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DEPARTMENT OF ECOLOGY
EXECUTIVE

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
IN AND FOR THE STATE OF WASHINGTON

WASHINGTON AGGREGATE AND
CONCRETE ASSOCIATION, ASSOCIATED
GENERAL CONTRACTORS OF
WASHINGTON, INLAND NORTHWEST
ASSOCIATED GENERAL CONTRACTORS,
ASSOCIATED BUILDERS &
CONTRACTORS WESTERN WASHINGTON
CHAPTER, ASSOCIATED BUILDERS &
CONTRACTORS INLAND PACIFIC
CHAPTER and BUILDING INDUSTRY
ASSOCIATION OF WASHINGTON,

Appellants,

v.

STATE OF WASHINGTON, DEPARTMENT
OF ECOLOGY,

Respondent.

PCHB No. 15-____

NOTICE OF APPEAL

Pursuant to Chapter 43.21B RCW, Chapter 34.05 RCW, and Chapter 371-08 WAC, the Washington Aggregate and Concrete Association, Associated General Contractors of Washington, and Inland Northwest Associated General Contractors, by and through their attorneys James A. Tupper and Tupper Mack Wells PLLC, hereby appeal the Construction Stormwater General Permit (CSGP or Permit) issued by the Department of Ecology (Ecology) on November 18, 2015.

NOTICE OF APPEAL

 COPY

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I. Appealing Parties

1.1 Appealing Parties:

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1.2 Representation:

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1 TUPPER MACK WELLS PLLC
2 2025 First Avenue, Suite 1100
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4 Telephone: 206-493-2300 Fax: 206-493-2310

5 II. Identification of Parties

6 2.1 Washington Aggregate and Concrete Association, Associated General Contractors
7 of Washington, Inland Northwest Associated General Contractors, Associated Builders &
8 Contractors Western Washington Chapter, Associated Builders & Contractors Inland Pacific
9 Chapter and Building Industry Association of Washington, Appellants.

10 2.2 State of Washington, Department of Ecology, Respondent.

11 III. Decision under Appeal

12 3.1 The Construction Stormwater General Permit issued by the Department of
13 Ecology on November 1, 2015. A copy of the CSGP is attached hereto.

14 IV. Grounds for Appeal

15 4.1 The CSGP as issued includes several conditions that are unreasonable and
16 contrary to established construction practices that are protective of surface water quality. These
17 new conditions are in several instances vague and contradictory and have been adopted by
18 Ecology with insufficient information and basis. Compliance with these conditions will
19 unreasonably add to the cost of construction and in some instances may not be reasonably
20 attainable. The conditions at issue include but are not limited to the follow specific permit terms
21 of the permit identified in the following Statement of Facts. The Appellants are continuing to
22 review the CSGP and reserve the right to add additional issues and specific conditions in the
23 CSGP of concern in this appeal based on that ongoing review as well as any discovery in this
24 matter and as allowed by the rules and practice of the PCHB.

25 V. Statement of Facts

26 5.1 Condition S1.B.3.i unreasonably qualifies the use of water for dust control as an
authorized non-stormwater discharge. The permit adds a restriction on the use of

1 “uncontaminated” water that is not defined in the permit and could be interpreted to preclude any
2 use of water for dust suppression. Potable water, which is otherwise an authorized non-
3 stormwater discharge under S1.B.3.c could not be used for dust control as it is likely to contain
4 constituents consistent with chlorination and disinfection of public water supplies. The residual
5 level of such contaminates is extremely low and will not cause or contribute to a violation of
6 water quality standards. Potable water is most often the only source of water available for dust
7 control and it is unrealistic to impose significant restrictions on its appropriate use for dust
8 control.

9 5.2 Condition S2.A.1.f unreasonably adds application requirements for
10 “contaminated” soils and groundwater. The permit requires a vague list of examples of the type
11 of information that must be provided to the department regarding circumstances where the
12 applicant is “aware” of contaminated soils and groundwater. The CSGP does not define the
13 basis for such knowledge or the extent to which an applicant must conduct a site assessment to
14 develop such information. The request for detailed information on how such contamination will
15 be managed in an application conflicts with existing regulations for management of solid waste,
16 hazardous waste and other regulations such as the state UST regulations. It is unreasonable for
17 the Ecology Water Quality Program to overlap these programs with vague and as yet
18 undetermined obligations for compliance. In many cases the requirements for the application in
19 these circumstances cannot be satisfied. It is often the case that CSGP coverage is secured
20 before a contractor is retained or a contract is awarded. In those circumstances it will be the
21 responsibility of the contractor to develop a Stormwater Pollution Prevention Plan (SPPP) that
22 will be consistent with the CSGP and all other applicable regulations that address the presence of
23 contaminated soils or groundwater. This condition creates an ad hoc process within the Ecology
24 Water Quality Program that lacks clear and definitive standards for compliance in areas that are
25 fully regulated by other laws and regulations.

1 5.3 Condition S4.B. Table 3, n. 2 unreasonably requires pH sampling if any amount
2 of recycled concrete or engineered soils is used on a site of one acre or more in size. It is
3 unreasonable to require such monitoring without a threshold for the volume of material that
4 triggers sampling requirements. The same footnote sets a minimum threshold for “significant”
5 concrete work of 1000 cubic yards poured over the life of a project. There is no basis for
6 requiring pH monitoring for recycled or engineered soils unless the use of materials is deemed
7 significant.

8 5.4 Condition SA.D.2 unreasonably requires pH monitoring of sites with recycled
9 concrete to continue until the concrete is “fully stabilized.” The permit fails to define or explain
10 how a facility determines when recycled concrete is “fully stabilized.” The condition may not be
11 achievable as chemical reactions in the concrete are slow and never ending.

12 5.5 Condition S9.D.9.g adds a requirement in the permit to adjust the pH of
13 stormwater as necessary to prevent an exceedance of groundwater quality standards. This
14 condition is unreasonable and beyond the scope of the permit coverage that is limited to
15 authorized discharges to surface water.

16 5.6 Condition S9.D.9.h restricting the washout of concrete trucks or concrete
17 handling equipment to offsite locations or dedicated washout areas is unreasonable, arbitrary and
18 capricious. Concrete washout has been allowed by Ecology onto ground in areas that are formed
19 and set to receive concrete paving within a short period of time—typically one to two days. This
20 practice is specifically described in BMP C154 of the 2012 Western Washington Stormwater
21 Management Manual. The ability to washout concrete shutes is a critical function on job sites that
22 typically involves a small amount of water. The ability to use formed and contained areas set up
23 for additional concrete pours is critical to construction activities and has no potential impact on
24 water quality.

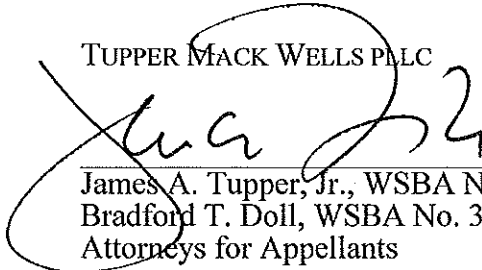
VI. Relief Sought

Wherefore, Appellants respectfully request that the Board grant the following relief:

1. An order declaring invalid the CSGP and directing Ecology to modify the CSGP for consistency with applicable requirements of federal and state law;
3. Such other and further relief as the Board deems appropriate under the circumstances of this case.

Respectfully submitted this 17th day of December, 2015.

TUPPER MACK WELLS PLLC



James A. Tupper, Jr., WSBA No. 16873
Bradford T. Doll, WSBA No. 38479
Attorneys for Appellants

DECLARATION OF SERVICE

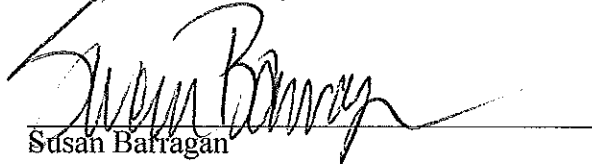
I declare on oath that on this date I filed the foregoing Notice of Appeal with the Pollution Control Hearings Board by delivering a copy via facsimile, and by sending the original and one copy, via U.S. mail, postage prepaid, addressed as follows:

Pollution Control Hearings Board
1111 Israel Rd. SW, Ste 301
Tumwater, WA 98501

I further declare that I caused copies of the foregoing Notice of Appeal to be served on the Department of Ecology by mailing the same via first-class mail, postage prepaid, addressed as follows:

Department of Ecology
Appeals Coordinator
P. O. Box 47608
Olympia, WA 98504-7608

Signed at Seattle, Washington, this 17th day of December, 2014.


Susan Barragan

4826-9814-7884, v. 1

