Permit specifically
26 seeks to regulate discharges of stormwater to surface water bodies. In addition to the
27 category of permittees (operators of construction activities) listed in S1(B)(1)(a) of the Permit,
28
29

1 permit coverage can be required of an operator of any size construction activity discharging
 2 stormwater that the Department determines to be a significant contributor of pollutants to
 3 waters of the state or that the Department reasonably expects to cause a violation of a water
 4 quality standard.

5 **5.4** The Permit conditions the discharge of stormwater to protect the beneficial
 6 uses of the receiving water. Permit conditions include a requirement to have a Stormwater
 7 Pollution Prevention Plan (SWPP) and Best Management Practices (BMPs) implemented to
 8 eliminate or minimize the potential to contaminate stormwater at the construction site.
 9 Treatment of stormwater before discharge may also be required if source control and the so-
 10 called "good housekeeping" BMPs fail to adequately protect stormwater from pollutants.
 11
 12

13 **VI. FACTS**

14 **6.1** Snohomish County, a political subdivision of the State of Washington, is a
 15 county government that employees best management practices to reduce and limit pollutant
 16 discharged from construction sites. County staff was active in advisory committee meetings
 17 leading to the issuance of the draft Construction Stormwater General Permit (CSGP).
 18

19 **6.2** On November 16, 2005, Ecology issued the Construction Stormwater General
 20 Permit, which becomes effective on December 16, 2005. The permit expires on December
 21 16, 2010. The Department also issues a fact sheet that describes the history of the permit,
 22 the Department's decisions on limiting pollutants from construction activities and the
 23 regulatory and technical basis for those decisions. The fact sheet is incorporated herein as if
 24 set forth in full by this reference. In establishing the terms of the general permit, the
 25 Department was engaged in implementing the Federal Clean Water Act (CWA), 33 U.S.C.
 26
 27
 28
 29

Sections 1251 – 1376, and the Washington State Pollution Control Act, Ch. 90.48 RCW and the accompanying regulations issued thereunder.

6.3 The proposed permit authorizes the discharge of stormwater and non-stormwater associated with construction activity. Construction activity refers to the clearing, grading, excavation, and other land disturbing activities which result in the disturbance of one or more acres, as well as disturbance of less than one acre of total land area that is part of a larger common plan of development or sale, if the larger common plan will ultimately disturb one acre or more.

6.4 The Department issued its first stormwater general permit on November 18, 1992, covering both industrial and construction activities. When reissued in 1995, Ecology decided to move construction activities into a separate permit. The 1995 CSGP was reissued by the Department on October 4, 2000, with an expiration date of November 18, 2005. A Notice of Appeal was filed on November 17, 2000, by Puget Soundkeeper Alliance, Waste Action Project, Washington Public Employees for Environmental Responsibility, Resources for Sustainable Communities, and Citizens for a Healthy Bay. Revising and reissuing this permit was a condition of settling the appeal.

VII. RELIEF SOUGHT

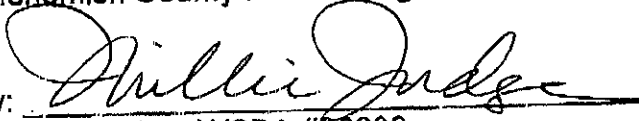
Based upon the foregoing, Snohomish County respectfully requests that the Board grant the following relief:

7.1 An order directing the Department of Ecology to modify the Construction Stormwater General Permit to address the permit deficiencies set forth above.

7.2 Such other and further relief as the Board deems appropriate under the circumstances of this case.

Respectfully submitted this 16th day of December, 2005.

JANICE E. ELLIS
Snohomish County Prosecuting Attorney

By: 

Millie M. Judge, WSBA #20699
Asst. Chief Civil Deputy and
Elizabeth Anderson, WSBA # 34036
Deputy Prosecuting Attorney
Attorneys for Snohomish County

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29