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POLLUTION CONTROL HEARINGS BOARD
FOR THE STATE OF WASHINGTON

THE PORT OF SEATTLE,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT
OF ECOLOGY,

Respondent.

No.

NOTICE OF APPEAL AND REQUEST
FOR STAY PENDING APPEAL

I. INTRODUCTION

On September 4, 2003, the Washington State Department of Ecology (“Ecology”) issued National Pollutant Discharge Elimination System Waste Discharge Permit No. 002465-1 (the “Permit” or “NPDES Permit”) to the Port of Seattle (“Port”). See Exhibit 1. The Permit authorizes the discharge of industrial wastewater and stormwater associated with industrial and construction activity at the Seattle-Tacoma International Airport (“STIA”) according to the Permit terms and conditions. This includes discharges from airport operation areas associated with industrial activity and from construction projects.

For over a year, the Port has engaged in discussions with Ecology over the terms and conditions of the Permit. A draft version of the Permit was issued in March 2003, and was the subject of extensive comments by the Port as well as by concerned members of the public.

1 Ecology responded to many of these comments either by revising draft Permit language and
2 conditions, or by explaining in its Responsiveness Summary why proposed changes were not
3 made.

4 Despite the Port's efforts to resolve these issues through the comment process, the
5 Permit contains a number of terms and conditions that are unsupported by the law and that
6 impose undue burdens on the Port and its STIA operations and projects without achieving
7 any corresponding environmental benefits. This appeal is being filed to address those issues.
8

9 **II. BACKGROUND**

10 STIA has been subject to an individual NPDES permit for its industrial waste system
11 since January 2, 1980. Since 1980, STIA's NPDES Permits have been modified or broadened
12 to cover new discharges or construction at the airport, with each new permit becoming
13 increasingly stringent. In 1994, the Permit was expanded to address stormwater associated
14 with industrial activity. Today, STIA is recognized regionally and nationally for its proactive
15 approach to stormwater management, performing innovative studies that go well beyond
16 permit requirements, such as bacteria source testing, dissolved oxygen studies, BMP
17 performance evaluations and research on emerging technologies.

18 In December 2001, the Port began the application process to renew its then-existing
19 permit, which had been effective since March 1, 1998 ("1998 Permit"). The renewal
20 application was amended and updated on several occasions. *See* Exhibit 2. Ecology issued the
21 draft Permit in March 2003, public comments were submitted by April 21, 2003, and Ecology
22 issued the final Permit, Fact Sheet and Responsiveness Summary on September 4, 2003. The
23 Permit became effective on October 1, 2003.

24 The 2003 Permit represents a substantial departure from the 1998 permit in its
25 organization, regulatory scope and added monitoring requirements. It now clearly
26 distinguishes between three types of discharges from STIA: discharges from the industrial
27

1 wastewater system (Part I), stormwater associated with industrial activity (Part II), and
2 construction stormwater (Part III). Part I's use of the term "industrial wastewater" is
3 somewhat of a misnomer because the discharges regulated in Part I consist primarily of
4 stormwater that runs off from certain portions of STIA that is treated at the Port's Treatment
5 Plant, and eventually discharges to Puget Sound. STIA is one of the few airports in the
6 country to have an on-site treatment plant for its stormwater. Non-construction stormwater
7 (Part II) consists of stormwater runoff from other parts of the airport where there is industrial
8 activity. Such stormwater is generally channeled through constructed stormwater facilities
9 (i.e., Lake Reba and Northwest Ponds) after application of Best Management Practices
10 ("BMPs") before being discharged to area waterbodies or municipal storm sewer systems.
11 Part III covers temporary stormwater discharges from construction projects. Erosion control
12 and runoff treatment BMPs are used to manage construction stormwater before being released
13 to area waterbodies or municipal storm sewer systems. For each section, the Permit includes
14 conditions requiring extensive monitoring, reporting, development and implementation of
15 substantial additional BMPs and studies.

16 For many years, NPDES permits were issued for point source discharges of industrial
17 and municipal wastewater to surface waters of the State. The NPDES program has now
18 expanded to cover stormwater discharges; however, NPDES Stormwater Permits are
19 authorized to address only those stormwater discharges that are "associated with industrial
20 activity," which includes stormwater from construction activities. 40 CFR 122.26 (a), (b)(14).

21 The Port Permit at issue here represents the most complex and rigorous stormwater
22 permit that has been issued in this State. Over the next six years, the Port will spend over
23 \$150 million implementing water quality and flow control BMPs, including enhanced
24 treatment BMPs and enhanced treatment facilities.
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2 **III. APPEALING PARTY**

3 The appealing party is:

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7 Seattle, WA 98111
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9 (206) 728-3205 (fax)

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26 **IV. ADDITIONAL PARTIES**

27 The only other party to this appeal is the Washington State Department of Ecology,
which issued the decision for which review is sought. Ecology's address is:

Washington State Department of Ecology
P.O. Box 47600
Olympia, WA 98504

1 **V. ORDER OR DECISION APPEALED FROM**

2
3 The Port is appealing portions of the National Pollutant Discharge Elimination System
4 Waste Discharge Permit No. 002465-1, issued September 4, 2003 to the Port of Seattle for
5 Sea-Tac International Airport. *See* Exhibit 1.

6 **VI. GROUNDS FOR APPEAL**

7
8 The Port is appealing a number of conditions imposed under the NPDES Permit, most
9 of which were raised in written comments to Ecology before the Permit was issued. Briefly,
10 the Port appeals on the following grounds:

11 **A. Part I. Industrial Wastewater System (“IWS”)**

12 1. Part I of the Permit establishes a numeric “benchmark” for Biological
13 Oxygen Demand (“BOD”), including conditions associated with testing for and exceeding the
14 benchmark, that was not developed in accordance with applicable laws and regulations. This
15 creates considerable uncertainty for the Port in its attempt to manage BOD in its effluent, not
16 only during the life of this Permit but in subsequent permits as well. This uncertainty makes it
17 difficult for the Port to determine what is the appropriate design standard for the AKART
18 pipeline and therefore may compromise the Port’s ability to complete the pipeline according to
19 the schedule laid out in the Permit.

20 2. The Permit incorporates inappropriate requirements for acute and
21 chronic toxicity testing.

22 3. The Permit establishes interim “milestone” dates for the AKART
23 pipeline that are unrealistic and unachievable.

24 **B. Part II. Non-Construction Stormwater Runoff**

25 1. Effluent limits for non-construction stormwater runoff and related
26 conditions were not applied in accordance with applicable state and federal laws and regulations.
27 It is not appropriate to apply effluent limitations to stormwater until the usual adaptive

1 management, BMP-based approach has been fully implemented and shown to be inadequate to
2 address water quality problems. The Port has been and will be implementing an extensive BMP
3 program under both this Permit, the Port's 401 certification, and the PCHB's recent decision
4 regarding the Port's 401 certification.

5 2. In accordance with applicable laws and regulations, effluent limits should
6 not apply to water going into the Northwest Ponds stormwater facility. The Northwest Ponds
7 stormwater facility should be treated the same way as the Port's other stormwater facility, Lake
8 Reba.

9 3. The Permit inappropriately includes an effluent limit based on turbidity.
10 The appropriate parameter for measuring BMP performance is total suspended solids ("TSS"),
11 not turbidity, according to Ecology and EPA sources.

12 4. The sampling frequency and monitoring required under Part II of the
13 Permit is excessive and unjustified. Stormwater monitoring should only be required at those
14 outfalls and for those pollutants that have actually been detected during the past eight years of
15 stormwater monitoring. In addition, uncertainties associated with the unpredictability of weather
16 events and forecasting will make implementation of the required sampling program impracticable
17 and costly without any defined environmental benefit.

18 5. The Permit is contrary to Ecology's own stormwater management
19 guidance and policies. It inappropriately limits turbidity measurement to only "grab" sampling,
20 rather than allowing for either grab or composite sampling.

21 6. The Permit arbitrarily deleted a future outfall location without justification
22 or explanation, and failed to delete some current outfalls where there is no industrial activity,
23 thereby significantly constraining the Port's ability to effectively plan for and manage its
24 stormwater.

25 7. Part II of the Permit improperly requires the Port to sample at incorrect
26 locations, including those where the stormwater contains commingled runoff from both Port and
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1 non-Port properties. The Port should not be held responsible for pollution generated on non-
2 Port owned property.

3 8. Contrary to regulations, the Permit unjustifiably requires acute toxicity
4 effluent characterization during the first year of the permit despite the fact that the Port
5 completed a round of testing concurrent with Permit renewal and all performance standards were
6 met.

7 9. The Permit requires that the Port conduct a Comprehensive Receiving
8 Water and Stormwater Runoff Study that obligates the Port to go far beyond its legal authority
9 and responsibility, such as by requiring the Port to solve the stormwater problems of
10 surrounding cities and Washington State Department of Transportation. The Study also
11 requires the Port to study aspects of stormwater that the Port has already demonstrated are not
12 water quality problems and sample in places where there is no industrial activity.

13 10. The Permit contains an inappropriate regulatory process for sublethal
14 toxicity that appears to result in the establishment of effluent limits. Sublethal toxicity
15 characterization of stormwater is experimental at this time and should not be used as a basis for
16 setting effluent limits until such time as additional BMPs have been evaluated and implemented.
17 Requirements for testing and implementation should therefore provide greater flexibility.
18 Moreover, the schedule, locations and conditions of sampling are all inappropriate.

19 **C. Part III: Construction Stormwater**

20 1. The sampling frequency and monitoring required under Part III of the
21 Permit is excessive and unjustified. Uncertainties associated with the unpredictability of weather
22 events and forecasting will make implementation of the required sampling program impracticable
23 and costly without any defined environmental benefit.

24 2. The effluent limits for construction stormwater were not developed in
25 accordance with applicable laws and regulations. Also, the Permit does not provide for a
26 compliance schedule applicable to effluent limits.

27 3. The permit requires the Port to meet construction design standards that

1 lack support from Ecology's own technical guidance and are unreasonable and infeasible to
2 achieve.

3 **D. General Issue**

4 During this appeal process, the Port would like to correct a number of minor errors
5 contained in the Permit, including a few typographical mistakes as well as technical and
6 compliance date inconsistencies.

7 **VII. REQUEST FOR STAY**

8
9 During the pendency of this appeal, and in accordance with WAC 371-08-415, the
10 Port seeks a stay of the Permit. The Port requests a prehearing conference as soon as possible
11 so that the Board can set an appropriate briefing schedule for the stay motion.

12 **VIII. RELIEF REQUESTED**

13
14 The Port respectfully requests that the Board eliminate, modify or clarify the terms
15 and conditions appealed in Section VI of this Notice of Appeal, as necessary to remedy the
16 error of law, injustice or inadequacy complained of. In addition, the Port requests that a stay
17 be issued after appropriate briefing on the legal and factual issues relevant to the granting of a
18 stay.

19 Dated: October ___, 2003.

20 PORT OF SEATTLE

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