

Mentor Law Group

PLLC

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Initial: Update 12/16/05

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DEC 16 2005

DEPARTMENT OF ECOLOGY
OFFICE OF DIRECTOR

Jennifer Symms
206.493.2305
symms@mentorlaw.com

December 15, 2005

Judy Greear
Clerk and Hearings Coordinator
Pollution Control Hearings Board
Environmental Hearings Office
PO Box 40903
Lacey, WA 98504-0903

Via Federal Express Overnight

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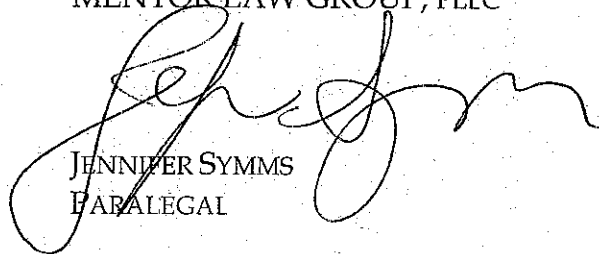
RE: *Associated General Contractors of Washington & Building Industry
Association of Washington v. State of Washington Department of Ecology.
PCHB No. 05-*

Dear Ms. Greear:

Please find enclosed the original Notice of Appeal for filing in the above-mentioned matter. This document was faxed to you December 15, 2005. Also enclosed is a copy to be conformed and returned to us in the envelope provided.

Sincerely,

MENTOR LAW GROUP, PLLC


JENNIFER SYMMS
PARALEGAL

Enclosures

CC: Department of Ecology
Office of the Attorney General
Roland Dewhurst
Tom McCabe
Jodi Slavik

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POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

ASSOCIATED GENERAL CONTRACTORS
OF WASHINGTON and BUILDING
INDUSTRY ASSOCIATION OF
WASHINGTON,

Appellants,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent

No 05-

NOTICE OF APPEAL

Associated General Contractors of Washington (AGC) and the Building Industry Association of Washington (BIAW) hereby appeal the State of Washington Construction Stormwater General Permit, National Pollutant Discharge Elimination System and State Waste Discharge General Permit for Discharges Associated with Construction Activity, issued on November 16, 2005.

I. Appealing Party

1.1 Appealing Parties
Roland Dewhurst, Chief Executive Officer
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2 Tom McCabe
3 Executive Vice President
4 Building Industry Association of Washington
5 111 21st Avenue SW
6 Olympia, WA 98501
7 Telephone: 360-352-7800 Fax: 360-352-7801

7 1.2 Representation

8 James A Tupper, Jr.
9 Mentor Law Group, PLLC
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13 Jodi Slavik
14 Of Counsel, WSBA No 25088
15 Building Industry Association of Washington
16 111 21st Avenue SW
17 Olympia, WA 98501
18 Telephone: 360-352-7800 Fax: 360-352-7801

16 **II. Identification of Parties**

17 2.1 Associated General Contractors of Washington and Building Industry Association
18 of Washington, Appellants.

19 2.2 State of Washington, Department of Ecology, Respondent.

20 **III. Copy of Permit**

21 3.1 See attached copy of the Construction Stormwater General Permit (CSGP) issued
22 on November 16, 2005.

23 **IV. Grounds for Appeal**

24 4.1 The CSGP authorizes discharges associated with construction activity As issued,
25 the Permit exceeds the authority of the Department of Ecology, is inconsistent with applicable
26

1 provisions in federal and state water quality laws and regulations, and imposes terms that are
2 unreasonable and unattainable.

3 V. Statement of Facts

4 5.1 AGC is a trade association representing contractors, businesses, and professional
5 associated with the commercial construction industry. Many AGC contractors will be covered
6 under and will be required to comply with the terms and conditions of the CSGP. AGC, on
7 behalf of its members, was active in advisory committee meetings leading to the issuance of a
8 draft CSGP and submitted comments on the draft permit.

9 5.2 AGC members are committed to the goals of the CSGP and play an important role
10 in training members and member employees in best management practices to reduce and limit
11 pollutant discharges from construction sites. AGC has also been a leader in providing training
12 for the Certified Erosion Sedimentation Lead as recommended under the Western Washington
13 Stormwater Management Manual and required for facility inspections under the new CSGP.

14 5.3 BIAW represents over 11,000 member companies in the state of Washington
15 engaged in the homebuilding industry. The CSGP directly affects BIAW members, especially
16 those contractors who develop small sites less than five acres that are now covered under the
17 CSGP. BIAW and its local associations and member companies regularly provide erosion
18 training courses in an effort to comply with state and local stormwater regulations. BIAW has
19 been active in the development of the CSGP and submitted comments on the draft permit.

20 5.4 The CSGP includes conditions that are unreasonable, arbitrary and capricious, and
21 exceed the authority of the Department of Ecology. These conditions include but are not limited
22 to the following:

23 5.5 Special Condition S4 C and Table 3 unreasonably require the use of turbidity
24 meters over transparency tubes as a means of measuring turbidity.

25 5.6 Special Condition S4 C requires weekly water quality samples when there is a
26 discharge from a construction site. Sampling at a frequency of once a week is not reasonably
necessary to determine whether best management practices are installed and functioning.

1 5.7 Special Condition S4 B 1, 5, S4.C.5, and S9.B2 require review and revision to
2 Stormwater Pollution Prevention Plans within seven days of certain inspections and sampling
3 events and further require that source control and treatment best management practices be fully
4 implemented within 10 days. These requirements are unreasonable and inconsistent with
5 applicable law because (1) the terms of the conditions are vague and conflict with other relevant
6 provisions in the permit; (2) the conditions impose unreasonable and potentially unattainable
7 timelines; and (3) the conditions subject the permit holder to excessive liability. It is not
8 reasonably possible for a covered discharger to know whether they are in compliance with these
9 conditions in the CSGP

10 5.8 Special Condition S4 sets forth a benchmark for turbidity of 25 NTU that is
11 unreasonable and excessive to determine compliance with applicable water quality standards.

12 5.9 The 25 NTU benchmark for turbidity, when combined with other permit
13 requirements, constitutes a de facto numeric effluent limitation in violation of RCW 90.48.555.

14 5.10 Special Condition S8 requires receiving water sampling for discharges to certain
15 water body segments listed pursuant to section 303(d) of the Clean Water Act. The requirement
16 for receiving water sampling violates RCW 90.48.555 that prohibits the Department of Ecology
17 from requiring such sampling unless it can be conducted without endangering the health and
18 safety of persons conducting the sampling.

19 5.11 Special Condition S8 sets numeric effluent limitations for discharges to certain
20 303(d) listed water bodies in violation of RCW 90.48.555 where the Department of Ecology has
21 not completed a Total Maximum Daily Load analysis or assigned waste load allocations for
22 stormwater discharges associated with construction activities.

23 5.12 Special Condition S8 sets numeric effluent limitations for certain discharges to
24 303(d) listed water bodies in violation of RCW 90.48.555 by failing to consider existing controls
25 on point and nonpoint sources of pollution, the variability of the pollutant, or pollutant parameter
26 in stormwater and, as appropriate, the dilution of stormwater in receiving waters.

1 **VI. Relief Sought**

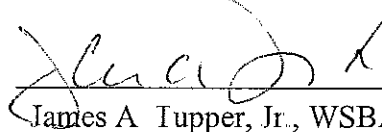
2 Wherefore, Associated General Contractors of Washington and the Building Industry
3 Association of Washington respectfully request the Board grant the following relief:

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

6 2. Such further relief the Board deems appropriate under the circumstances of this
7 case.

8 DATED this 15th day of December, 2005.

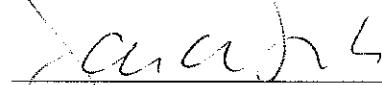
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21 WASHINGTON

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