

COURT OF APPEALS
DIVISION II

NO. 41833-9-II

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON
BY
DEPUTY

CLARK COUNTY and BUILDING INDUSTRY ASSOCIATION OF
WASHINGTON,

Petitioners

v.

ROSEMERE NEIGHBORHOOD ASSOCIATION, COLUMBIA
RIVERKEEPER, and NORTHWEST ENVIRONMENTAL DEFENSE
CENTER,

Respondents.

CLARK COUNTY'S REPLY BRIEF

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I. INTRODUCTION

Petitioner Clark County submits this reply to the brief of respondents Rosemere Neighborhood Association, et al. (Rosemere). Clark County respectfully requests that this Court reverse the decisions of the Pollution Control Hearings Board (PCHB) in the appeals Rosemere Neighborhood Association v. Department of Ecology, PCHB Nos. 10-013 and 10-103 (PCHB Decisions). The PCHB Decisions misinterpret the applicable law, result from actions outside the PCHB's jurisdiction, misapply the law to the facts, include factual findings that are not supported by evidence in the record, and are arbitrary and capricious. Pursuant to RCW 34.05.570(3), the PCHB Decisions should be reversed.

II. STATEMENT OF THE CASE

Clark County will not correct here every exaggeration or omission that characterizes the Introduction and Statement of the Case in Respondents' Opening Brief (Respondents' Brief) at 1-10, although some misstatements will be addressed in the later sections of this reply. The County reaffirms the Statement of the Case in its own Opening Brief.

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III. STANDARD OF REVIEW

Rosemere has misstated the standards of review in several respects. Fundamentally, Rosemere has failed to distinguish among the different standards of review applicable to the County's separate contentions of error in the PCHB Decisions. Instead, Rosemere would have it that virtually all aspects of the PCHB Decisions are due highly deferential treatment (Respondents' Brief at 10), which is not correct under Washington law. Judicial review of the PCHB Decisions is governed by Part V of the Washington Administrative Procedures Act, RCW 34.05.510, *et seq.*, and the standards of review are set forth in RCW 34.05.570(3). The lead case in this area is Port of Seattle v. Pollution Control Hearings Board, 151 Wn.2d 568, 99 P.3d 659 (2004).

The Court reviews the PCHB's interpretations of governing law *de novo*. Id. at 588; *RCW 34.05.570(d)*.

The Court should utilize *de novo* review in determining whether whether Washington's law on vesting governs the county treatment of development applications that trigger the stormwater flow control requirements that are mandated by the Phase I Permit,¹ but are

¹ Phase I Municipal Stormwater Permit issued by the Washington Department of Ecology (Ecology), effective February 2007, pursuant to the National Pollutant Discharge Elimination System (NPDES) under the federal Clean Water Act, 33 U.S.C. 1251, *et seq.*

implemented in developments, in the course of development, pursuant to county development code, and which simultaneously depend on the characteristics of the development, and determine how much land can be developed and in what manner it can be developed.

De novo review is again the standard for the Court in considering whether the PCHB should have deferred to the scientific and technical expertise of Ecology, which determined that the County's overall program of stormwater flow control met the same standard as that in the default Phase I Permit, and therefore gave similar or equivalent protection to receiving waters as the permit and met the requirements of MEP² and AKART.³ *See*, Concurrence and Dissent of PCHB Chair Andrea McNamara Doyle in PCHB 10-013 (PCHB Dissent), at 2-3 (majority opinion did not grant proper deference to Ecology regarding technical determinations within its expertise).

De novo review is also the standard for the Court's analysis of whether the PCHB decisions strayed outside the PCHB's jurisdiction or statutory authority, RCW 34.05.570(3)(b), by ruling on matters related to

² "MEP" is the requirement from the federal Clean Water Act (CWA) to control pollution to the maximum extent practicable. 33 U.S.C. 1342.

³ "AKART" means the state requirement to use all known, available and reasonable methods of treatment to control discharges and protect water quality. PCHB Order No. 10-013 at 17.

the Phase I Permit that were not properly the subject of Rosemere's appeal, as they were not established, amended, or affected in any way by the Agreed Order or Permit Modification that Rosemere did appeal.

Review of the PCHB's findings of facts is more deferential, in that a finding of fact will be upheld if it is supported by substantial evidence in light of the whole record before the court. *RCW 34.05.570(3)(e)*; Port of Seattle, 151 Wn.2d at 588. Substantial evidence is a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order. Port of Seattle, 151 Wn.2d at 588. If, however, the PCHB's findings of fact are clearly erroneous, and the Court is definitely and firmly convinced that a mistake has been made, the Court will overturn the PCHB's findings of fact. Id.

"Within the framework of determining whether one of the PCHB's factual findings is clearly erroneous, this court gives due deference to Ecology's expertise." Id., *citing*, Department of Ecology v. Public Utility District No 1 of Jefferson County, 121 Wn.2d 179, 201, 849 P.2d 646 (1993), *aff'd*, 511 U.S. 700 (1994). In considering an assertion that the law has been misapplied to the facts, *RCW 34.05.570(3)(d)*, the facts are reviewed under the standard related to factual findings, and the law is reviewed *de novo*. Port of Seattle, 151 Wn.2d at 588.

The latter standard is applicable to the Court's review of whether any evidence in the record supports the PCHB's determinations that the Agreed Order authorized the County to reduce its overall effort to comply with Phase I Permit special condition S5.C.6, and that the County has done so.

Respondents argue that the Court's review of these aspects of the PCHB Decisions is subject to more deferential standards, but the law makes clear that Respondents are incorrect.

IV. ARGUMENT

A. The PCHB Erred by Ruling on Matters That Rosemere Should Have Raised in an Appeal of the Phase I Permit.

First, Clark County acknowledges that it incorrectly stated that Rosemere had belatedly attempted to add Ecology's interpretation that that vesting applied to the flow control standards to the Phase I litigation. *County Opening Brief at 18-19.* Rosemere was not a party to the Phase I litigation. Clark County apologizes to the Court and the parties for this mistake, which was inadvertent.

The Phase I litigation, however, was the opportunity to challenge any aspect of Phase I permit that any party believed to be invalid. Having failed to take part in that appeal, Rosemere should not have challenged in an appeal of the Agreed Order, portions of the Phase I Permit that were not

addressed, changed, revised, added to, or amended in any way by the Agreed Order. The PCHB should not have ruled on Rosemere's challenges to the Agreed Order that reached beyond the provisions of the Agreed Order itself. To do so was beyond its authority.

The Agreed Order is attached as *Appendix 4* to the County's Opening Brief to this Court. The Agreed Order requires that the County provide flow control that would meet the historic standards for the duration of stormwater flow, in an amount sufficient to offset the extent to which new development and redevelopment did not meet the historic flow duration. It includes provisions on implementing the County's flow control obligations, on reporting to Ecology, and reversion to the default Phase I program if the requirements of the Agreed Order were not met. The Agreed Order requires that the County repeal exemptions from stormwater review for infill⁴ development and certain small redevelopment projects.

The Agreed Order does not alter, amend, or affect any other provision of the Phase I Permit, and therefore, it was not proper for the PCHB to rule on other provisions of the Phase I permit. *Compare,*

⁴ The exemption for infill development was already moot because the County had repealed its code on infill development in June 2009.

Thurston County v. Hearings Bd., 164 Wn.2d 329, 344, 189 P.3d 38 (2008) (“*We hold a party may challenge a county’s failure to revise a comprehensive plan only with respect to those provisions that are directly affected by new or recently amended GMA provisions, meaning those provisions related to mandatory elements of a comprehensive plan that have been adopted or substantively amended....*”) The Supreme Court in Thurston County explained that limiting the scope of failure-to-revise challenges would recognize that the initial comprehensive plan was legally deemed compliant with the governing law. *Id.* at 344-45. In the same manner, limiting the ability to challenge the Agreed Order based on perceived issues in the Phase I Permit recognizes that the litigation over the Phase I Permit has concluded.

Importantly, the Agreed Order requires the County to comply with every provision of the Phase I Permit that is not altered by the Agreed Order. *Agreed Order at 7.* The PCHB erroneously ruled on just such provisions. Specifically, the PCHB should not have ruled that the Agreed Order was invalid for failure to require Low Impact Development (LID). The LID requirements of the Phase I Permit, including those developed as a result of the Phase I litigation, are applicable to Clark County regardless of the content of the Agreed Order.

Rosemere's attorneys, who represented other clients in the Phase I litigation, did attempt to raise vesting as an appeal issue in that litigation, and the PCHB ruled that their attempt had been untimely.⁵

In this appeal, Rosemere moved for an order of summary judgment from the PCHB, expressly complaining that Ecology had construed the vested rights doctrine to apply to the Phase I Permit, and requesting a declaration that vesting would not apply to the stormwater ordinances adopted by any municipal permittee.⁶ The Agreed Order did not revise the doctrine of vested rights as applied by the Phase I Permit. Although Rosemere's request was beyond the scope of an appeal of the Agreed Order, the PCHB ruled on the request, ruling that stormwater regulations in general are not subject to vested rights. It should not have done so. The merits of that ruling are discussed below.

Moreover, the PCHB Decisions held that the Agreed Order violated Phase I Permit condition S5.C.6 (structural controls requirement). This ruling is especially mysterious because the Agreed Order did not even

⁵ See PCHB Nos. 07-021, 026, 027, 028, 029, 030 & 037, Decision denying request to add additional issue dated January 9, 2008 and Order Denying Motion to Reconsider Addition of Issue dated January 18, 2008.

⁶ See, Rosemere v. Ecology, PCHB No. 10-013, Clark County's Response to Rosemere's Motion for Partial Summary Judgment and Clark County's Cross-Motion for Summary Judgment at 1-2, 11-12. CP.

mention condition S5.C.6, let alone revise its provisions in any manner. Rather, the Agreed Order explicitly acknowledges Ecology's authority to enforce the Phase I Permit terms. *Agreed Order, County Brief, App.4 at 7.* The real issue addressed by the PCHB Decisions is that S5.C.6 requires absolutely no particular level of effort at any point during the term of the Phase I Permit, other than to develop, plan, include, describe, and report on a Structural Control Program. *Phase I Permit, at 13-15, County Brief, App. 8.*

Nothing in the Phase I Permit prohibits a permittee from reducing its expenditures on the S5.C.6 program to near-zero, if another aspect of permit compliance requires resources. The PCHB's ruling that invalidated the Agreed Order because it allowed the County to reduce its expenditures on S5.C.6, and thereby lessen its overall level of effort to reduce pollution from stormwater, is a ruling on S5.C.6 itself, which should not have been made in the context of the appeal of the Agreed Order.

B. Washington's Vested Rights Doctrine Applies to Local Ordinances Adopted as Stormwater Regulations.

In its Order Denying Summary Judgment, County Brief App. 3, and Decisions, the PCHB ruled that Washington's vested rights doctrine set forth at RCW 58.17.033 and RCW 19.27.095 does not apply to stormwater regulations. The PCHB reasoned, and Rosemere contends,

that this ruling is correct because the purpose of the stormwater regulations is to limit water pollution, not control the use of land. The ruling is an erroneous interpretation of law, is contrary to appellate precedent directly on point, and is based on faulty reasoning.

The flow control standard of the Phase I Permit controls the use of land. Its purpose is to restore damage to streams from development, and it operates in the context of development by regulating development. The lead cases are Phillips v. King County, 136 Wn.2d 946, 963, 968 P.2d 871 (1998); and Westside Business Park, LLC, v. Pierce County, 100 Wn.App. 599, 5 P.3d 713, *rev. denied*, 141 Wn.2d 1023, 10 P.3d 1075 (2000). In Westside Business Park at 602, the court stated:

The only issue in this case is whether the land use vesting statute, RCW 58.17.033, vests a developer's right to have the stormwater drainage ordinance in effect at the time of its "barebones" application for short plat approval.

In Westside Business Park, Pierce County made the argument that stormwater ordinances were not land use control ordinances subject to vesting. The court directly rejected this argument, stating:

Storm water drainage ordinances are land use control ordinances. Under RCW 58.17.060, local governments may approve a short division only if they enter written findings in support, as provided in RCW 58.17.110. RCW 58.17.110(1) requires, as a prerequisite to subdivision approval, written findings that "appropriate provisions are made for [inter alia] drainage ways [.]" As a mandatory

prerequisite to short subdivision approval, storm water drainage ordinances do exert a “restraining or directing influence” over land use and are, therefore, are land use control ordinances.

Furthermore, the Supreme Court has indicated that storm water drainage ordinances are subject to the vesting rule. In Phillips v. King County, 136 Wn.2d 946, 963, 968 P.2d 871 (1998), the Supreme Court held that the vested rights doctrine required the county to apply the surface water drainage regulations in effect at the time of the developer’s application for preliminary plat approval. (*Emphasis added.*)

Westside Business Park at 607. There can be no question that stormwater regulations are land use ordinances that are subject to the vested rights doctrine.

Rosemere argues that because the County can impose impact fees upon vested projects, it should be able to impose new stormwater standards upon those projects.⁷ The simple answer to this argument is that while Washington courts have determined that stormwater regulations are “land use ordinances,”⁸ they have declined to apply the vested rights doctrine to impact fees. In Newcastle Investments v. City of La Center, 98 Wn.App. 224, 989 P.2d 569 (1999), the Court held that a transportation

⁷ See Rosemere’s Motion at page 9 and 14.

⁸ See Westside Business Park.

impact fee did not limit the use of land and was not the type of right that the vested rights doctrine applies to.

Impact fees are fundamentally different than development regulations. They do not affect the physical aspects of a development and are not intended to provide improvements that are specific to the development. Rather, they “simply add to the cost of a project” for improvements that serve the community at large and reasonably benefit the development. Belleau Woods II, LLC v. City of Bellingham, 150 Wn.App. 228, 238-9 (2009). Impact fees are to be used for “system improvements,” which “are designed to provide service to service areas within the community at large, in contrast to project improvements.” *RCW 82.02.090(9)*. “Project improvements” are more specific to the particular development and are necessary for the use and convenience of the occupants of the project. *RCW 82.02.090(6)*. A municipality is not required to spend impact fees on facilities that specifically serve a particular development. Pavlina v. City of Vancouver, 122 Wn.App. 520, 94 P.3d 366 (2004). Rosemere’s argument that flow control regulations should not vest because impact fees do not vest is without merit.

The State Environmental Policy Act (SEPA) does not alter the vested rights law. Rosemere has not clearly identified what they believe

the County should do when exercising its SEPA authority as it relates to this appeal. Thus, it is difficult to respond to its SEPA argument. If the contention is that the County can use its SEPA authority to ignore the vested rights doctrine and apply the new flow control standard to all development projects, Rosemere is mistaken. If, on the other hand, Rosemere contends that the County can use its SEPA authority in a particular case to address an impact not adequately mitigated through the County's development regulations and programs, it is correct. However, the Agreed Order does not in any way address SEPA; nor does it prohibit the County from exercising its SEPA authority to condition or deny individual projects.

Rosemere cites to Adams v. Thurston County, 70 Wn. App. 741, 855 P.2d 284 (1993), for authority that a local government can use SEPA authority to condition or deny a project, even when the project complies with local zoning and building codes. However, that case held that refusing to vest a development application until an EIS was completed violated the vested rights doctrine. The court rejected the county's attempt to delay vesting while the SEPA process was being undertaken.

Rosemere also cites West Main Associates v. The City of Bellevue, 106 Wn.2d 47, 720 P.2d 782 (1986), in which the court actually

invalidated a city ordinance that prohibited the filing of a building permit application and delayed vesting until a number of other land use processes were complete. The court held that the ordinance invalidly “attempted to preempt this court’s vesting doctrine by enacting ordinance 3359.” West Main Associates at 51-52.

The cases cited by Rosemere relating to SEPA authority do not contain any analysis of the impact of the Integration of Growth Management Planning and Environmental Review Act. *Laws of 1995, Ch. 347*. Consideration of the Integration Act is fundamental to understanding the interplay of development regulations and SEPA authority. As noted in Moss v. City of Bellingham, 109 Wn.App. 6, 31 P.3d 703 (2001):

According to Professor Settle, the Integration Act “seeks to avoid duplicative environmental analysis and substantive mitigation of development projects by assigning SEPA a secondary role to (1) more comprehensive environmental analysis in plans and their programmatic environmental impact statements, and (2) systematic mitigation of adverse environmental impacts through local development regulations and other local, state, federal environmental laws.

Moss at 9-10.

The Legislature determined that the project review process should “place an emphasis on relying on existing requirements and adopted standards, with the use of supplemental authority, as specified by Chapter

43.21C., RCW, to the extent that existing requirements do not adequately address a project's specific probable adverse environmental impacts.”⁹ Project review may be used to identify specific measures to mitigate a project's probable adverse environmental impacts. RCW 36.70B.030(5). During that review, a county may determine that the requirements of its development regulations provide adequate analysis of and mitigation for the impacts of a project. *WAC 197-11-158*. Counties may not use SEPA authority to impose additional mitigation measures on impacts that have been adequately addressed in development regulations. *Moss* at 12-13. However, a project's specific impacts that are not adequately addressed in development regulations may be subject to conditions or denial under the authority of SEPA. *WAC 197-11-158(3) and (5)*. While SEPA may be used to mitigate a particular project's impacts, broader “fundamental land use planning choices” are to be made in adopted comprehensive plans and development regulations and “shall serve as the foundation for project review.” *RCW 36.70B.030(1)*.

Rosemere's contention that SEPA authority should be used to implement a county-wide policy of imposing the flow control standard upon vested development would be contrary to the Integration Act. Such a

⁹ See Laws of 1995, Ch. 347, §§ 403-405.

broad-based policy would have to be enacted through the adoption of comprehensive plans or development regulations, but Rosemere cite no authority that would require that enactment.

Pursuant to WAC 197-11-158, the County may only use its SEPA authority to address specific impacts of specific projects that are not adequately addressed by existing development regulations. The Agreed Order does not limit the County's authority to use its supplemental SEPA authority to condition or deny specific projects. In fact, in CCC 40.570.020.E, the County endorses and adopts the procedures of WAC 197-11-158. Rosemere's contention that the County should use its SEPA authority to subvert the Washington vested rights doctrine is ill-advised and premised upon case law that was decided before application of the Integration Act to the facts.

Rosemere also contends that state vesting law must give way to conflicting federal authority in the Clean Water Act. However, it points to no requirement in the Clean Water Act or regulations that mandate an effective date, earlier than April 13, 2009, for the new flow control standards. Rosemere's "conflict preemption" argument fails simply because there is no conflict between the requirements of the Clean Water Act and the establishment of an effective date for the date of the Permit.

Conflict preemption applies “where it is impossible to comply with both local and federal law.” Magnolia Neighborhood Planning Council v. City of Seattle, __ Wn.App. __, __ P.3d __ (March 29, 2010). There is a presumption that the “historic police powers on the States” will not be preempted by federal law. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, 91 L.Ed. 1447, 67 S.Ct. 1146 (1947). The presumption against federal preemption can be overcome if it can be established that Congress intended for federal law to preempt state law. All-Pure Chemical Co., v. White, 127 Wn.2d 1, 896 P.2d 697 (1995). Rather than preempting state law, Congress intended that states have an active role in the enforcement of the Clean Water Act. As explained in Chevron U.S.A., Inc., v. Hammond, 726 F.2d 483, 489 (9th Cir., 1984):

Under this [NPDES] system, the states maintain primary responsibility for abating pollution in their jurisdictions; they have authority to establish and administer their own permit systems and to set standards stricter than the federal ones. 33 U.S.C. §§ 1342(b), 1370. The role of the states is made clear by Section 1251(b), which says: “It is the policy of the Congress to recognize, preserve and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution . . .”

In Pacific Legal Foundation v. Costle, 586 F.2d 650 (9th Cir, 1978), *rev'd on other grounds*, 445 U.S. 198, 63 L.Ed.2d 329, 100 S.Ct. 1095 (1980), this court commented that “there is strong support in the legislative history [*of the CWA*] for a conclusion that Congress wanted to encourage a federal-state partnership for the control of water pollution

. . . . Thus, in the CWA, Congress has clearly expressed its intent to allow states to take an active role in abating water pollution.”

Conflict preemption is found where state law stands as an obstacle to the accomplishment of the objectives of Congress. Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984). The obstruction strand of conflict preemption focuses on both the objective of the federal law and the method chosen by Congress to effectuate that objective. McKee v. AT & T Corp., 164 Wn.2d 372, 191 P.3d 845 (2008). Where the coordinated state and federal efforts exist within a complimentary administrative framework and, in the pursuit of common purposes, the case for federal preemption becomes less persuasive. Bath Petroleum Storage, Inc., v. Sovas, 309 F.Sup.2d 357 (NDNY, 2004). Here, given the complimentary administrative framework for state and federal partnership provided by the CWA, there is no support for Rosemere’s federal preemption argument.

Rosemere relies upon Northern Plains Resource Council v. Fidelity Exploration and Development Co., 325 F.3d 1155 (9th Cir., 2003). In that case, the court struck down an action of the Montana Department of Environmental Quality (“MDEQ”) in failing to require an NPDES permit for a discharge of contaminated groundwater from a mining operation.

MDEQ had followed a provision of state law that defined “pollutant” as not including groundwater. The Ninth Circuit Court of Appeals held in Northern Plains that the definition of “pollution” in Montana law directly conflicted with the definition in the Clean Water Act. Northern Plains at 1165. The court found that conflict preemption applied and federal law controlled. This result was hardly surprising, given the direct conflict in the state and federal law and the impossibility of complying with both.

The Agreed Order established an effective date of April 13, 2009, which was struck down by the PCHB Decisions. Rosemere has not cited any provision of federal law that would prohibit a state from establishing an effective date for a permittee’s program. Instead, Ecology’s designation of an effective date for the County’s mitigation program is the type of administrative and enforcement action Congress authorized states to take in order to effectuate the objectives of the CWA. In the absence of any direct conflict, federal law does not preempt Washington’s vested rights doctrine. The PCHB misinterpreted and misapplied the law in ruling otherwise.

C. The PCHB Erred by Failing to Defer to Ecology’s Conclusion that the Agreed Order Provided Equivalent or Similar Protection as the Phase I Permit, and by Ruling that the Agreed Order did not Provide Similar or Equivalent Protection.

Ecology's expertise is recognized in Washington law. Ecology, not the PCHB, possesses the technical and scientific expertise – and the legal authority – to issue, administer, and enforce permits that regulate water pollution. Port of Seattle, 151 Wn.2d at 593-95; *RCW 90.48.260(1)*. The PCHB should have deferred to the judgment of Ecology, as stated in the Agreed Order, and to Ed O'Brien, Ecology's expert on the flow control standard, who determined that the County's flow control program was equivalent to that of the Phase I Permit. Agreed Order at 3, County Brief App. 4 (County's program to control runoff will provide equivalent level of flow control to that required in S5.C.5; approach is consistent with Permit provision allowing permittees to propose alternate methods of achieving flow control standards): Testimony of Ed O'Brien at 782-82, 808-809, CP.

The United States Supreme Court recently affirmed the special nature of regulation by the EPA in a manner directly parallel to Ecology's role in stormwater here. American Electric Power Co. v. Connecticut, ___ U.S. ___ (June 20, 2011). In recognizing the authority of the EPA to regulate carbon dioxide emissions from power plants, the Court stressed that the agency is better equipped than federal courts to address the issues

presented. This is because of the EPA's expertise, noting federal courts lack scientific, economic and technical resources. Id. at 14.

It is altogether fitting that Congress designated an expert agency, here, EPA, as best suited to serve as primary regulator of greenhouse gas emissions. The expert agency is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions. Federal courts lack the scientific, economic and technological resources an agency can utilize in coping with issues of this order. See generally *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 865-866 (1984).” Id.

In this case, the expert agency designated by RCW 90.48.260, pursuant to the federal Clean Water Act, 33 U.S.C. 1342, is Ecology. The case law concerning Ecology under the Washington APA, RCW 34.05, *et seq.*, is in accord with the Supreme Court's reasoning and decision in American Electric Power and Chevron. Port of Seattle, 151 Wn.2d at 588, 593-95; Department of Ecology v. PUD 1, 121 Wn.2d 179, 201, 849 P.2d 646 (1993) (Ecology's specialized knowledge and expertise is entitled to due deference); Pacific Topsoils v. Department of Ecology, 157 Wn. App. 629, 641, ___ P.3d ___ (2010) (Ecology's interpretation of statutes and regulations entitled to great weight); Lund v. Department of Ecology, 93 Wn. App. 329,333, 969 P.2d 1072 (1998) (Ecology's interpretation of law within its realm of expertise is entitled to substantial weight).

Nothing in the Phase I Permit requires a permittee to maintain “a sustained level of effort” with respect to special condition S5.C.6, and the Agreed Order does not change that lack of a requirement. *PCHB Decision 10-013*, Conclusion of Law 20. Certainly, nothing in the Permit requires a permittee to “continue implementation of existing stormwater management program components *that go beyond what is required in this permit* where they are necessary to reduce the discharge of pollutants to the MEP.” *Id.* (*emphasis in original*), *citing*, Phase I Permit Fact Sheet, CP, J-15 at 29. Nor does the Agreed Order require the County to go beyond the permit requirements in order to comply with the permit. Ecology staff, however, testified that they expected that the County would not reduce its level of efforts in compliance with S5.C.6.

Even the PCHB acknowledged that the evidence in the record demonstrated that the County had spent \$800,000 annually from 2003-2010 on projects in compliance with S5.C.6. *Finding of Fact 50*. The remainder of the PCHB’s findings and conclusions are based on faulty interpretation of the law and speculation about the future, not evidence. *Id.* (criticizing County budget projections because they are based on the state’s accepted vested rights doctrine and the idea that recessionary effects on development would continue).

S5.C.6 does not require more of the County than the evidence before the PCHB demonstrated that it had done and was doing. No evidence demonstrated that the County had not, in fact, increased its overall efforts to comply with the Permit. Rather, the evidence demonstrated that the County was spending down its reserves in order to make more money available for Permit compliance. Id. Ecology staff believed that the Agreed Order required continued compliance with S5.C.6. To have found the Agreed Order invalid based on an allowed “reduced level of effort” to comply with that standard misconstrued the law, was not supported by substantial evidence in the record, and misapplied the law to the facts.

The PCHB’s conclusions that the Agreed Order failed to provide equivalent or similar protection to receiving waters as the Phase I Permit failed miserably to provide the deference to Ecology’s scientific and technical expertise required by the law, and entirely supplanted Ecology’s judgment regarding the flow control standard with that of the majority. Rosemere defends the PCHB’s conclusion, arguing:

Central to the Board’s conclusion was the undisputed fact that the Agreed Order allowed the County – with no oversight or standards – to choose mitigation sites anywhere in the same basin [as a development] without considering the actual environmental impacts of the development. COL 12-14. *Respondents’ Brief at 42.*

Ecology staff testified as to the equivalence at the landscape area, or even potential benefits, of the County's program over the usual workings of the Permit. *O'Brien testimony*, County Brief, App.6 at 732-34, 750-53. The PCHB should have paid more heed to the agency that established the flow control standard, and presumably knows what it means and how it works.

Additionally, the PCHB's decision misinterprets the Phase I Permit, in that absolutely no consideration of environmental impacts of development is required by that Permit, nor is the impact of stormwater controls at development sites evaluated by Ecology, or any other party. No valid comparison can be made between environmental impacts of the program under the Agreed Order as opposed to the Phase I Permit, which was heavily criticized by Rosemere's expert, Dr. Booth, for its failure to address environmental damage. *County Brief*, App. 7 at 10.

The PCHB is entitled to determine the credibility of witnesses before it; however, the PCHB defied reason in its decision to disbelieve Douglas Beyerlein, who invented the metric for designing stormwater facilities under the Phase I Permit, when he testified that the metric for designing facilities under the Agreed Order would control equivalent stormwater runoff. PCHB Finding of Fact 25 states the conclusion that the

metric “rests on no science.” This finding is not supported by substantial evidence in the record, and is clearly erroneous.

In general, with regard to the technical and scientific bases of the Phase I Permit and the Agreed Order, the PCHB Dissent properly summarizes the flaws in the majority PCHB Decisions for their failure to defer to the expertise of Ecology. *PCHB Dissent* at 2-3, County Brief, App.2.

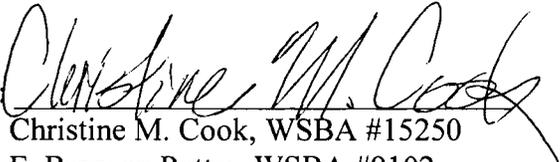
V. CONCLUSION

This Court should reverse the PCHB decisions for these reasons, and those set forth in the County’s Opening Brief.

Respectfully submitted this 16th day of September, 2011.

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DIVISION II

NO. 41833-9-II

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON
WASHINGTON
DEPUTY

CLARK COUNTY and BUILDING INDUSTRY ASSOCIATION OF
WASHINGTON,

Petitioners

v.

ROSEMERE NEIGHBORHOOD ASSOCIATION, COLUMBIA
RIVERKEEPER, and NORTHWEST ENVIRONMENTAL DEFENSE
CENTER,

Respondents.

CERTIFICATE OF SERVICE

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11/1/19

I, Thelma Kremer, hereby certify and state the following: I am a citizen of the United States of America and a resident of the State of Washington; I am over the age of eighteen years; I am not a party to this action; and I am competent to be a witness herein.

On this 16th day of September, 2011, I mailed the original and true and correct copies of *Reply Brief* and *Certificate of Service* to the court as follows:

David C. Ponzoha
Court Clerk
WA State Court of Appeals II
950 Broadway #300
Tacoma WA 98402-4454

On this 16th day of September, 2011, I caused true and correct copies of *Reply Brief* and *Certificate of Service* to be served on the parties below by mailing and email as specified below:

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

DATED this 16th day of September, 2011.

