

FEB 23 2016

^E
Ronald R. Carpenter
Clerk

NO. 92805-3

Court of Appeals, Div. II Case No. 46378-4-II

DEPUTY

STATE OF WASHINGTON

2016 FEB 18 PM 3:31

FILED
COURT OF APPEALS
DIVISION II

SUPREME COURT OF THE STATE OF WASHINGTON

SNOHOMISH COUNTY, KING COUNTY, and BUILDING
INDUSTRY ASSOCIATION OF CLARK COUNTY,

Respondents,

v.

PUGET SOUNDKEEPER ALLIANCE, WASHINGTON
ENVIRONMENTAL COUNCIL, and ROSEMERE NEIGHBORHOOD
ASSOCIATION,

Petitioners,

and

POLLUTION CONTROL HEARINGS BOARD, and WASHINGTON
STATE DEPARTMENT OF ECOLOGY,

Respondents below.

**PUGET SOUNDKEEPER ALLIANCE, WASHINGTON
ENVIRONMENTAL COUNCIL, and ROSEMERE
NEIGHBORHOOD ASSOCIATION'S PETITION FOR
DISCRETIONARY REVIEW**

JAN HASSELMAN (WSB #29107)
JANETTE K. BRIMMER (WSB #41271)
Earthjustice
705 Second Avenue, Suite 203
Seattle, WA 98104-1711
Telephone: (206) 343-7340
*Attorneys for Petitioners Puget Soundkeeper
Alliance, Washington Environmental
Council, and Rosemere Neighborhood
Association*

TABLE OF CONTENTS

I. IDENTITY OF PETITIONERS 1

II. CITATION TO COURT OF APPEALS DECISION..... 1

III. ISSUES PRESENTED FOR REVIEW 1

IV. STATEMENT OF THE CASE..... 1

 A. The Stormwater Problem In Western Washington 1

 B. State and Federal Water Pollution Statutes Require Control of Stormwater to Protect Water Quality 3

 C. The PCHB Found that “Low Impact Development” Was Required to Meet the MEP and AKART Standards 5

 D. The Court of Appeals Overturned the PCHB’s Ruling that Vesting Doesn’t Apply to the Stormwater Permits..... 6

ARGUMENT 9

 I. WASHINGTON’S VESTING DOCTRINE DOES NOT APPLY TO THE REQUIREMENTS OF STORMWATER PERMITS..... 9

 A. Washington Vesting Law Seeks to Strike a Reasonable Balance Between Certainty and Public Interest. 9

 B. Ordinances Adopted to Comply with NPDES are Not “Land Use Control Ordinances”..... 11

 II. APPLICATION OF STATE VESTING TO NPDES PERMITS IS PREEMPTED BY THE CLEAN WATER ACT. 16

CONCLUSION.....	20
APPENDIX:	
<i>Snohomish County, et al. v. Pollution Control Hearings Board, et al.,</i> No. 46378-4-II, Published Opinion, dated Jan. 19, 2016	A-001
Federal Law Constitutional Provisions and Statutes	A036
State Statutes	A040
<i>Walt Cox v. State of Washington, Department of Ecology,</i> 2009 WL 542494 (PCHB, Feb 26, 2009)	A048
<i>Puget Soundkeeper Alliance, et al. v Wash. Dep't of Ecology, et al.,</i> 2008 WL 5510411 (PCHB, Apr. 2, 2008)	A056
<i>Puget Soundkeeper Alliance, et al. v. Wash. Dep't of Ecology, et al.,</i> 2008 WL 5510413 (Aug. 8, 2008).....	A075
<i>Rosemere Neighborhood Association, et al. v. Wash. Dep't of Ecology,</i> <i>et al.,</i> 2010 WL 3420570 (PCHB, Aug. 26, 2010)	A107
<i>Rosemere Neighborhood Ass'n, et al. v. Wash. Dep't of Ecology,</i> 2011 WL 62921 (PCHB, Jan. 5, 2011).....	A115

TABLE OF AUTHORITIES

Cases

Abbey Rd. Grp. v. City of Bonney Lake,
167 Wn.2d 242 (2009) 10, 15

City of Seattle v. Hinkley,
40 Wash. 468 (1905)..... 13

Cox v. Ecology,
2009 WL 542494 (PCHB, Feb 26, 2009) 12, 19

Defenders of Wildlife v. Babbitt,
130 F. Supp. 2d 121 (D.D.C. 2001) 18

Envtl. Def. Ctr. v. EPA,
344 F.3d. 832 (9th Cir. 2003) 2

Erickson & Assocs., Inc. v. McLerran,
123 Wn.2d 864 (1994) 10, 11, 15

Hangman Ridge Training Stables v. Safeco Title Ins.,
105 Wn.2d 778 (1986) 15

Hillman v. Maretta,
133 S. Ct. 1943 (2013)..... 16

In the Matter of Williams,
121 Wn.2d 655 (1993) 16

N. Plains Res. Council v. Fid. Exploration & Dev. Co.,
325 F.3d 1155 (9th Cir. 2003) 17

New Castle Investments v. City of LaCenter,
98 Wn. App. 224 (Div. II, 1999)..... 11, 12

Noble Manor Co. v. Pierce Cnty.,
133 Wn.2d 269 (1997) 10, 11, 15

Polygon Corp. v. Seattle,
90 Wn.2d 59 (1978) 10

<i>Potala Village Kirkland v. Kirkland</i> , 334 P.3d 1143 (Div. I, 2014)	10
<i>Pronsolino v. Nastri</i> , 291 F.3d 1123 (9th Cir. 2002)	3
<i>Puget Soundkeeper Alliance v Wash. Dep't of Ecology</i> , 2008 WL 5510411 (PCHB, Apr. 2, 2008)	2, 4
<i>Puget Soundkeeper Alliance v. Wash. Dep't of Ecology</i> , 2008 WL 5510413 (Aug. 8, 2008).....	5, 19
<i>Rosemere Neighborhood Ass'n v. Ecology</i> , 2011 WL 62921 (PCHB, Jan. 5, 2011).....	2
<i>Rosemere Neighborhood Association v. Ecology</i> , 2010 WL 3420570 (PCHB, Aug. 26, 2010)	12
<i>Rybachek v. U.S. EPA</i> , 904 F.2d 1276 (9th Cir. 1990)	18
<i>West Main Assocs. v. City of Bellevue</i> , 106 Wn.2d 47 (1986)	10
<i>Westside Bus. Park v. Pierce Cnty.</i> , 100 Wn. App. 599 (Div. II, 2000).....	14
Statutes	
33 U.S.C. § 1251(a)	3
33 U.S.C. § 1251(a)(1).....	17
33 U.S.C. § 1311(a)	3
33 U.S.C. § 1342(b).....	20
33 U.S.C. § 1342(p)	3
33 U.S.C. § 1342(p)(3)	4
33 U.S.C. § 1370(1).....	16

40 C.F.R. § 122.4(a),(d)	20
40 C.F.R. § 123.25(a).....	17
RCW 19.27.095	9, 11
RCW 58.17.020	11
RCW 58.17.033	9
RCW 90.48.010	3
RCW 90.48.260(3)(b)(i)	5, 6, 15
RCW 90.54.020(3)(b)	4
RCW 90.71.210	3
WAC 173-201A-300(2)	4

I. IDENTITY OF PETITIONERS

Petitioners are Puget Soundkeeper Alliance, Washington Environmental Council, and Rosemere Neighborhood Association (collectively, “Soundkeeper”), respondents in the Court of Appeals below and intervenors in the underlying Pollution Control Hearings Board (“PCHB”) appeal of the Phase I Municipal Stormwater General Permit.

II. CITATION TO COURT OF APPEALS DECISION

Petitioners seek review of the Court of Appeals, Division II, Published Opinion, dated Jan. 19, 2016. A copy of the Court’s decision is included in the Appendix at A-1 (hereinafter, “Decision”).

III. ISSUES PRESENTED FOR REVIEW

1. Are requirements imposed by a state agency on local governments pursuant to federal and state clean water protection laws “land use control” ordinances subject to state vesting statutes?
2. If state vesting statutes apply to federal Clean Water Act permits issued by the state, does federal law preempt their application in this case?

IV. STATEMENT OF THE CASE

A. The Stormwater Problem In Western Washington

Stormwater pollution—runoff from roads, buildings, and other developed areas—is among the gravest threats to the ecological health of Western Washington’s rivers and marine waters. *Puget Soundkeeper*

Alliance v Wash. Dep't of Ecology, 2008 WL 5510411, at *7 (PCHB, Apr. 2, 2008).¹ “Stormwater is the leading contributor to water quality pollution in urban waterways.... Stormwater discharges degrade water bodies and, consequently, impact human health, salmon habitat, drinking water, and the shellfish industry.”² *Id.* The environmental status quo in Western Washington “is currently degraded, with many streams unable to support beneficial uses and even basic ecological function in large part due to stormwater runoff from developed areas.” *Rosemere Neighborhood Ass'n v. Ecology*, 2011 WL 62921, at *9 (PCHB, Jan. 5, 2011).

In the decision that forms the basis of Respondents' appeal, the PCHB cited undisputed facts that runoff in Western Washington included “dangers to human health and drinking water from untreated stormwater, degradation of salmon habitat..., economic threats to the shellfish industry resulting from stormwater contamination, and overall degradation of water bodies affecting beneficial uses in Washington's waters.” CR3971 at 8. Stormwater is a chief threat to the ecological health of Puget Sound, the

¹ Copies of PCHB decisions cited in this Petition are included in the Appendix, along with relevant statutory and constitutional provisions.

² This is true not just of Washington, but the nation as a whole. *See, e.g., Env'tl. Def. Ctr. v. EPA*, 344 F.3d. 832, 840-41 (9th Cir. 2003) (“Stormwater runoff is one of the most significant sources of water pollution in the nation, at times ‘comparable to, if not greater than, contamination from industrial and sewage sources.’”).

recovery of which is a high priority of the state. RCW 90.71.210 (creating Puget Sound Partnership to oversee recovery of Puget Sound by 2020).

B. State and Federal Water Pollution Statutes Require Control of Stormwater to Protect Water Quality

Congress enacted the Clean Water Act in 1972 (“CWA”) with the sweeping goals of maintaining and restoring the “chemical, physical, and biological integrity” of the nation’s waters, eliminating the discharge of pollutants, and providing for the protection of beneficial uses like fish and recreation. 33 U.S.C. § 1251(a); *Pronsolino v. Nastri*, 291 F.3d 1123, 1126 (9th Cir. 2002). The goals of the state water pollution control act are just as ambitious. RCW 90.48.010 (seeking “highest possible standards to insure the purity of all waters of the state”). The heart of the CWA is the National Pollution Discharge Elimination System (“NPDES”), which prohibits the discharge of pollution without a permit. Permits are required to meet minimum criteria for the control and elimination of pollutants. 33 U.S.C. § 1311(a). Ecology has been delegated authority by the EPA to implement NPDES in Washington.

Congress amended the CWA in 1987 to address the problem of stormwater from municipal storm sewers. 33 U.S.C. § 1342(p). Section 402(p) sets forth a schedule for imposition of stormwater permits for municipalities starting with the larger jurisdictions (Phase I) and

continuing with smaller ones (Phase II). Permits for municipal sewer systems “shall require controls to reduce the discharge of pollutants to the maximum extent practicable...” *Id.* § 1342(p)(3). The requirement to reduce municipal stormwater discharges to the maximum extent practicable is referred to as the “MEP” standard.

State law also requires permits for stormwater discharges. Under state law, municipal stormwater discharges must be controlled by “all known, available, and reasonable methods of treatment” (the “AKART” standard), RCW 90.54.020(3)(b); must ensure compliance with water quality standards, *Puget Soundkeeper Alliance v. Ecology*, 2008 WL 5510411 (PCHB, April 2, 2008), at *15; and must comply with the state’s robust anti-degradation policy. *Id.* at *16; WAC 173-201A-300(2).

Under this joint federal-state approach, Ecology issues permits for discharges from municipal stormwater sewer systems to the cities and counties which manage those systems. Municipalities must manage their storm sewers directly (e.g., mapping their systems, investigating illicit discharges, and educating the public) and must also regulate certain third-party activities to minimize pollutants in stormwater runoff (e.g., setting runoff standards for new and re-development projects).

C. The PCHB Found that “Low Impact Development” Was Required to Meet the MEP and AKART Standards

In *Puget Soundkeeper Alliance v. Wash. Dep’t of Ecology*, 2008 WL 5510413 (Aug. 8, 2008), the PCHB found unlawful and set aside the 2007 iteration of the Phase I Permit because it failed to regulate stormwater runoff consistent with the MEP and AKART standards. The focus of that decision was Ecology’s failure to mandate use of low impact development (“LID”) techniques to prevent the generation of stormwater runoff in the first instance.³ The Board directed Ecology to amend the 2007 permit to impose LID techniques.

Ecology effectively disregarded that order. Instead, it waited until issuance of the 2012 Permit on the normal five-year permitting schedule to include LID as a requirement. CR 4983 (“2012 Permit”). Ecology released a draft of the revised Permit in November 2011 and finalized it on August 1, 2012, but delayed the effective date for a year pursuant to direction from the state legislature. RCW 90.48.260(3)(b)(i). The 2012 Permit requires each permittee to adopt and make effective a local program that meets its requirements (including various LID standards) by

³ The Permit defines LID as “a stormwater and land use management strategy that strives to mimic pre-disturbance hydrologic processes of infiltration, filtration, storage, evaporation, and transpiration by emphasizing conservation, use of on-site natural features, site planning, and distributed stormwater management practices that are integrated into a project design.” 2012 Permit, Appendix 1 at 4.

June 30, 2015, almost three years after the permits were issued. 2012 Permit at 16. The local program applies to all development applications submitted after July 1, 2015, as well as applications “submitted before July 1, 2015, but that do not start construction by June 30, 2020.” *Id.*⁴ That provision lies at the heart of this case.

D. The Court of Appeals Overturned the PCHB’s Ruling that Vesting Doesn’t Apply to the Stormwater Permits.

Snohomish County and several other entities appealed the Phase I permit to the PCHB. CR 4138. Among many other issues, appellants challenged the Permit’s requirement that otherwise-vested projects that don’t start construction by June of 2020 would have to meet the Permit’s updated standards, including LID.

Several parties moved for summary judgment on this claim. CR 234; CR 1061, CR 1284. The PCHB granted summary judgment for Soundkeeper and Ecology, and against appellants. CR 3971 (“SJ Order”). The Board repeated its long-standing precedent that “requirements imposed by NPDES stormwater permits are not land use control

⁴ The Phase II Permit allows until December 31, 2016 for new standards, and for applications submitted before that date, the previous stormwater requirements apply as long as the projects commence construction by June 30, 2022. These timelines are extended further for a few permittees. *Id.* The Phase II appellants joined the summary judgment briefing and the Board’s order encompasses both Permits. However, the Phase II appellants did not seek judicial review of that decision, so the Court of Appeals order only pertains to the Phase I permit.

ordinances that are subject to state vesting laws.” *Id.* at 29. The Board reasoned that the conditions imposed by the Permit “are designed to address pollution, not to control the use of land” and that the authority to issue the permits lies in “state and federal environmental laws, not any land-use related statute.” *Id.* at 30. The Board also found that the application of state vesting law “would thwart the public, and legislatively stated interest of enhanced environmental quality.” *Id.* at 31. It took note that the state legislature had expressly confirmed the dates Ecology proposed for the new LID provisions of the permit, thereby indicating “legislative approval” for this position. *Id.* at 34.⁵ It later upheld the Permit in its entirety with minor changes. CR 4047 (“Final Order”).

Snohomish and King Counties and an industry group sought judicial review of the Board’s vesting order. Division II of the Court of Appeals granted direct review, and, in a 2-1 decision, reversed the PCHB. The majority concluded that the Permit’s requirements for new and re-development were “land use control ordinances” subject to state vesting statutes because they exert a “restraining or directing” influence over the development of land. Decision, at 13. The majority also found that

⁵ Because it found vesting inapplicable to the Permit, the Board did not reach the argument that doing so would result in preemption of vesting law by the CWA. *Id.* at 36 n.8. However, it did observe that “applying the vested rights doctrine as requested by the Appellants would allow developments to violate the state and federal water quality laws.” *Id.* at 32

applying state vesting laws to the Permit did not result in preemption under the CWA because federal law only required control to the maximum extent “practicable.” In the majority’s view, this meant that achievement of the Act’s objectives “would occur within the framework of state law, not that it intended to preempt state law.” *Id.* at 25.

One member of the panel dissented, finding first that there was no dispute that the specific technical requirements of the permit were necessary to meet the MEP standard. *Id.* at 29. Applying state vesting law to allow continued discharges of pollution that didn’t achieve such standard would “frustrate the achievement” of federal law, and as such was preempted. *Id.* at 30. The dissent also found a conflict with state law. Because the LID permit standards were necessary to meet AKART, application of vesting laws would prevent that objective. And since clean water laws were the more narrow and specific of the two, and since applying vesting in this circumstance would subvert the public’s interest in clean water, the vesting doctrine would have to give way.⁶ *Id.* at 31.

Soundkeeper timely seeks discretionary review of the majority opinion and reinstatement of the PCHB decision.

⁶ The dissent did not reach the question of whether vesting applied in the first instance to state and federal clean water statutes.

ARGUMENT

This Court should grant discretionary review of the majority opinion because it decided a federal constitutional question when it found that the CWA did not preempt state vesting statutes under the supremacy clause. RAP 13.4(b)(4). Discretionary review should also be granted because the application of state vesting law to state pollution statutes is “an issue of substantial public interest” and importance. RAP 13.4(b)(3). As Ecology, the PCHB, and the dissent all agreed, application of vesting laws would frustrate the public’s interest in clean water and allow pollution inconsistent with state and federal goals.

I. WASHINGTON’S VESTING DOCTRINE DOES NOT APPLY TO THE REQUIREMENTS OF STORMWATER PERMITS.

A. Washington Vesting Law Seeks to Strike a Reasonable Balance Between Certainty and Public Interest.

Under Washington law, building permits and proposed divisions of land are to be considered under the zoning and other “land use control ordinances” in effect at the time a “fully completed application” has been filed. RCW 58.17.033 (subdivision code); RCW 19.27.095 (building permits). Under this doctrine, “developers who file a timely and complete building permit application obtain a vested right to have their application processed according to the zoning and building ordinances in effect at the time of the application.” *West Main Assocs. v. City of Bellevue*, 106

Wn.2d 47, 50-51 (1986). Where a use for property is properly disclosed in a subdivision application, all future required permits vest at that time. *See Noble Manor Co. v. Pierce Cnty.*, 133 Wn.2d 269, 278 (1997).⁷

The Washington vesting doctrine strives to balance competing objectives: on the one hand, the doctrine provides property owners some certainty. *Abbey Rd. Grp. v. City of Bonney Lake*, 167 Wn.2d 242, 251 (2009). On the other, vesting creates conflicts with public policy, and hence courts have been careful not to expand the doctrine. *Erickson & Assocs., Inc. v. McLerran*, 123 Wn.2d 864, 873 (1994) (“A proposed development which does not conform to newly adopted laws is, by definition, inimical to the public interest embodied in those laws.”).

While more favorable to development interests than most jurisdictions, vesting in Washington remains a limited right. As this Court has held, “[m]unicipalities can regulate or even extinguish vested rights by exercising the police power reasonably and in furtherance of a legitimate public goal.” *West Main*, 106 Wn.2d at 53. They can deny or condition vested development applications due to environmental impacts under their SEPA authority. *Polygon Corp. v. Seattle*, 90 Wn.2d 59 (1978). Because the doctrine is rooted in principles of “fundamental fairness,” it cannot be

⁷ Although initially a product of common law development, vesting is now governed by statute, not common law. *Potala Village Kirkland v. Kirkland*, 334 P.3d 1143 (Div. I, 2014).

used to allow “permit speculation.” *Erickson*, 123 Wn.2d at 874.

B. Ordinances Adopted to Comply with NPDES are Not “Land Use Control Ordinances”.

The vesting statutes apply only to “zoning and land use ordinances.” RCW 58.17.020; RCW 19.27.095. The PCHB concluded that stormwater programs adopted to comply with the Permit are not “land use ordinances” because they were dictated by clean water laws and serve the purpose of reducing pollution, not controlling the use of land. SJ Order at 28-36. The PCHB’s analysis was correct.

The term “land use control ordinances” is not defined by statute or regulation, nor has it been the focus of close analysis by this Court. However, the context and legislative history support a narrow reading of the term. For example, the Final Legislative Report on the bill enacting RCW 58.17.033 explains that the intent of the legislation was to ensure that projects “cannot be obstructed by *new zoning ordinances or building codes.*” *Noble Manor*, 133 Wn.2d at 277 (emphasis added). Division II ruled that impact fees—although they affect the ultimate cost of development—are not subject to vesting because they do not “limit the use of land” or “resemble a zoning law.” *New Castle Investments v. City of LaCenter*, 98 Wn. App. 224, 232 (Div. II, 1999).

The majority found that ordinances to comply with the Permit were

“land use ordinances” since they would exert a “restraining and directing influence” over development and would “significantly curtail how developers use their land.” Decision, at 13. But this overbroad analysis fails to acknowledge this Court’s more nuanced application of the vesting doctrine, and the careful balance between certainty and the public interest.

No one disputes that the use of land is implicated in meeting the environmental goals of the Permit. While there is abundant flexibility in meeting the Permit’s goals, permit compliance presumably means that there are limits on what a developer can do. However, it has never been the law that anything that “affects” the use of property is a “land use control ordinance” subject to vesting. *See, e.g., New Castle Invs.*, 98 Wn. App. at 232. Indeed, interpreting it in such a way would intolerably expand the vesting doctrine beyond what the legislature intended.

As the PCHB has repeatedly found, the *purpose* of the Permit is not to control land use, it is to achieve a particular environmental result—the protection of water quality standards. *See, e.g., Rosemere Neighborhood Association v. Ecology*, 2010 WL 3420570 at *8 (PCHB, Aug. 26, 2010) (Permit “does not dictate particular uses of land but requires only that, however the land is used, damage to the environment is kept within prescribed limits”); *Cox v. Ecology*, 2009 WL 542494 (PCHB, Feb 26, 2009) (stormwater permit “does not exert any restraining or

directing influence over land use, but rather applies current environmental best management control practices to the land-disturbing development of the site”). By way of comparison, air pollution standards presumably affect the height of smokestacks. That doesn’t make them “land use controls,” because the goal of such standards is to protect people from pollution, not dictate smokestack heights. The same is true of the Permit.

If vesting applies to any government action that ultimately has an impact on how land is used, any number of laws—for example, pollution standards, fire codes, and basic health and safety measures—could be subject to vesting. That has never been the law. *City of Seattle v. Hinkley*, 40 Wash. 468, 471 (1905) (“no such thing” as a vested right to “imperil the health or impair the safety of the community”).⁸

The majority’s conclusion that the Permit “would significantly curtail” how developers use their land is particularly surprising, since there was no evidence whatsoever to support it. Decision at 17.⁹ To the contrary, the Permit offers extensive flexibility in how permittees can

⁸ The majority refused to entertain the argument that stormwater regulations could be adopted under a municipality’s police powers because, it claimed, Ecology did not argue it below. Decision, at 17. But Soundkeeper cited *Hinkley*, CR 1061 at 12, and even Snohomish County acknowledged that the Permit operates by requiring municipalities to use their “police powers” to reduce runoff. CR 2043 at 3.

⁹ The PCHB ruled on the vesting issue on summary judgment, prior to the development of evidence at hearing.

achieve the goals of water quality protection. It allows permittees to submit their individual draft programs to Ecology for approval (which all of them have done) as long as they offer “equal or similar” levels of environmental protection as the Permit’s technical standards. Permit at 15. The standards themselves offer flexibility at the development stage to choose whatever approach is consistent with the project. For example, developers can design projects to meet a downstream LID “flow control” standard through any combination of techniques they want. Alternatively, they can choose from a menu of LID approaches. Permit App. 1 § 4.5. The Permit’s primary focus is on the result, not the way land is used.

The majority relied on dicta in *Westside Bus. Park v. Pierce Cnty.*, 100 Wn. App. 599 (Div. II, 2000), stating that stormwater controls are “land use ordinances.” But that case neither controlled nor was it even particularly informative. The “only issue” in that case was whether a “bare bones” short plat application that didn’t disclose the intended use of the site vested the storm drainage regulations in effect at the time of the application. *Id.* at 602. The controversy concerned the adequacy of the short plat application to invoke vesting, not the nature of the drainage regulations themselves. *Id.*¹⁰ The PCHB correctly found that the

¹⁰ Moreover, the *Westside Bus. Park* court sidestepped the question of whether applying vesting to federal law would raise preemption concerns.

Westside Bus. Park case was not relevant to the determination in this matter.

The majority also overlooked the fact that the legislature in 2012 explicitly directed Ecology to implement the revised permits—including provisions “relating to new requirements for low impact development”—by a date certain. RCW 90.48.260(3)(b)(i). The legislature is assumed to be aware that Ecology and the PCHB have taken the view that stormwater permits are not subject to the vesting statutes. It not only didn’t take any action to alter that interpretation, it affirmatively endorsed adoption of new LID requirements by 2013, without qualification. *See Hangman Ridge Training Stables v. Safeco Title Ins.*, 105 Wn.2d 778, 789 (1986) (“legislative action in this instance indicates legislative approval”).

Perhaps most troublingly, the majority failed to heed this Court’s consistent warning against expansion of the vesting doctrine. *Noble Manor Co.*, 133 Wn.2d at 280 (“If a vested right is too easily granted, the public interest is subverted.”); *Erickson*, 123 Wn.2d at 876. This Court has repeatedly admonished that expansion “would eviscerate the balance struck in the vesting statute.” *Abbey Road*, 167 Wn.2d at 261. There has *never* been a case holding that state vesting law constrains the requirements of federal and state pollution statutes. As discussed above, such a precedent could expand vesting into numerous areas where it was

never intended. This Court must restore the careful balance between certainty for development and the public's repeatedly expressed interest in protecting water quality and restoring Puget Sound.

In sum, the majority is wrong that the flexible pollution prevention standards of the Permit are "land use control" ordinances subject to the vesting statutes, and discretionary review should be granted.

II. APPLICATION OF STATE VESTING TO NPDES PERMITS IS PREEMPTED BY THE CLEAN WATER ACT.

Soundkeeper and Ecology argued below that adoption of Respondents' position on vesting would create a constitutional conflict between the CWA and the state vesting statutes, resulting in preemption of the state law. *See Hillman v. Mareta*, 133 S. Ct. 1943, 1950 (2013) (conflict preemption occurs when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"). The majority rejected that argument, finding no preemption problem with applying state vesting law to the water pollution standards in the Permit. This conclusion was also in error and should be reversed.¹¹

State NPDES programs may not impose less stringent

¹¹ "It is a general rule that statutes are construed to avoid constitutional difficulties when such construction is consistent with the purposes of the statute." *In the Matter of Williams*, 121 Wn.2d 655, 665 (1993). Accordingly, the question of preemption should be avoided by overturning the majority's decision that vesting laws apply to the CWA.

requirements than those mandated by Congress. 33 U.S.C. § 1370(1); 40 C.F.R. § 123.25(a). In *N. Plains Res. Council v. Fid. Exploration & Dev. Co.*, 325 F.3d 1155 (9th Cir. 2003), for example, the Ninth Circuit rejected Montana’s decision to exempt a discharge from the NPDES, finding that “Montana has no authority to create a permit exemption from the CWA for discharges that would otherwise be subject to the NPDES permitting process.” *Id.* at 1164. The court reasoned that “absent statutory authority for Montana to create such exemptions, it cannot possibly be urged that Montana state law in itself can contradict or limit the scope of the CWA, for that would run squarely afoul of our Constitution’s Supremacy Clause.” *Id.* at 1165. But creating a new exemption from § 402(p)’s requirement to reduce discharges to the MEP is precisely what the majority opinion accomplishes.

The majority relied on the term “practicable” in § 402(p) and reasoned that “a state may legitimately determine that it is not ‘practicable’ to impose new NPDES permit requirements” on vested projects. Opinion at 23. The majority also relied on the absence of a firm statutory deadline for adopting pollution controls.¹² This reasoning suffers

¹² In 33 U.S.C. § 1251(a)(1), Congress set a goal that the discharge of pollutants be *eliminated* by 1985, but did not set firm deadlines in permits for that goal to be achieved. As the dissent observed, using the flexibility shown by the Act as a license for further delay “is to risk passage into the

from multiple flaws.

First, “practicability” is not an empty term that the state legislature can define however it chooses. “Practicable” is a legal term of art under federal environmental law, and means the most effective technology available unless costs are “wholly disproportionate” to pollution reduction benefits. *See Rybachek v. U.S. EPA*, 904 F.2d 1276, 1289 (9th Cir. 1990); *Defenders of Wildlife v. Babbitt*, 130 F. Supp. 2d 121, 131 (D.D.C. 2001) (“[T]he phrase ‘to the maximum extent practicable’ does not permit an agency unbridled discretion. It imposes a clear duty on the agency to fulfill the statutory command to the extent that it is feasible or possible.”).

“Practicability” under the CWA has never been interpreted to mean a state can legislatively declare that certain projects are exempt from pollution controls. If the majority is correct that “practicable” simply means whatever the legislature says it means, nothing would stop the legislature from finding that imposing stormwater controls, say, on all projects in a particular area, or above a certain cost threshold, is *a priori* not practicable. That’s plainly not what the CWA intended.

Indeed, the CWA relies on “increasingly stringent” NPDES permits over time until the original goal of the Act to eliminate water pollution is achieved. Final Order, at 34. Allowing a permit applicant to

absurd.” Dissent at 30.

avoid compliance based on a vested right to follow older standards—standards that have been explicitly declared to be insufficient to comply with the CWA—would conflict with the purposes of the CWA and would collide with Congress’s determination that stormwater must be reduced to the maximum extent practicable. *Cox*, 2009 WL 542494, at *5.

Second, by asserting that the state is authorized to determine what is practicable, the majority ignores the fact that Ecology *did* precisely that in setting the standards of this permit. It found that LID was necessary to meet the MEP standard, and defined a more than fair timeline by which those standards need to be achieved. But the majority ignored that exercise of discretion, and created a sweeping rule that a state *legislature* can place an entire class of developments out of the reach of updated standards.

Third, the majority completely ignored the fact that the PCHB in 2008 explicitly determined that in order to satisfy the MEP standard, the permits needed to contain LID requirements. *Puget Soundkeeper Alliance, supra*, 2008 WL 5510413. No one appealed that decision, nor has anyone disputed it. The LID requirements of the Permit were upheld by the PCHB in this case. But the effect of the majority’s decision is that an entire class of projects need not meet this CWA standard, ever. If that is not an obstacle to achieving the objectives of Congress, it is hard to

imagine what would be.

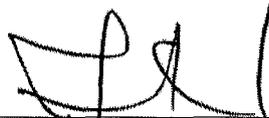
While the majority is correct that the CWA envisions a federal-state partnership, Ecology is only delegated authority to implement the NPDES program pursuant to clear statutory factors and minimums, including clear authority to issue permits that meet all the statute's requirements. 33 U.S.C. § 1342(b); 40 C.F.R. § 122.4(a), (d) (prohibiting state issuance of permits that do not comply with CWA and ensure compliance with water quality standards). If Ecology lacks authority to require "practicable" approaches to stormwater pollution like LID because of the state vesting statutes, its delegation to administer and implement the CWA program as directed by Congress should be withdrawn. 33 U.S.C. § 1342(c) (authorizing EPA to withdraw approval of program).

In sum, the majority was incorrect that applying state vesting laws to exempt projects from updated standards is not be preempted.

CONCLUSION

For the foregoing reasons, Soundkeeper respectfully requests that this Court grant its motion for discretionary review.

Respectfully submitted this 18th day of February, 2016.



JAN HASSELMAN (WSB #29107)
JANETTE K. BRIMMER (WSB #41271)

Earthjustice
705 Second Avenue, Suite 203
Seattle, WA 98104
(206) 343-7340 | Phone
(206) 343-1526 | Fax
jhasselman@earthjustice.org
jbrimmer@earthjustice.org

*Attorneys for Puget Soundkeeper Alliance,
Washington Environmental Council, and
Rosemere Neighborhood Association*

DECLARATION OF SERVICE

I declare that on February 18, 2016, I served a true and copy of the foregoing *Puget Soundkeeper Alliance, Washington Environmental Council, and Rosemere Neighborhood Association's Petition for Discretionary Review* on the following parties via email:

Attorneys for Appellant Snohomish County
Alethea Hart, Deputy Prosecuting Attorney
Laura C. Kisielius, Deputy Prosecuting Attorney
ahart@snoco.org
laura.kisielius@snoco.org

Attorneys for Appellant King County
Devon Shannon
Darren Carnell
devon.shannon@kingcounty.gov
darren.carnell@kingcounty.gov

Attorney for Appellant Building Industry Association of Clark County
James D. Howsley
jamie.howsley@jordanramis.com

Attorneys for Respondent Department of Ecology
Ronald L. Lavigne, Senior Counsel
Phyllis J. Barney, Assistant Attorney General
ronaldl@atg.wa.gov
phyllisb@atg.wa.gov

Attorneys for Amicus Master Builders Association
Nancy Bainbridge Rogers
Randall P. Olsen
nrogers@cairncross.com
rolsen@cairncross.com

Attorney for Pierce County
Lori Terry Gregory
terrl@foster.com

FILED
COURT OF APPEALS
DIVISION II
2016 FEB 18 PM 3:32
STATE OF WASHINGTON
BY 
DEPUTY

Attorney for Clark County

Christine M. Cook, Deputy Prosecuting Attorney
christine.cook@clark.wa.gov

Attorney for City of Tacoma

Jeff H. Capell, Deputy City Attorney
Elizabeth A. Pauli
jcapell@ci.tacoma.wa.us
epauli@ci.tacoma.wa.us

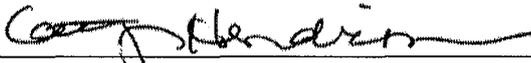
Attorney for City of Seattle

Theresa R. Wagner, Senior Assistant City Attorney
theresa.wagner@seattle.gov

Attorney for Pollution Control Hearings Board

Robert W. Ferguson, Attorney General
Diane L. McDaniel, Senior Assistant Attorney General
dianem@atg.wa.gov

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed this 18th day of February, 2016, at Seattle, Washington.


Cathy Hendrickson, Litigation Assistant

APPENDIX

APPENDIX

TABLE OF CONTENTS

Snohomish County, et al. v. Pollution Control Hearings Board, et al.,
No. 46378-4-II, Published Opinion, dated Jan. 19, 2016A-001

Federal Law Constitutional Provisions and Statutes A036

State Statutes A040

Walt Cox v. State of Washington, Department of Ecology,
2009 WL 542494 (PCHB, Feb 26, 2009) A048

Puget Soundkeeper Alliance, et al. v Wash. Dep't of Ecology, et al.,
2008 WL 5510411 (PCHB, Apr. 2, 2008)..... A056

Puget Soundkeeper Alliance, et al. v. Wash. Dep't of Ecology, et al.,
2008 WL 5510413 (Aug. 8, 2008)..... A075

Rosemere Neighborhood Association, et al. v. Wash. Dep't of Ecology,
et al., 2010 WL 3420570 (PCHB, Aug. 26, 2010) A107

Rosemere Neighborhood Ass'n, et al. v. Wash. Dep't of Ecology,
2011 WL 62921 (PCHB, Jan. 5, 2011)..... A115

January 19, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

SNOHOMISH COUNTY, KING COUNTY,
and BUILDING INDUSTRY ASSOCIATION
OF CLARK COUNTY,

No. 46378-4-II

Appellants,

v.

POLLUTION CONTROL HEARINGS
BOARD, and WASHINGTON STATE
DEPARTMENT OF ECOLOGY, and PUGET
SOUNDKEEPER ALLIANCE,
WASHINGTON ENVIRONMENTAL
COUNCIL, and ROSEMERE
NEIGHBORHOOD ASSOCIATION,

PUBLISHED OPINION

Respondents.

MAXA, J. — Snohomish County, King County, and the Building Industry Association of Clark County (collectively, appellants) appeal the Pollution Control Hearings Board's (Board) order holding that condition S5.C.5.a.iii in the 2013-2018 Phase I Municipal Stormwater Permit (the 2013-2018 Permit) issued by the Washington Department of Ecology (Ecology) does not violate the vested rights of property developers. The 2013-2018 Permit requires Phase I permittees, which include certain counties and cities, to adopt by June 30, 2015 regulations for controlling stormwater drainage and runoff to municipal stormwater sewer systems for new development, redevelopment, and construction activities. Condition S5.C.5.a.iii provides that

the new regulations will apply to all development applications submitted after July 1, 2015 and submitted before July 1, 2015 if construction is not started by June 30, 2020.

The statutory vested rights doctrine provides that a land use application generally must be considered under the zoning or other land use control ordinances in effect at the time the application was submitted. The appellants argue that enforcement of condition S5.C.5.a.iii would require permittees to violate the vested rights of developers because (1) the required stormwater regulations are land use control ordinances, (2) an application submitted before July 1, 2015 might not result in the start of construction by June 2020, and (3) condition S5.C.5.a.iii therefore might require counties to enforce stormwater regulations adopted after an application is submitted.

Ecology and Puget Soundkeeper Alliance (PSA) (collectively, Ecology) argue, and the Board ruled, that the 2013-2018 Permit would not require permittees to violate the vested rights doctrine because the required regulations are environmental regulations, not land use control ordinances. They also argue that even if the regulations are land use control ordinances, federal law preempts Washington's vested rights statutes.

We hold that (1) the 2013-2018 Permit's required stormwater regulations are "land use control ordinances" under the vested rights statutes, (2) enforcement of condition S5.C.5.a.iii would violate the statutory vested rights of developers who submit applications before July 1, 2015 but do not begin construction until after June 30, 2020, and (3) federal law does not preempt Washington's vested rights statutes. Accordingly, we reverse the Board's order and remand to the Board to direct Ecology to revise condition S5.C.5.a.iii to specify that the 2013-2018 Permit applies only to those completed applications submitted after July 1, 2015.

FACTS

The federal Clean Water Act (CWA)¹ prohibits any discharge of pollutants into the nation's waters, unless the discharge is made according to the terms of a permit issued under the National Pollution Discharge Elimination System (NPDES). 33 U.S.C. §§ 1311(a), 1342. The federal Environmental Protection Agency (EPA) may issue NPDES permits, but it may also delegate the authority to issue permits to a state agency. 33 U.S.C. § 1342(a)(1), (b). In Washington, EPA has delegated the authority to issue NPDES permits to Ecology. *See* RCW 90.48.260.

2013 Municipal Stormwater Permit

In August 2012, Ecology issued the 2013-2018 Phase I Municipal Stormwater Permit.² The 2013-2018 Permit authorizes and regulates the discharge of stormwater to surface waters and to ground waters from large and medium municipal separate storm sewer systems, referred to as MS4s.³ Snohomish County, King County, Pierce County, Clark County, and the cities of Seattle and Tacoma are among the entities that are permittees under the 2013-2018 Permit.⁴ The 2013-2018 Permit is effective from August 1, 2013 through July 31, 2018.

¹ The Clean Water Act's formal name is the Water Pollution Control Act. 33 U.S.C. § 1251 et seq.

² The 2013-2018 Permit is the third Phase I municipal stormwater permit issued in Washington. Ecology issued the first such permit in 1995 and the second in 2007.

³ The Board described MS4s as "all the conveyances or systems of conveyances that are designed or used for collecting or conveying stormwater, including roads with drainage systems, municipal streets, catch basins, curb gutters, ditches, manmade channels or storm drains." Clerk's Papers at 32-33.

⁴ Ecology also regulates stormwater discharges from small municipalities with two Phase II permits. Neither of the Phase II permits are at issue in this appeal.

Ecology implements the 2013-2018 Permit at the local level by mandating that each local permittee be responsible for compliance with the 2013-2018 Permit's terms. The 2013-2018 Permit requires all permittees to create a stormwater management program. That program must include the enactment of local ordinances or other governing documents regulating development within each permittee's jurisdiction. The 2013-2018 Permit requires several conditions that permittees must implement through their ordinances. Condition S5.C.5 is one such condition.

Condition S5.C.5 focuses on preventing and controlling stormwater runoff from new development, redevelopment, and construction activities. This condition applies to those projects that meet certain thresholds specified in Appendix 1 of the 2013-2018 Permit⁵ and that will discharge stormwater into an applicable sewer system.

Condition S5.C.5 includes a lengthy set of minimum performance measures, one of which includes site and subdivision scale requirements implementing the “[m]inimum [r]equirements, thresholds, and definitions” in Appendix 1 of the 2013-2018 Permit for new development, redevelopment, and construction sites. Site and subdivision scale requirements that developers must implement include preparing stormwater site plans; drafting stormwater pollution prevention plans; utilizing all known, available, and reasonable source control best management practices; maintaining natural drainage patterns to the maximum extent practicable; and implementing on-site stormwater management best management practices to the extent feasible in various contexts. In addition, certain projects trigger additional minimum

⁵ The applicability of the 2013-2018 Permit's minimum requirements depends on the development project's type and size. Certain project types are expressly exempted from the 2013-2018 Permit's requirements.

requirements that developers must comply with. These include constructing stormwater treatment facilities to treat stormwater runoff, implementing flow control standards to reduce the impacts of stormwater runoff, ensuring that projects draining into wetlands comply with various guide sheets and construction restrictions, and maintaining an operation and maintenance manual.

Condition S5.C.5.a.iii provides that permittees must adopt and make effective a stormwater management program that meets the 2013-2018 Permit requirements no later than June 30, 2015. The second sentence of the condition addresses the applicability of the new program to development projects:

The local program adopted to meet the requirements of S5.C.5.a.i through ii shall apply to all applications submitted after July 1, 2015 and *shall apply to projects approved prior [to] July 1, 2015, which have not started construction by June 30, 2020.*

Certified Appeal Board Record (CABR) at 27 (emphasis added) (footnotes omitted).

Procedural History

Snohomish County, King County, Pierce County, Clark County, and the Building Industry Association of Clark County appealed the 2013-2018 Permit to the Board.⁶ They argued in part that the 2013-2018 Permit's requirements were land use control ordinances and that condition S5.C.5.a.iii conflicted with Washington's vested rights and finality laws. Ecology argued that the requirements under the 2013-2018 Permit were environmental regulations that

⁶ The City of Seattle, City of Tacoma, and the Washington State Department of Transportation received permission to intervene in the appeals. Puget Soundkeeper Alliance, Washington Environmental Council, and Rosemere Neighborhood Association (collectively PSA) also received permission to intervene on behalf of Ecology.

were necessary to comply with the federal CWA and state Water Pollution Control Act, and therefore did not implicate the vested rights doctrine.

In October 2013, the Board issued a summary judgment order ruling that the 2013-2018 Permit's requirements were environmental regulations and therefore that condition S5.C.5.a.iii did not violate Washington's vested rights doctrine or finality doctrine. The Board stated that it "has consistently ruled that the requirements imposed by NPDES stormwater permits are not land use control ordinances that are subject to state vesting laws." Clerk's Papers (CP) at 56. Moreover, the Board rejected the notion that the doctrines of vested rights and finality of land use decisions could control and limit the application of state and federal water quality requirements.

However, the Board's summary judgment order did require Ecology to modify the second sentence of condition S5.C.5.a.iii. The Board directed Ecology to replace the phrase "projects approved" with "application submitted."

Following a trial on the remaining issues in the case, the Board issued its final decision and order. The appellants separately appealed the Board's October 2013 decision to the Thurston County Superior Court. Thurston County consolidated the appeals. The appellants sought direct review, which this court granted.

ANALYSIS

A. STANDARD OF REVIEW

The Administrative Procedures Act (APA) governs our review of Board decisions. *See* RCW 34.05.570(1)(b); *Cornelius v. Dep't of Ecology*, 182 Wn.2d 574, 584-85, 344 P.3d 199 (2015). We apply the APA to the administrative record. *Cornelius*, 182 Wn.2d at 585. We may

No. 46378-4-II

grant relief from an order based on several reasons listed in RCW 34.05.570(3), including that the order is (1) outside the statutory authority of the agency, and (2) based on an erroneous interpretation or application of the law. RCW 34.05.570(3)(b), (d). The burden of demonstrating the invalidity of agency action is on the party asserting invalidity. RCW 34.05.570(1)(a).

We review questions of law de novo. *Cornelius*, 182 Wn.2d at 585. When a statute is ambiguous and falls within Ecology's area of expertise, we give great weight to Ecology's interpretation if it is consistent with the statutory language. *Clark County v. Rosemere Neigh. Ass'n*, 170 Wn. App. 859, 871, 290 P.3d 142 (2012). However, we are not bound by an agency's interpretation of a statute. *See* RCW 34.05.570(3)(d); *see also* . *Postema v. Pollution Control Hr'gs Bd.*, 142 Wn.2d 68, 77, 11 P.3d 726 (2000). The Board's order was made on summary judgment, which we also review de novo. *Cornelius*, 182 Wn.2d at 585.

B. CONFLICT BETWEEN CONDITION S5.C.5.a.iii AND VESTED RIGHTS DOCTRINE

The appellants challenge the second sentence of condition S5.C.5.a.iii, which requires permittees to apply the new stormwater regulations to property development applications filed before July 1, 2015 if construction on those projects has not started by June 30, 2020. The appellants focus specifically on the application of the new stormwater regulations to local building permit and subdivision applications and development agreements. They argue that condition S5.C.5.a.iii conflicts with the statutory vested rights doctrine. We agree.

1. Vested Rights Doctrine

The vested rights doctrine generally provides that certain land development applications must be processed under the land use regulations in effect when the application was submitted,

regardless of subsequent changes to those regulations. *Town of Woodway v. Snohomish County*, 180 Wn.2d 165, 172-73, 322 P.3d 1219 (2014). Development rights “vest” on a date certain – when a complete development application is submitted. *Id.* The purpose of the vested rights doctrine is to provide certainty to developers and to provide some protection against fluctuating land use policy. *Noble Manor Co. v. Pierce County*, 133 Wn.2d 269, 278, 943 P.2d 1378 (1997). The doctrine recognizes that development rights are valuable property interests and ensures that new land use regulations do not interfere with those rights. *Town of Woodway*, 180 Wn.2d at 173.

The vested rights doctrine originated at common law, but the legislature has codified the doctrine with regard to building permits (RCW 19.27.095(1)), subdivision applications (RCW 58.17.033(1)), and development agreements (RCW 36.70B.180).⁷ *Town of Woodway*, 180 Wn.2d at 173. RCW 19.27.095(1) provides that a valid and fully complete building permit application “shall be considered under the building permit ordinance in effect at the time of application, and the zoning or other land use control ordinances in effect on the date of application.” RCW 58.17.033(1) provides that a proposed division of land “shall be considered under the subdivision or short subdivision ordinance, and zoning or other land use control

⁷ A question exists as to whether the vested rights doctrine now is purely statutory or continues to evolve in the common law. The Supreme Court in *Town of Woodway* stated without discussion that “the vested rights doctrine is now statutory.” 180 Wn.2d at 173. Division One of this court also has held that the vested rights doctrine is purely statutory. *Potala Vill. Kirkland, LLC v. City of Kirkland*, 183 Wn. App. 191, 203-214, 334 P.3d 1143 (2014) (discussing the evolution of the vested rights doctrine and applying its holding that the doctrine is purely statutory). The appellants limit their arguments to the vested rights statutes, and none of the parties argue that we should address any common law vested rights doctrine. Therefore, we analyze only the vested rights statutes.

ordinances, in effect on the land at the time a fully completed application for preliminary plat approval of the subdivision, or short plat approval of the short subdivision, has been submitted to the appropriate county, city, or town official.” And RCW 36.70B.180 provides that a development agreement is not subject to an amended or new “zoning ordinance or development standard or regulation adopted after the effective date of the agreement.”

The issue here is whether the 2013-2018 Permit’s required stormwater regulations constitute “other land use control ordinances” under RCW 19.27.095(1) and RCW 58.17.033(1) and/or “development standard[s] or regulation[s]” under RCW 36.70B.180. If so, the statutory vested rights doctrine applies to those stormwater regulations. If not, the vested rights doctrine does not apply.

2. Principles of Statutory Construction

Determining whether the statutory vested rights doctrine applies to the 2013-2018 Permit’s required stormwater regulations involves the interpretation of the pertinent statutory language. Statutory interpretation is a matter of law that we review *de novo*. *Jametsky v. Olsen*, 179 Wn.2d 756, 761, 317 P.3d 1003 (2014).

The goal of statutory interpretation is to determine and give effect to the legislature’s intent. *Id.* at 762. To determine legislative intent, we first look to the plain language of the statute. *Id.* We consider the language of the provision in question, the context of the statute in which the provision is found, and related statutes. *Protect the Peninsula’s Future v. Growth Mgmt. Hr’gs Bd.*, 185 Wn. App. 959, 969, 344 P.3d 705 (2015). Undefined terms are given their plain and ordinary meaning, which can be derived from a dictionary. *Estate of Haselwood v. Bremerton Ice Arena, Inc.*, 166 Wn.2d 489, 498, 210 P.3d 308 (2009). If a statute is

unambiguous, we apply the statute's plain meaning as an expression of legislative intent without considering other sources of such intent. *Jametsky*, 179 Wn.2d at 762.

If the plain language of the statute is susceptible to more than one reasonable interpretation, the statute is ambiguous. *Id.* We resolve ambiguity by considering other indications of legislative intent, including principles of statutory construction, legislative history, and relevant case law. *Id.*

3. Statutory Language: Land Use Control Ordinances

RCW 19.27.095(1) and RCW 58.17.033(1) both provide that building permit and land division applications must be considered under the “zoning or other land use control ordinances” in effect at the time the application is submitted. Neither statute defines the term “land use control ordinance.” However, the appellants rely on Washington cases that do define the term and on this court's holding in *Westside Business Park, LLC v. Pierce County*, 100 Wn. App. 599, 607, 5 P.3d 713 (2000) to support their contention that stormwater drainage ordinances are land use control ordinances.

a. *New Castle* and *Westside*

In *New Castle Investments v. City of LaCenter*, this court first discussed the meaning of “land use control ordinance” in RCW 58.17.033(1). 98 Wn. App. 224, 228, 989 P.2d 569 (1999). We focused on the word “control,” which is defined in part as “ ‘[t]he ability to exercise a restraining or directing influence over something.’ ” *Id.* at 229 (quoting BLACK'S LAW DICTIONARY 329 (6th ed.1990)). Accordingly, we suggested that a land use control ordinance was one that “exercise[d] a restraining or directing influence over land use.” *New Castle*, 98 Wn. App. at 229. This court subsequently adopted this definition of land use control ordinance

No. 46378-4-II

in *Westside*, 100 Wn. App. at 607. Division One of this court also has adopted this definition. *Graham Neigh. Ass'n v. F.G. Assocs.*, 162 Wn. App. 98, 115, 252 P.3d 898 (2011).

In *New Castle*, we addressed whether an ordinance imposing a transportation impact fee (TIF) on a proposed subdivision was a land use control ordinance subject to the vesting rights provision of RCW 58.17.033. 98 Wn. App. at 226-27. We stated that TIFs do not exercise a controlling or restraining influence over land use; they only increase the cost of a development.

Id. at 229. Further, we explained:

The TIFs do not affect the physical aspects of development (i.e., building height, setbacks, or sidewalk widths) or the type of uses allowed (i.e., residential, commercial, or industrial). If they did, then TIFs would be subject to the vested rights doctrine. In other words, “[the developer] is not being forced to use its land or build differently from that which [the developer] was able to do at the time its plans were approved.”

Id. at 237 (quoting *Lincoln Shiloh Assocs. v. Mukilteo Water Dist.*, 45 Wn. App. 123, 128, 724 P.2d 1083 (1986)). We concluded:

Because TIFs do not “control” land use, do not affect the developer’s rights with regard to the physical use of his or her land, and are best characterized as revenue raising devices rather than land use regulation, we hold that the definition of “land use control ordinances” does not include TIFs.

Id. at 237-38.

In *Westside*, we addressed an issue very similar to the one here – whether an ordinance imposing increased stormwater drainage requirements was a land use control ordinance subject to the vesting rights provision of RCW 58.17.033. 100 Wn. App. at 602. After relying on *New Castle* to define “land use control ordinance” as an ordinance that exerts a restraining or directing influence over land use, we stated:

Storm water drainage ordinances are land use control ordinances. Under RCW 58.17.060, local governments may approve a short subdivision 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 land use control ordinances.*

Westside, 100 Wn. App. at 607 (emphasis added).

We also relied on *Phillips v. King County*, 136 Wn.2d 946, 963, 968 P.2d 871 (1998), where the Supreme Court stated that the vested rights doctrine applied to surface water drainage regulations. *Westside*, 100 Wn. App. at 607. We stated that “because the *Phillips* court plainly considered whether surface water drainage ordinances are within the ambit of the vested rights doctrine, . . . we are not prepared to say that storm water drainage ordinances are not subject to the vesting rule.” *Id.* at 607-08.

Ecology essentially ignores *Westside*. And PSA argues that the discussion in *Westside* regarding the definition of “land use control ordinance” is dicta and the case neither controls nor is informative here because the deciding issue was the adequacy of an application to invoke vesting.⁸ However, even if our discussion of the meaning of “land use control ordinance” in *Westside* was dicta, PSA does not explain why we should disregard the adoption of a definition of that term in *New Castle*, which we cited with approval in *Westside*.

Here, there is no indication that the effect of the stormwater regulations the 2013-2018 Permit requires would be appreciably different than the stormwater drainage ordinances

⁸ Similarly, the Board ruled that *Westside* was inapplicable and adopted its prior discussion in *Rosemere Neighborhood Ass’n v. Department of Ecology*, No. 10-013, 2010 WL 3420570, at * 2 (Wash. Pollution Control Hr’gs Bd. Aug. 26, 2010).

discussed in *Westside*. Therefore, in the absence of some reason to treat the regulations adopted pursuant to the 2013-2018 Permit differently than other stormwater drainage ordinances, we hold that *Westside* is controlling authority.

Further, the type of stormwater ordinances required under the 2013-2018 Permit clearly would satisfy *Westside*'s definition of "land use control ordinance." The 2013-2018 Permit requirements by their very design are intended to exert a restraining and directing influence over the development and redevelopment of land to effectuate Ecology's regulation of stormwater discharges into Washington's waters. Certain project developers must comply with local ordinances enacted under the 2013-2018 Permit requiring, for example, that they utilize source control best management practices, implement on-site stormwater best management practices, and implement flow control standards to reduce the impacts of stormwater runoff. These and other 2013-2018 Permit requirements would significantly curtail how developers use their land.

b. Ecology Arguments

Ecology argues that stormwater regulations adopted as required in the 2013-2018 Permit are not land use control ordinances for several reasons. First, Ecology argues that because the 2013-2018 Permit's required regulations are environmental regulations, they cannot be considered land use control ordinances. Ecology points out that the purpose of the regulations adopted pursuant to the 2013-2018 Permit is to control pollution discharges, not control the use of land. The Board's summary judgment order also focused on the purpose of the regulations at issue:

The conditions that are imposed pursuant to the Phase I and Phase II Permits exist and are designed to address pollution, not to control the use of land. The authority for these conditions is contained in state and federal environmental laws, not any

land use-related statute. The requirement to use various best management practices to control stormwater runoff from new development or redevelopment, . . . does not change the type of use the land may be put to (residential, commercial, etc[.]), nor is it a tool to regulate the subdivision of land. Rather, the requirements of the Phase I and II Permits are, by their nature, aimed at improving the quality of the environment and the beneficial uses of the state's waters for the public at large.

CP at 57-58.

Ecology's argument seems to be based on the assumption that a regulation can either be an environmental regulation or a land use control regulation, but not both. However, Ecology does not cite any case authority for this proposition. And several cases address the application of the vested rights doctrine to regulations that can be classified as "environmental." *See, e.g., Lauer v. Pierce County*, 173 Wn.2d 242, 258-263, 267 P.3d 988 (2011) (watercourse buffer regulations); *Phillips*, 136 Wn.2d at 951 (water drainage regulations); *Julian v. City of Vancouver*, 161 Wn. App. 614, 619, 626-28, 255 P.3d 763 (2011) (riparian buffer regulations); *Westside*, 100 Wn. App. at 601 (storm drainage regulations adopted in part as a response to the CWA). Nothing in Washington case law suggests that simply characterizing a land use control ordinance as an environmental ordinance limits the application of the vested rights doctrine.

Ecology emphasizes that the Board has held that NPDES permit requirements do not constitute land use control ordinances. *See Rosemere Neigh. Ass'n. v. Dep't of Ecology & Clark County*, No. 10-103, 2010 WL 3420570 (Wash. Pollution Control Hr'gs Bd. Aug. 26, 2010), *affirmed*, *Clark County v. Rosemere Neigh. Ass'n*, 170 Wn. App. 859, 875-76, 290 P.3d 142 (2012) (refraining from addressing the legal vesting issue); *Cox v. Dep't of Ecology*, No. 08-077, 2009 WL 542494 (Wash. Pollution Control Hr'gs Bd. Feb. 26, 2009). However, we are not bound by an agency's interpretation of a statute. *Postema*, 142 Wn.2d at 77. Here, the Board's

rulings are inconsistent with the language of the vested rights statutes, which do not carve out an exception for environmental regulations, and applicable case law.

Second, Ecology quotes language from *New Castle* that “ ‘[t]he vested rights rule is generally limited to those laws which can loosely be considered ‘zoning’ laws.’ ” 98 Wn. App. at 232 (quoting WASH. STATE BAR ASS’N, WASHINGTON REAL PROPERTY DESK BOOK, § 97.8(2)(d) (3d ed. 1996)). Ecology argues that environmental regulations do not resemble zoning laws. Although we quoted the same language in *Westside*, we then noted that the vested rights doctrine “has also been extended beyond zoning-type laws.” 100 Wn. App. at 607. And the definition of land use control ordinance in *Westside* focused on the effect of an ordinance on land use, not on any similarity to zoning laws. *Id.* Further, RCW 19.27.095(1) and RCW 58.17.033(1) both refer to “zoning or other land use control ordinances.” This language clearly establishes that a land use control ordinance is different than a zoning ordinance.

Third, Ecology argues that the purpose of the vested rights doctrine is only to limit the exercise of municipal discretion, rather than limiting the state’s ability to implement environmental regulations necessary to comply with state and federal water pollution laws. Ecology relies on *Erickson & Assocs., Inc. v. McLerran*, where the Supreme Court recognized that:

[o]ur vested rights doctrine is not a blanket rule requiring cities and towns to process all permit applications according to the rules in place at the outset of the permit review. Instead, the doctrine places limits on municipal discretion and permits landowners or developers “to plan their conduct with reasonable certainty of the legal consequences.”

123 Wn.2d 864, 873, 872 P.2d 1090 (1994) (quoting *West Main Assocs. v. City of Bellevue*, 106 Wn.2d 47, 51, 720 P.2d 782 (1986)). Ecology states that permittees do not

exercise municipal discretion when they implement environmental conditions imposed by the state to meet water pollution laws.

However, *Erickson* does not stand for the proposition that the vested rights doctrine applies only to limit municipal discretion and cannot apply to environmental requirements enacted pursuant to state direction. The language quoted above addressed an ordinance that determined the vesting date of certain permits, not land use control ordinances. *Erickson*, 123 Wn.2d at 869-71. And Ecology cites to no authority holding that the vested rights statutes do not apply to local regulations that are state mandated.⁹ Those statutes broadly apply to land use control ordinances without any exception for ordinances mandated by state or federal law. *See Westside*, 100 Wn. App. at 601 (recognizing a vested right to the application of the predecessor to stormwater drainage ordinances adopted in response to the CWA).

Fourth, Ecology argues that controlling water pollution is an exercise of a local municipality's police powers, which extinguishes a developer's vested right. Ecology quotes a 1905 case stating that "[t]here is no such thing as an inherent or vested right to imperil the health or impair the safety of the community." *City of Seattle v. Hinckley*, 40 Wash. 468, 471, 82 P. 747 (1905). Ecology also relies on *Rhod-A-Zalea & 35th, Inc. v. Snohomish County*, 136 Wn.2d 1, 6, 959 P.2d 1024 (1998), where the Supreme Court

⁹ Ecology cites only to *Citizens for Rational Shoreline Planning v. Whatcom County*, 172 Wn.2d 384, 389, 258 P.3d 36 (2011) to support its argument. But that case involved RCW 82.02.020, which has explicit language stating that it applies only to taxes imposed by local government, not by the state. *Citizens for Rational Shoreline Planning*, 172 Wn.2d at 390. RCW 19.27.095(1) and RCW 58.17.033(1) have no similar language.

addressed whether a nonconforming peat mining operation was subject to a county's police power regulations enacted for the health, safety, and welfare of the community. The court held that the peat mining operation was subject to subsequent police power regulations and that local governments may "preserve, regulate and even, within constitutional limitations, terminate nonconforming uses." *Id.* at 8. Ecology emphasizes that the court suggested that a nonconforming factory would not be exempt from later enacted pollution regulations. *Id.* at 15.

However, Ecology did not argue below that the stormwater regulations may be enacted pursuant to a municipality's police powers. And the Board did not address this issue. Therefore, whether a local municipality could impose police power conditions on a development application is not before us. The only issue on appeal is the application of the vested rights doctrine.

Fifth, Ecology argues that it could require permittees to use their authority under SEPA to enforce stormwater discharge regulations. SEPA regulations are exempt from the vested rights doctrine. RCW 19.27.095(6); RCW 58.17.033(3). However, once again Ecology did not argue below that it was requiring permittees to enact regulations pursuant to SEPA. And the Board did not base its decision on SEPA. Therefore, whether a local municipality could enact certain regulations under SEPA that would not be subject to the vested rights doctrine is not before us.

Sixth, Ecology argues that applying the vested rights doctrine here would conflict with the legislature's intent, expressed in RCW 90.48.010, to "maintain the highest possible standards to insure the purity of all waters of the state. . . , and to that end

require the use of all known available and reasonable methods by industries and others” to control water pollution. However, as noted above, RCW 19.27.095(6) and RCW 58.17.033(3) do not contain any exception for environmental regulations. And Ecology has not cited to any expression of a legislative intent to have NPDES permit requirements supersede the vested rights doctrine. Further, to the extent that RCW 90.48.010 and the vested rights statutes conflict, the more general policy statement in RCW 90.48.010 must yield to the more specific vested rights statutes. *See Ass’n of Wash. Spirits & Wine Distribs. v. Wash. State Liquor Control Bd.*, 182 Wn.2d 342, 356, 340 P.3d 849 (2015)(a general statutory provision must yield to a more specific provision).

c. Summary

Under a plain reading of RCW 19.27.095(1) and RCW 58.17.033(1), in combination with our case law interpreting these provisions, regulations enacting the 2013-2018 Permit requirements constitute local land use ordinances because the regulations will restrain and direct the use of land. Because development rights vest upon filing a completed building or land division application, condition S5.C.5.a.iii conflicts with the vested rights doctrine as stated in RCW 19.27.095(1) and RCW 58.17.033(1) because it could require a permittee to enforce regulations adopted after development rights had been vested. Accordingly, we hold that condition S5.C.5.a.iii of the 2013-2018 Permit is invalid.

4. Statutory Language: Development Standards and Regulations

RCW 36.70B.180 provides that a development agreement is not subject to an amended or new “zoning ordinance or development standard or regulation adopted after the effective date of the agreement.” The statute does not define “development standard or regulation.” And there

are no cases or statutes that define this term. However, the ordinary meaning of “development regulation” is a regulation that affects the development of land. Using this meaning, there is no reason to interpret development regulation differently than land use control ordinance. Similarly, the ordinary meaning of “development standards” is a standard that affects the development of land. Although “standard” may have a narrower meaning than “regulation,” again there is no reason to interpret development standards differently than land use control ordinances.

We hold that under a plain reading of RCW 36.70B.180, local regulations enacting the 2013-2018 Permit requirements constitute development regulations and development standards. Accordingly, we hold that condition S5.C.5.a.iii conflicts with the vested rights doctrine as stated in RCW 36.70B.180, and therefore is invalid.¹⁰

5. Remedy

We hold that condition S5.C.5.a.iii of the 2013-2018 Permit conflicts with RCW 19.27.095(1), RCW 58.17.033(1), and RCW 36.70B.180. The appellants contend that this holding requires us to find that condition S5.C.5.a.iii is invalid because the Washington legislature did not provide Ecology with the authority to compel permittees to violate Washington law and to do so would be unreasonable. We agree.

An administrative regulation that conflicts with a statute is invalid. *See Cannabis Action Coal. v. City of Kent*, 180 Wn. App. 455, 481, 322 P.3d 1246 (2014). Such a conflict exists when an ordinance permits what state law forbids or forbids what state law permits. *Id.* at 482.

¹⁰ Snohomish County also argues that compliance with condition S5.C.5.a.iii could require permittees to violate Washington’s doctrine of finality of land use decisions for land use applications actually approved before January 1, 2015. Because we reverse based on the vested rights doctrine, we do not address this issue.

No. 46378-4-II

“ ‘The conflict must be direct and irreconcilable with the statute, and the ordinance must yield to the statute if the two cannot be harmonized.’ ” *Id.* (quoting *City of Tacoma v. Luvene*, 118 Wn.2d 826, 835, 827 P.2d 1374 (1992)).

Here, condition S5.C.5.a.iii requires that permittees apply the new 2013-2018 Permit requirements to completed building and subdivision permit applications and executed development agreements that were submitted before July 1, 2015 that have not started construction by June 30, 2020. The vesting rights statutes provide that certain land development projects must be processed under the land use or development regulations in effect at the time the completed building or land division application is submitted or the effective date of the development agreement regardless of when construction starts. Therefore, there is a direct conflict between the condition and the statutory provisions because condition S5.C.5.a.iii requires imposition of new regulations on those applications and agreements that had development rights vested before the new regulations were adopted.

The proper remedy is to reverse the Board’s order and remand to the Board to direct Ecology to revise condition S5.C.5.a.iii to specify that the 2013-2018 Permit applies only to those completed applications submitted after permittees adopted the new Permit requirements. *See Puget Soundkeeper Alliance v. State*, 189 Wn. App. 127, 131, 152, 356 P.3d 753 (2015) (reversing Board order and remanding to Ecology to revise permit condition).

D. FEDERAL PREEMPTION

Ecology argues that even if Washington’s vested right doctrine applies to the 2013-2018 Permit’s required regulations, the federal CWA preempts that doctrine. Ecology contends that preemption applies here because the application of the vested rights doctrine to the 2013-2018

Permit requirements would prevent accomplishing the purposes and objectives of Congress. We disagree and hold that the CWA does not preempt Washington's vested rights doctrine.

1. Legal Principles

The Supremacy Clause of the United States Constitution gives the federal government the power to preempt state law. *Hillman v. Maretta*, ___ U.S. ___, 133 S. Ct. 1943, 1949, 186 L. Ed. 2d 43 (2013). "Conflict preemption" occurs when (1) federal and state laws conflict, making compliance with both an impossibility, or (2) state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 1950 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S. Ct. 399, 85 L. Ed. 581 (1941)). "[S]tate laws are not superseded by congressional legislation unless that is the clear and manifest purpose of Congress." *McKee v. AT&T Corp.*, 164 Wn.2d 372, 387, 191 P.3d 845 (2008). Courts should not seek out conflict where none actually exists. *Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483, 499 (9th Cir. 1984).

Significantly, there is a strong presumption against preemption under Washington law. *Nw. Wholesale, Inc. v. Pac Organic Fruit, LLC*, 184 Wn.2d 176, 184, 357 P.3d 650 *pet. for cert. filed sub nom. Ostenson v. Holzman*, No. 15-763 (U.S. Dec. 9, 2015). "Preemption is the exception, not the rule in Washington." *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 864, 93 P.3d 108 (2004).

We review federal preemption issues de novo. *Wal-Mart Stores, Inc. v. United Food & Commercial Workers Int'l Union*, 190 Wn. App. 14, 21, 354 P.3d 31 (2015).

2. No Direct Conflict Between State and Federal Law

Washington's vested rights doctrine does not *directly* conflict with the CWA. The CWA does not provide that state agencies must require local municipalities to enact certain stormwater regulations applicable to land development. Instead, Congress has delegated implementation of general pollution control guidelines to the states. As a result, the requirements of condition S5.C.5.a.iii reflect Ecology's interpretive choices meant to effectuate a framework of federal and state environmental guidelines. Further, there is no counterpart to condition S5.C.5.a.iii in the CWA. And nothing in the CWA requires that stormwater regulations be applied within a set deadline. Accordingly, we hold that the CWA does not directly conflict with Washington's vested rights doctrine.

3. Obstacle to Congressional Objectives

Ecology argues that the second prong of conflict preemption applies here. To determine whether this prong applies, we must determine the purposes and objectives of Congress that are embodied in the CWA and determine whether the vested rights doctrine stands as an obstacle to the accomplishment of those objectives. *Beatty v. Fish & Wildlife Comm'n*, 185 Wn. App. 426, 454, *review denied*, 183 Wn.2d 1004 (2015). "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*, 164 Wn.2d at 388.

a. Objective of CWA

The CWA is a comprehensive water quality statute with the stated goal of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters" and achieving or maintaining "water quality which provides for the protection and propagation of

fish, shellfish, and wildlife.” 33 U.S.C. §1251(a)(2). Under the statute, the administrator of EPA is charged with the responsibility of “establish[ing] and enforc[ing] technology-based limitations on individual discharges into the country’s navigable waters from point sources.” *PUD No. 1 of Jefferson County v. Wash. Dep’t of Ecology*, 511 U.S. 700, 704, 114 S. Ct. 1900, 128 L. Ed. 2d 716 (1994) (citing 33 U.S.C. §§ 1311, 1314). The states also are required to provide water quality standards, which may be more stringent than the federal standards but cannot be less protective than the federal standards. *Jefferson County*, 511 U.S. at 705; 33 U.S.C. § 1370.

The key provision of the CWA regarding stormwater pollution is 33 U.S.C. § 1342(p)(3)(B)(iii), which states that permits issued for discharges from municipal storm sewers “shall require controls to reduce the discharge of pollutants to the maximum extent practicable.” Ecology argues that the stormwater requirements in the 2013-2018 Permit will reduce the discharge of pollutants to the maximum extent practicable, and therefore allowing the vested rights doctrine to prevent application of these requirements to certain developments would be an obstacle to the accomplishment of the objectives of 33 U.S.C. § 1342(p)(3)(B)(iii).

However, 33 U.S.C. § 1342(p)(3)(B)(iii) does not require controls to reduce the discharge of pollutants to the maximum extent *possible*. Congress used the word “practicable.” 33 U.S.C. § 1342(p)(3)(B)(iii). This language necessarily provides some flexibility to the states in adopting stormwater control regulations. Consistent with 33 U.S.C. § 1342(p)(3)(B)(iii), a state may legitimately determine that it is not “practicable” to impose new NPDES permit requirements on those projects with development applications that have already vested under state law.

Further, as noted above, the CWA contains no timeline for adopting controls to reduce the discharge of pollutants. The absence of any directive requiring the adoption of new

regulations within a specific timeframe necessarily provides some flexibility to the states in implementing stormwater control regulations. Ecology itself recognized this flexibility by delaying the application of the 2013-2018 Permit requirements until 2020 for development applications filed before July 1, 2015. Ecology does not suggest that this five year delay violates 33 U.S.C. § 1342(p)(3)(B)(iii) or interferes with Congressional objectives. If delaying the application of 2013-2018 Permit requirements until 2020 for some developments is acceptable under federal law, we cannot agree that delaying the application of 2013-2018 Permit requirements for a few more years in the present context to fully protect vested development rights interferes with Congressional objectives.

b. Method Chosen by Congress

In enacting the CWA, Congress chose not to adopt rigid requirements for the immediate elimination of the discharge of pollutants to stormwater collection systems. Instead, Congress developed the NPDES permit program to gradually reduce such discharges. This choice suggests that some delay in the implementation of NPDES permit requirements would not necessarily prevent the accomplishment of Congress's broad purposes and objectives. As the United States Supreme Court noted, "[b]y establishing a permit system for effluent discharges, Congress implicitly has recognized that the goal of the CWA – elimination of water pollution – cannot be achieved immediately." *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494, 107 S. Ct. 805, 93 L. Ed. 2d 883 (1987).

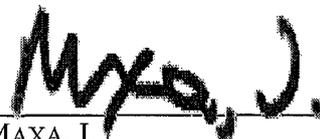
Further, Congress did not retain control over the specific terms of NPDES permits. Instead, Congress provided EPA with the authority to delegate the NPDES permit program to approved state agencies, with the requirement that state standards not fall below federal

No. 46378-4-II

standards. 33 U.S.C. § 1370. This delegation suggests that Congress intended that the implementation of CWA objectives would occur within the framework of state law, not that it intended to preempt state law. Although the application of Washington's vested rights doctrine may delay the application of Ecology's current permit requirements for a limited number of developments, the doctrine itself does not prevent the accomplishment of Congress's broad purposes and objectives.

Given the strong presumption against preemption under Washington law, we hold that that the CWA does not preempt Washington's statutory vested rights doctrine.

We reverse the Board's order and remand to the Board to direct Ecology to revise condition S5.C.5.a.iii in the 2013-2018 Phase I Municipal Stormwater Permit to specify that the 2013-2018 Permit applies only to those completed applications submitted after July 1, 2015.



MAXA, J.

I concur:



LEE, J.

BJORGEN, J. (dissenting) — The application of the vested rights doctrine proposed by Snohomish County, King County, and the Building Industry Association of Clark County (collectively appellants), in my view, is both preempted by federal law and in conflict with governing state law. Therefore, I would affirm the decision of the Pollution Control Hearings Board (Board).

I. FEDERAL PREEMPTION

The issue in this appeal is whether the state vested rights doctrine excuses a specific class of applicants from compliance with new storm water regulations adopted by local governments to implement the 2013-2018 Phase I Municipal Storm Water NPDES¹¹ permit (2013-2018 Permit). The class at issue comprises those who filed a complete development application before July 1, 2015, but who will not have started construction by June 30, 2020. The 2013-2018 Permit and the Board's ruling upholding it deems them subject to the new regulations. The appellants urge that the state's vested rights doctrine shields those applicants from the reach of the new regulations.

The pulse of the federal Clean Water Act (CWA) is set by 33 U.S.C. 1311(a), which bans the discharge of any pollutant from a point source into the nation's navigable waters, unless within applicable standards and subject to a permit. *See also* 33 U.S.C. 1312, 1316-17, 1328, 1342, 1344. The principal permit under the CWA is the NPDES permit. The federal government has delegated the authority to issue NPDES permits in Washington to the state Department of Ecology (Ecology). *See* RCW 90.48.260.

¹¹ National Pollutant Discharge Elimination System.

Of the various types of discharges,

[s]tormwater runoff is one of the most significant sources of water pollution in the nation, at times comparable to, if not greater than, contamination from industrial and sewage sources. Storm sewer waters carry suspended metals, sediments, algae-promoting nutrients (nitrogen and phosphorus), floatable trash, used motor oil, raw sewage, pesticides, and other toxic contaminants into streams, rivers, lakes, and estuaries across the United States. . . . Urban runoff has been named as the foremost cause of impairment of surveyed ocean waters.

Envtl. Def. Ctr., Inc. v. United States Env'tl. Prot. Agency, 344 F.3d 832, 840-41 (9th Cir. 2003)

(footnotes and internal quotation marks omitted). To implement CWA requirements, Ecology issued the 2013-2018 Permit authorizing discharges from large and medium municipal storm water systems, subject to standards and conditions. Of those, Condition S5.C.5 imposes new requirements on specified land development, including source control, flow control, and treatment, among others. Under this condition, local governments covered by the 2013-2018 Permit must adopt plans and regulations imposing these requirements on development proposals by June 30, 2015. At the heart of this appeal, Condition S5.C.5.a.iii states that these plans and regulations shall apply to all applications submitted after June 30, 2015 “and shall apply to applications submitted no later than June 30, 2015, which have not started construction by June 30, 2020.”

Subject to the intricacies and exceptions unpacked by the case law, vesting

refers generally to the notion that a land use application, under the proper conditions, will be considered only under the land use statutes and ordinances in effect at the time of the application's submission.

Noble Manor Co. v. Pierce County, 133 Wn.2d 269, 275, 943 P.2d 1378 (1997). As noted, the 2013-2018 Permit required local governments to adopt new storm water regulations by June 30, 2015. With that, appellants argue, the Permit violates the vested rights doctrine, since Condition

S5.C.5.a.iii imposed those new regulations on applications submitted *before* that date, as long as construction will not have started by June 30, 2020. Whether the appellants are correct in this, however, need not detain the analysis, since relieving this class of applicants from compliance with the new regulations is preempted by the CWA.

State law is preempted “to the extent of any conflict with a federal statute.” *Hillman v. Maretta*, ___ U.S. ___, 133 S. Ct. 1943, 1949-50, 186 L. Ed. 2d 43 (2013) (quoting *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372, 120 S. Ct. 2288, 147 L. Ed. 2d 352 (2000)). Conflict preemption occurs “when compliance with both federal and state regulations is impossible . . . or when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Hillman*, 133 S. Ct. at 1950 (internal citations omitted) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S. Ct. 399, 85 L. Ed. 2d 581 (1941)).

The objective of the CWA is to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters” and to achieve or maintain “water quality which provides for the protection and propagation of fish, shellfish, and wildlife.” 33 U.S.C. § 1251(a); *Pub. Util. Dist. No. 1 of Jefferson County v. Washington Dep’t of Ecology*, 511 U.S. 700, 704, 114 S. Ct. 1900, 128 L. Ed. 2d 716 (1994). To serve this goal, the CWA broadly prohibits “the discharge of any pollutant by any person,” except as authorized by enumerated statutory provisions. 33 U.S.C. § 1311(a); *Puget Soundkeeper Alliance v. State, Pollution Control Hr’gs Bd.*, 189 Wn. App. 127, ¶18, 356 P.3d 753 (2015). More specifically, the CWA mandates that permits for discharges from municipal storm sewers require controls to reduce the discharge of pollutants to “the maximum extent practicable.” 33 U.S.C. § 1342(p)(3)(B).

State agencies may not issue NPDES permits

[w]hen the conditions of the permit do not provide for compliance with the applicable requirements of CWA, or regulations promulgated under CWA; . . . [or w]hen the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States.

40 C.F.R. § 122.4(a), (d) (alteration in original). Washington law makes clear that these requirements apply to each discharge: WAC 173-220-150(1)(c) provides that “each issued [NPDES] permit shall require that . . . [a]ny discharge of any pollutant . . . at a level in excess of that identified and authorized by the permit shall constitute a violation of the terms and conditions of the permit.” *Puget Soundkeeper*, 189 Wn. App. at ¶ 20.

The appellants do not argue that the specific standards of the 2013-2018 Permit are not strict enough to serve the CWA’s purposes. Therefore, they do not dispute that the 2013-2018 Permit is a method of achieving the “maximum extent practicable” standard of 33 U.S.C. § 1342(p)(3)(B). Similarly, the Board concluded in its findings of fact, conclusions of law and order, dated March 21, 2014 (2014 decision), that the 2013-2018 Permit’s low-impact development requirements, including those covering permeable pavement, bioretention, and the phasing of watershed basin planning “constitute . . . MEP,” which is the abbreviation for “maximum extent practicable.” Clerk’s Papers at 248.

Against this background, one must conclude that the permit’s standards are reasonably necessary to reduce the discharge of pollutants to “the maximum extent practicable,” as required by federal law. Among those standards is the one at issue here: that the Permit’s substantive requirements apply to projects for which applications were filed before July 1, 2013, but which will not have commenced construction by June 30, 2020. Similarly, one must conclude that this

temporal choice of law provision is also reasonably necessary to meet the “maximum extent practicable” standard of 33 U.S.C. § 1342(p)(3)(B).

The state’s vested rights doctrine would directly obstruct these federal purposes. Under the permit, projects with applications submitted before July 1, 2015 and which did not commence construction by 2020 would be subject to the standards of the 2013-2018 Permit. Under the vested rights doctrine as expounded by appellants, projects within this window would escape those standards. Thus, the proposed application of the doctrine would result in greater discharge of pollutants into receiving waters and consequent greater compromise to the purity of those waters. While the CWA may not require choosing the least polluting of all conceivable alternatives in every situation, it does require that permits for municipal storm sewers reduce the discharge of pollutants to “the maximum extent practicable.” 33 U.S.C. § 1342(p)(3)(B). Applying the vested rights doctrine as appellants urge would frustrate the achievement of that standard, since, as shown above, subjecting projects within this window to the specific controls of the 2013-2018 Permit is a part of the Permit’s reduction of polluting discharges to the maximum extent practicable.

The United States Congress recognized that the goals of the CWA cannot be achieved immediately, setting in 33 U.S.C 1251(a)(1) the goal that the discharge of pollutants into the navigable waters be eliminated by 1985. Thirty years have now passed since the 1985 deadline. To use the flexibility shown by that deadline as a license for further delay thirty years after its expiration is to risk passage into the absurd. Because application of the vested rights doctrine would frustrate accomplishment of the federal purposes, it is preempted under *Hillman*, 133 S. Ct. at 1950.

II. CONFLICT WITH STATE LAW

The policy of the water pollution control statute at chapter 90.48 RCW is “to maintain the highest possible standards to insure the purity of all waters . . . and to that end require the use of all known, available and reasonable methods by industries and others to prevent and control the pollution of the waters of the state of Washington.” RCW 90.48.010. Similarly, RCW 90.54.020(3)(b) states:

Regardless of the quality of the waters of the state, all wastes and other materials and substances proposed for entry into said waters shall be provided with all known, available, and reasonable methods of treatment prior to entry . . . wastes and other materials and substances shall not be allowed to enter such waters which will reduce the existing quality thereof, except in those situations where it is clear that overriding considerations of the public interest will be served.

These designs are also reflected in the state anti-degradation policy to “[r]estore and maintain the highest possible quality of the surface waters of Washington” and to “[e]nsure that all human activities that are likely to contribute to a lowering of water quality, at a minimum, apply all known, available, and reasonable methods of prevention, control, and treatment (AKART).” WAC 173-201A-300(2)(a), (d).

Conclusions 10, 17 and 43 of the Board’s 2014 decision determined that the 2013-2018 Permit’s low-impact development requirements, including those covering permeable pavement, bioretention, and the phasing of watershed basin planning “constitute AKART.” The 2013-2018 Permit thus would require AKART of projects with applications submitted before July 1, 2015, and which did not commence construction by June 30, 2020. The theory of the vested rights doctrine urged by appellants would relieve that class of projects from the duty to provide AKART. Thus, this application of the vested rights doctrine would conflict with RCW

No. 46378-4-II

90.48.010, RCW 90.54.020(3)(b), and WAC 173-201A-300 (2). The proper resolution of that conflict depends on the source of the vested rights doctrine.

In *West Main Associates v. City of Bellevue*, 106 Wn.2d 47, 51, 720 P.2d 782 (1986), our Supreme Court struck down Bellevue's local vesting ordinance, because it did not meet the due process standards of the Fourteenth Amendment. *West Main*, 106 Wn.2d at 52. The ordinance provided that rights would vest only upon filing a building permit application, but prohibited the filing of such an application until up to eight other permits or reviews had been approved. *Id.* at 49. The ordinance further barred filing a building permit application until any appeal of four of these other approvals had been resolved. *Id.* Not surprisingly, the court found this artifice to be unconstitutional. The court, however, did not hold that the state's general vesting rule, that projects are subject to the law in effect when a complete application is filed, is compelled by either the state or federal constitution. To do so would have approached the extremity of implying that the reliance-based vesting rule current in the great majority of states was unconstitutional. More recently, our Supreme Court held in *Town of Woodway v. Snohomish County*, 180 Wn.2d 165, 173, 322 P.3d 1219, *remanded*, 2014 WL 6968436 (May 2014), that "[w]hile it originated at common law, the vested rights doctrine is now statutory." *Accord*, *Potala Vill. Kirkland, LLC v. City of Kirkland*, 183 Wn. App. 191, 202, 334 P.3d 1143 (2014), *review denied*, 182 Wn.2d 1004 (2015). Although arbitrarily fluctuating governmental standards may scant the degree of fairness required by the constitution, our minority vesting doctrine is not constitutionally required medicine for that problem.

For these reasons, the conflict between the appellants' view of the vested rights doctrine and state water quality law must be analysed as a conflict between two statutes. When faced

with apparently conflicting statutes, we employ a two-step process. *See Gorman v. Garlock, Inc.*, 155 Wn.2d 198, 210, 118 P.3d 311 (2005). First, we examine whether the statutes can be harmonized and effect given to both. *City of Lakewood v. Pierce County*, 106 Wn. App. 63, 71, 23 P.3d 1 (2001). Then, if the statutes truly conflict and cannot be reconciled, we give preference to a more specific or more recently enacted statute. *Tunstall ex rel. Tunstall v. Bergeson*, 141 Wn.2d 201, 211, 5 P.3d 691 (2000).

Turning to the first step, the conflict between the two positions seems beyond the reach of harmonization: one would exempt a certain class of projects from the new standards and one would not. Chronology likewise is of little help. On one hand, the antecedents of RCW 90.48.010 go back to 1945, although its modern form was enacted in the early 1970s. Chapter 90.54 RCW was enacted in 1971. The lineage of WAC 173-201A-300 is more recent. *See* WSR 03-14-129. On the other hand, the two principal vesting statutes, RCW 19.27.095 (building permits) and RCW 58.17.033 (preliminary subdivision approval), were each enacted in 1987.

A better window into legislative intent lies in the nature of the competing statutes. The vested rights doctrine is a general rule covering all development within its scope, without specific regard to the effects or interests at stake. RCW 90.48.010 and WAC 173-201A-300, in contrast, are aimed at protecting a specific resource, the waters of the state, from a specific threat, pollution. Chapter 90.54 RCW is of similarly focused scope, directed at ensuring the proper utilization of the state's water resources. RCW 90.54.010. These measures were enacted pursuant to legislative recognition of the value of the resource and the presence of the threat. RCW 90.48.010; RCW 90.54.010. The narrowed circumference of both focus and purpose in

the water quality measures suggests that within those bounds the more general vesting doctrine must give way.

This conclusion flows also from our Supreme Court's view of the purpose of the vested rights doctrine. In *West Main* the court held that the purpose of the vesting doctrine is to allow developers to determine, or "fix," the rules that will govern development. 106 Wn. 2d at 51. The court then took a more nuanced view in *Erickson & Associates, Inc. v. McLerran*, 123 Wn.2d 864, 873-74, 872 P.2d 1090 (1994), recognizing that

[t]he practical effect of recognizing a vested right is to sanction the creation of a new nonconforming use. A proposed development which does not conform to newly adopted laws is, by definition, inimical to the public interest embodied in those laws. If a vested right is too easily granted, the public interest is subverted.

To use the vested rights doctrine to exempt from compliance those who filed before July 1, 2015, but who still have not begun construction over five years later, is to engage in the sort of subversion of the public interest against which *Erickson* warned. Reversing the defilement of our public waters stands high in any ranking of public interest. On the other hand, the public interest in allowing applicants to proceed under the standards current when they applied declines with time, as those standards become more obsolete and the excuses for inaction become weaker. Perhaps more to the point, the 2013-2018 Permit was adopted in 2012, effective in 2013. Thus, there can be little surprise in applying the permit's standards to those applying before July 1, 2015.

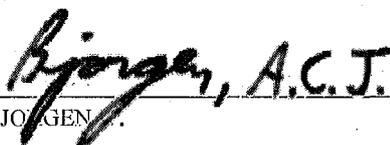
The purposes of the vested rights doctrine and our clean water laws are not in equipoise. The scrutiny of those purposes, as well as the specific nature of the latter, shows that protection of the state's waters must prevail in its conflict with the vested rights doctrine. By relieving a

No. 46378-4-II

class of projects from the duty to provide AKART, the vested rights doctrine would conflict with RCW 90.48.010, RCW 90.54.020(3)(b), and WAC 173-201A-300 (2). In resolving that conflict, these statutes have the last word.

III. CONCLUSION

For the reasons set out above, I would affirm the order of the Board.¹²



BJORGEN

¹² This opinion does not examine whether the vested rights doctrine would apply in these circumstances in the absence of federal preemption or conflict with state statutes.

**FEDERAL LAW CONSTITUTIONAL PROVISIONS AND
STATUTES**

U.S. Constitution, Article VI

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

33 U.S.C. § 1251(a)

(a) Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objectiveThe objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter—

- (1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;
- (2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;
- (3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;
- (4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;
- (5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State;
- (6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans; and

(7) it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this chapter to be met through the control of both point and nonpoint sources of pollution.

33 U.S.C. § 1311(a)

(a) Illegality of pollutant discharges except in compliance with law
Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful

33 U.S.C. § 1342(p) (CWA § 402(p))

(p) Municipal and industrial stormwater discharges

(1) General rule

Prior to October 1, 1994, the Administrator or the State (in the case of a permit program approved under this section) shall not require a permit under this section for discharges composed entirely of stormwater.

(2) Exceptions

Paragraph (1) shall not apply with respect to the following stormwater discharges:

(A) A discharge with respect to which a permit has been issued under this section before February 4, 1987. (B) A discharge associated with industrial activity. (C) A discharge from a municipal separate storm sewer system serving a population of 250,000 or more. (D) A discharge from a municipal separate storm sewer system serving a population of 100,000 or more but less than 250,000. (E) A discharge for which the Administrator or the State, as the case may be, determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

(3) Permit requirements

(A) Industrial discharges: Permits for discharges associated with industrial activity shall meet all applicable provisions of this section and section 1311 of this title. (B) Municipal discharge Permits for discharges from municipal storm sewers—

(i) may be issued on a system- or jurisdiction-wide basis;

(ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and

(iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.

(4) Permit application requirements

(A) Industrial and large municipal discharges: Not later than 2 years after February 4, 1987, the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraphs (2)(B) and (2)(C). Applications for permits for such discharges shall be filed no later than 3 years after February 4, 1987. Not later than 4 years after February 4, 1987, the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

(B) Other municipal discharges: Not later than 4 years after February 4, 1987, the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraph (2)(D). Applications for permits for such discharges shall be filed no later than 5 years after February 4, 1987. Not later than 6 years after February 4, 1987, the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

(5) Studies: The Administrator, in consultation with the States, shall conduct a study for the purposes of—

(A) identifying those stormwater discharges or classes of stormwater discharges for which permits are not required pursuant to paragraphs (1) and (2) of this subsection;

(B) determining, to the maximum extent practicable, the nature and extent of pollutants in such discharges; and

(C) establishing procedures and methods to control stormwater discharges to the extent necessary to mitigate impacts on water quality.

Not later than October 1, 1988, the Administrator shall submit to Congress a report on the results of the study described in subparagraphs (A) and (B). Not later than October 1, 1989, the Administrator shall submit to Congress a report on the results of the study described in subparagraph (C).

(6) Regulations

Not later than October 1, 1993, the Administrator, in consultation with State and local officials, shall issue regulations (based on the results of the studies conducted under paragraph (5)) which designate stormwater discharges, other than those discharges described in paragraph (2), to be regulated to protect water quality and shall establish a comprehensive program to regulate such designated sources. The program shall, at a minimum, (A) establish priorities, (B) establish requirements for State stormwater management programs, and (C) establish expeditious deadlines. The program may include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate.

33 U.S.C. § 1370

Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this chapter, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

STATE STATUTES

RCW 19.27.095

Building permit application—Consideration—Requirements.

(1) A valid and fully complete building permit application for a structure, that is permitted under the zoning or other land use control ordinances in effect on the date of the application shall be considered under the building permit ordinance in effect at the time of application, and the zoning or other land use control ordinances in effect on the date of application.

(2) The requirements for a fully completed application shall be defined by local ordinance but for any construction project costing more than five thousand dollars the application shall include, at a minimum:

(a) The legal description, or the tax parcel number assigned pursuant to RCW 84.40.160, and the street address if available, and may include any other identification of the construction site by the prime contractor;

(b) The property owner's name, address, and phone number;

(c) The prime contractor's business name, address, phone number, current state contractor registration number; and

(d) Either:

(i) The name, address, and phone number of the office of the lender administering the interim construction financing, if any; or

(ii) The name and address of the firm that has issued a payment bond, if any, on behalf of the prime contractor for the protection of the owner, if the bond is for an amount not less than fifty percent of the total amount of the construction project.

(3) The information required on the building permit application by subsection (2)(a) through (d) of this section shall be set forth on the building permit document which is issued to the owner, and on the inspection record card which shall be posted at the construction site.

(4) The information required by subsection (2) of this section and information supplied by the applicant after the permit is issued under subsection (5) of this section shall be kept on record in the office where building permits are issued and made available to any person on request. If a copy is requested, a reasonable charge may be made.

(5) If any of the information required by subsection (2)(d) of this section is not available at the time the application is submitted, the applicant shall so state and the application shall be processed forthwith and the permit issued as if the information had been supplied, and the lack of the information shall not cause the application to be deemed incomplete for the purposes of vesting under subsection (1) of this section. However, the applicant shall provide the remaining information as soon as the applicant can reasonably obtain such information.

(6) The limitations imposed by this section shall not restrict conditions imposed under chapter 43.21C RCW.

RCW 58.17.033

Proposed division of land—Consideration of application for preliminary plat or short plat approval—Requirements defined by local ordinance.

(1) A proposed division of land, as defined in RCW 58.17.020, shall be considered under the subdivision or short subdivision ordinance, and zoning or other land use control ordinances, in effect on the land at the time a fully completed application for preliminary plat approval of the subdivision, or short plat approval of the short subdivision, has been submitted to the appropriate county, city, or town official.

(2) The requirements for a fully completed application shall be defined by local ordinance.

(3) The limitations imposed by this section shall not restrict conditions imposed under chapter 43.21C RCW.

RCW 90.48.010

Policy enunciated.

It is declared to be the public policy of the state of Washington to maintain the highest possible standards to insure the purity of all waters of the state consistent with public health and public enjoyment thereof, the propagation and protection of wild life, birds, game, fish and other aquatic life, and the industrial development of the state, and to that end require the use of all known available and reasonable methods by industries and others to prevent and control the pollution of the waters of the state of Washington. Consistent with this policy, the state of Washington will exercise its powers, as fully and as effectively as possible, to retain and secure high quality for all waters of the state. The state of Washington in recognition of the federal government's interest in the quality of the navigable waters of the United States, of which certain portions thereof are within the jurisdictional limits of this state, proclaims a public policy of working cooperatively with the federal government in a joint effort to extinguish the sources of water quality degradation, while at the same time preserving and vigorously exercising state powers to insure that present and future standards of water quality within the state shall be determined by the citizenry, through and by the efforts of state government, of the state of Washington.

RCW 90.48.260

Federal clean water act—Department designated as state agency, authority—Delegation of authority—Powers, duties, and functions.

(1) The department of ecology is hereby designated as the state water pollution control agency for all purposes of the federal clean water act as it exists on February 4, 1987, and is hereby authorized to participate fully in the programs of the act as well as to take all action necessary to secure to the state the benefits and to meet the requirements of that act. With regard to the national estuary program established by section 320 of that act, the department shall exercise its responsibility jointly with the Puget Sound partnership, created in RCW 90.71.210. The department of ecology may delegate its authority under this chapter, including its national pollutant discharge elimination permit system authority and duties regarding animal feeding operations and concentrated animal feeding operations, to the department of agriculture through a memorandum of understanding. Until

any such delegation receives federal approval, the department of agriculture's adoption or issuance of animal feeding operation and concentrated animal feeding operation rules, permits, programs, and directives pertaining to water quality shall be accomplished after reaching agreement with the director of the department of ecology. Adoption or issuance and implementation shall be accomplished so that compliance with such animal feeding operation and concentrated animal feeding operation rules, permits, programs, and directives will achieve compliance with all federal and state water pollution control laws. The powers granted herein include, among others, and notwithstanding any other provisions of this chapter or otherwise, the following:

(a) Complete authority to establish and administer a comprehensive state point source waste discharge or pollution discharge elimination permit program which will enable the department to qualify for full participation in any national waste discharge or pollution discharge elimination permit system and will allow the department to be the sole agency issuing permits required by such national system operating in the state of Washington subject to the provisions of RCW 90.48.262(2). Program elements authorized herein may include, but are not limited to: (i) Effluent treatment and limitation requirements together with timing requirements related thereto; (ii) applicable receiving water quality standards requirements; (iii) requirements of standards of performance for new sources; (iv) pretreatment requirements; (v) termination and modification of permits for cause; (vi) requirements for public notices and opportunities for public hearings; (vii) appropriate relationships with the secretary of the army in the administration of his or her responsibilities which relate to anchorage and navigation, with the administrator of the environmental protection agency in the performance of his or her duties, and with other governmental officials under the federal clean water act; (viii) requirements for inspection, monitoring, entry, and reporting; (ix) enforcement of the program through penalties, emergency powers, and criminal sanctions; (x) a continuing planning process; and (xi) user charges.

(b) The power to establish and administer state programs in a manner which will ensure the procurement of moneys, whether in the form of grants, loans, or otherwise; to assist in the construction, operation, and maintenance of various water pollution control facilities and works; and the administering of various state water pollution control management, regulatory, and enforcement programs.

(c) The power to develop and implement appropriate programs pertaining to continuing planning processes, area-wide waste treatment management plans, and basin planning.

(2) The governor shall have authority to perform those actions required of him or her by the federal clean water act.

(3) By July 31, 2012, the department shall:

(a) Reissue without modification and for a term of one year any national pollutant discharge elimination system municipal storm water general permit applicable to western Washington municipalities first issued on January 17, 2007; and

(b) Issue an updated national pollutant discharge elimination system municipal storm water general permit applicable to western Washington municipalities for any permit first issued on January 17, 2007. An updated permit issued under this subsection shall become effective beginning August 1, 2013.

(i) Provisions of the updated permit issued under (b) of this subsection relating to new requirements for low-impact development and review and revision of local development codes, rules, standards, or other enforceable documents to incorporate low-impact development principles must be implemented simultaneously. These requirements may go into effect no earlier than December 31, 2016, or the time of the scheduled update under RCW 36.70A.130(5), as existing on July 10, 2012, whichever is later.

(ii) Provisions of the updated permit issued under (b) of this subsection related to increased catch basin inspection and illicit discharge detection frequencies and application of new storm water controls to projects smaller than one acre may go into effect no earlier than December 31, 2016, or the time of the scheduled update under RCW 36.70A.130(5), as existing on July 10, 2012, whichever is later.

(4) By July 31, 2012, the department shall:

(a) Reissue without modification and for a term of two years any national pollutant discharge elimination system municipal storm water general permit applicable to eastern Washington municipalities first issued on January 17, 2007; and

(b) Issue an updated national pollutant discharge elimination system municipal storm water general permit for any permit first issued on January 17, 2007, applicable to eastern Washington municipalities. An updated permit issued under this subsection becomes effective August 1, 2014.

RCW 90.54.020

General declaration of fundamentals for utilization and management of waters of the state.

Utilization and management of the waters of the state shall be guided by the following general declaration of fundamentals:

(1) Uses of water for domestic, stock watering, industrial, commercial, agricultural, irrigation, hydroelectric power production, mining, fish and wildlife maintenance and enhancement, recreational, and thermal power production purposes, and preservation of environmental and aesthetic values, and all other uses compatible with the enjoyment of the public waters of the state, are declared to be beneficial.

(2) Allocation of waters among potential uses and users shall be based generally on the securing of the maximum net benefits for the people of the state. Maximum net benefits shall constitute total benefits less costs including opportunities lost.

(3) The quality of the natural environment shall be protected and, where possible, enhanced as follows:

(a) Perennial rivers and streams of the state shall be retained with base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values. Lakes and ponds shall be retained substantially in their natural condition. Withdrawals of water which would conflict therewith shall be authorized only in those situations where it is clear that overriding considerations of the public interest will be served.

(b) Waters of the state shall be of high quality. Regardless of the quality of the waters of the state, all wastes and other materials and substances proposed for entry into said waters shall be provided with all known, available, and reasonable methods of treatment prior to entry.

Notwithstanding that standards of quality established for the waters of the state would not be violated, wastes and other materials and substances shall not be allowed to enter such waters which will reduce the existing quality thereof, except in those situations where it is clear that overriding considerations of the public interest will be served. Technology-based effluent limitations or standards for discharges for municipal water treatment plants located on the Chehalis, Columbia, Cowlitz, Lewis, or Skagit river shall be adjusted to reflect credit for substances removed from the plant intake water if:

(i) The municipality demonstrates that the intake water is drawn from the same body of water into which the discharge is made; and

(ii) The municipality demonstrates that no violation of receiving water quality standards or appreciable environmental degradation will result.

(4) The development of multipurpose water storage facilities shall be a high priority for programs of water allocation, planning, management, and efficiency. The department, other state agencies, local governments, and planning units formed under *section 107 or 108 of this act shall evaluate the potential for the development of new storage projects and the benefits and effects of storage in reducing damage to stream banks and property, increasing the use of land, providing water for municipal, industrial, agricultural, power generation, and other beneficial uses, and improving streamflow regimes for fisheries and other instream uses.

(5) Adequate and safe supplies of water shall be preserved and protected in potable condition to satisfy human domestic needs.

(6) Multiple-purpose impoundment structures are to be preferred over single-purpose structures. Due regard shall be given to means and methods for protection of fishery resources in the planning for and construction of water impoundment structures and other artificial obstructions.

(7) Federal, state, and local governments, individuals, corporations, groups and other entities shall be encouraged to carry out practices of conservation as they relate to the use of the waters of the state. In addition to traditional development approaches, improved water use efficiency, conservation, and use of reclaimed water shall be emphasized in the management of the state's water resources and in some cases will be a potential new source of water with which to meet future needs throughout

the state. Use of reclaimed water shall be encouraged through state and local planning and programs with incentives for state financial assistance recognizing programs and plans that encourage the use of conservation and reclaimed water use, and state agencies shall continue to review and reduce regulatory barriers and streamline permitting for the use of reclaimed water where appropriate.

(8) Development of water supply systems, whether publicly or privately owned, which provide water to the public generally in regional areas within the state shall be encouraged. Development of water supply systems for multiple domestic use which will not serve the public generally shall be discouraged where water supplies are available from water systems serving the public.

(9) Full recognition shall be given in the administration of water allocation and use programs to the natural interrelationships of surface and groundwaters.

(10) Expressions of the public interest will be sought at all stages of water planning and allocation discussions.

(11) Water management programs, including but not limited to, water quality, flood control, drainage, erosion control and storm runoff are deemed to be in the public interest.

RCW 90.71.210

Puget Sound partnership—Created.

An agency of state government, to be known as the Puget Sound partnership, is created to oversee the restoration of the environmental health of Puget Sound by 2020. The agency shall consist of a leadership council, an executive director, an ecosystem coordination board, and a Puget Sound science panel.

2009 WL 542494 (Wash.Pol.Control Bd.)

Pollution Control Hearings Board

State of Washington

WALT COX, APPELLANT

v.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, RESPONDENT

PCHB No. 08-077

February 26, 2009

ORDER GRANTING SUMMARY JUDGMENT

INTRODUCTION

*1 On July 29, 2008, Appellant Walt Cox, filed an appeal with the Pollution Control Hearings Board (Board), challenging an Order from the Department of Ecology (Ecology) requiring Mr. Cox to apply for coverage under the Construction Stormwater General Permit for construction activities at a site in Olympia, Washington. Attorney Richard L. Ditlevson represents the Appellant. Senior Counsel Ronald L. Lavigne from the Attorney General's Office represents the Department of Ecology (Ecology).

The Pre-Hearing Order set out the legal issues presented by the parties, which control the scope and course of the appeal pursuant to WAC 371-08-435(2), as follows:

1. Is the Order under appeal precluded by the Vested Rights Doctrine?
2. Is the Respondent's determination to require coverage of this project under the Construction Stormwater Permit a result of improper internal staff irregularities generated by the misrepresentations of an employee of the Respondent with a personal opposition to the subject project and, therefore, void for lack of fairness to the Appellant?
3. Is Ecology equitably estopped from requiring appellant to apply for coverage under the Construction Stormwater General Permit?
4. Does the size of appellant's construction project preclude Ecology from requiring coverage under the Construction Stormwater General Permit?
5. Was it arbitrary, capricious, or otherwise unlawful for Ecology to issue an Order on or about July 15, 2008, requiring appellant to apply for coverage under the Construction Stormwater General Permit if appellant had completed the site work necessary for achieving final plat approval prior to issuance of the Order?

Ecology has moved for summary judgment on all the issues set forth in the Pre-Hearing Order. Ecology also requests summary judgment be granted because the Appellant failed to timely respond to the Motion for Summary Judgment. The Board has considered the following submissions in ruling on this motion:

1. Ecology's Motion for Summary Judgment and Memorandum in Support Thereof.
2. Declaration of Stephanie Werkman in Support of Respondent Ecology's Motion for Summary Judgment, including Exhibits A-E.

3. Appellant's Response to Respondent's Motion for Summary Judgment.
4. Affidavit of Appellant, Walt Cox, in Opposition to Respondent's Motion for Summary Judgment, including Exhibits A-L.
5. Respondent Ecology's Opposition to Appellant's Untimely Response and Reply in Support of Motion for Summary Judgment.

Based on the record and pleadings filed, the Board enters the following decision.

ANALYSIS

A. Alternative Basis for Dismissal

The Board has considered the arguments presented by both parties on summary judgment, including Appellant's untimely response to the Motion for Summary Judgment, which includes the affidavit of Mr. Cox. The Board has also considered the reasons offered by counsel for the Appellant for the late response to the motion. The Board concludes that summary judgment should be granted to Ecology and the case dismissed on alternative grounds, first on the merits of the motion before us, and alternatively, on procedural grounds. The Board does so in the interests of judicial economy, and because the Board reviewed the pleadings filed by both parties as it considered the procedural status of the case. Additionally, we conclude that Ecology is not prejudiced by our consideration of the merits of Appellant's response.

B. Factual Background

*2 The material facts leading to Ecology's issuance of the Order under appeal are not in dispute. By Order of July 15, 2008, Ecology required the Appellant to apply for coverage under the then effective Construction Stormwater General Permit (CSGP) and to implement all best management practices necessary to prevent the discharge of sediment and other pollutants into waters of the state at a construction site in Olympia, Washington. Ecology's Order was based on the terms of the November 16, 2005, CSGP which, for the first time, required permit coverage for those construction sites disturbing an area of one acre or more and that have or will have a discharge of stormwater to surface waters of the state or a storm sewer that drains to such surface waters. *Werkman Decl., Ex. E.* Mr. Cox appealed this Order to the Board, contending, in part, that he was entitled to the benefit of the terms of the previous CSGP, which set a five acre threshold for when a construction site must seek permit coverage. Mr. Cox contended that since his construction site soil disturbance would be less than five acres, he was not required to obtain any permit coverage from Ecology.

Mr. Cox originally proposed to develop a nine lot, large lot subdivision on a 47.25 acre parcel. The project involved grading for homes and an access road, as well as the planned ultimate construction of homes. *Werkman Decl., Ex. D.* Mr. Cox later amended the proposal to obtain approval for a six lot subdivision. *Cox Decl.* The application, which was submitted to Thurston County in October 2004, was deemed complete for purposes of project review at the County level on November 2, 2004, and the County apprised Mr. Cox of the same. *Cox Decl., Ex. C.* Thurston County issued a Mitigated Determination of Nonsignificance (MDNS) under the State Environmental Policy Act (SEPA) on October 6, 2005, and included conditions related to wetland buffers and erosion control, among others. *Cox Decl., Ex. G.* The Thurston County Hearing Examiner subsequently denied an appeal of the MDNS, and granted the application for the subdivision, subject to a large number of conditions. *Cox Decl., Ex. I.* Among these many conditions, the Hearing Examiner stated as follows: "This approval does not relieve the Applicant from compliance with all other local, state and/or federal approvals, permits, and/or laws necessary to conduct the development activity for which this permit is issued. Any additional permits and/or approvals shall be the responsibility of the Applicant." *Cox Decl., Ex. I.*

It is also undisputed that Ecology's position regarding the need for Mr. Cox to obtain coverage under the CSGP changed over the course of the several years between submission of the application to the County and construction at the site. Ecology commented

on the SEPA environmental checklist on November 2, 2004, and noted to the County that the owner of a construction site which disturbs five acres or more of total land area must apply for coverage under the NPDES and state waste discharge general permit for construction activities. *Cox Decl., Ex. F. Ecology's Reply in Support of Motion for Summary Judgment, p. 12*. This was an accurate statement under the then-effective CSGP. Subsequently, in February 2008 Ecology again provided comments to the County on the subdivision project, noting the need for the project applicant to comply with the reissued CSGP, which covered construction sites disturbing an area of one acre or more. *Werkman Decl., Ex. C*. On February 10, 2008, Ecology also sent a warning letter to the owner of the property under development, Karen Baze, setting out the terms of the 2005 CSGP that require permit coverage for construction activities that disturb one or more acres and discharge stormwater to state waters. *Werkman Decl., Ex. A*. Ecology warned the property owner that failure to apply for permit coverage and/or discharges of turbid water could result in enforcement actions, including directives or monetary penalties. *Id.* Neither Mr. Cox nor Ms. Baze applied for such permit coverage.

*3 Ecology explains that the one acre threshold requirement of the CSGP is calculated by looking at the land disturbances related to both the infrastructure improvements (such as the access road), as well as those related to the actual construction of homes. Ecology's determination that the Cox construction site is of a size sufficient to require coverage under the November 2005 CSGP is supported by a square footage calculation of site disturbance created by the access road and home construction. *Werkman Decl.* At the Cox construction site, while the land that will be disturbed by the access road alone is slightly under one acre, the total land that will be disturbed when the home construction is factored in will exceed the one acre threshold, thus triggering the requirement for permit coverage. *Werkman Decl.* Mr. Cox does not dispute this calculation, but counters that if one adds in the disturbance related to home construction, the total soil disturbance is less than five acres. *Cox Decl.* Mr. Cox's argument is a purely legal one—whether he is entitled to the benefit of the terms of the previous permit, which would not capture his development within its terms. Thus, the matter is ripe for summary judgment.

The record is also clear that at certain points an employee of Ecology, Dee Ragsdale, participated in her personal capacity to express concerns over aspects of the project approval and implementation. She appealed the MDNS and presented testimony before the County Hearings Examiner. Ms. Ragsdale and others filed complaints with Ecology over the discharge of mud and silt from the Cox construction site to nearby waters. *Cox Decl., Ex. I, p. 2, Ex. K*. Mr. Cox states in his affidavit that he believes Ms. Ragsdale's involvement wrongly influenced other Ecology employees. Ms. Werkman, the Ecology employee responsible for the enforcement action involved in this case, states that she handled matters related to this construction site unaware that Ms. Ragsdale was another Ecology employee, and at no time did Ms. Ragsdale use her position to attempt to improperly influence decisions with respect to the Cox construction site. Indeed, at the time Ecology issued the February 2008 warning letter, Ms. Werkman was unaware that Ms. Ragsdale, as a complaining party, was even an Ecology employee. *Werkman Decl., ¶ 4*. Although this is an area of dispute between the parties, Mr. Cox offers no evidence of improper communication or actions on the part of Ms. Ragsdale, and there are no material facts supporting his belief of improper influence in the development of the enforcement action against him.¹

Summary Judgment Standard

Summary judgment is a procedure available to avoid unnecessary trials on issues that cannot be factually supported and could not lead to, or result in, a favorable outcome to the opposing party. *Jacobsen v. State*, 89 Wn.2d 104, 569 P.2d 1152 (1977). The summary judgment procedure is designed to eliminate trial if only questions of law remain for resolution. Summary judgment is appropriate when the only controversy involves the meaning of statutes, and neither party contests the facts relevant to a legal determination. *Rainier Nat'l Bank v. Security State Bank*, 59 Wn. App. 161, 164, 796 P.2d 443 (1990), *review denied*, 117 Wn.2d 1004 (1991).

*4 The party moving for summary judgment must show there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Magula v. Benton Franklin Title Co., Inc.*, 131 Wn.2d 171, 182, 930 P.2d 307 (1997). A material fact in a summary judgment proceeding is one that will affect the outcome under the governing law. *Eriks v. Denver*, 118 Wn.2d 451, 456, 824 P.2d 1207 (1992). In a summary judgment, all facts and reasonable inferences must be construed

in favor of the nonmoving party. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). However, a party may not rely on speculation, or on argumentative assertions that unresolved factual issue remain, and must set forth specific facts that sufficiently rebut the contentions of a moving party and disclose the existence of a genuine issue of material fact. *Seiber v. Poulsbo Marine Ctr., Inc.*, 136 Wn. App. 731, 736, 150 P.3d 633 (2007). Conclusory statements and speculation are insufficient to defeat summary judgment. *Seiber*, 136 Wn. App. At 736-737. With these standards in mind, we turn to the issues presented by the parties on summary judgment.

C. Issues from Pre-Hearing Order:

1. Is Ecology's Order precluded by the Vested Rights Doctrine? (Issue No. 1)

Under RCW 58.17.033 (1) (referred to as the vested rights doctrine), a proposed division of land shall be considered under the subdivision or short subdivision ordinance and zoning or other land use control ordinances in effect on the land at the time of submittal of an application for preliminary plat or short plat approval. The Appellant relies on this statute and *Westside Business Park v. Pierce County*, 100 Wn. App. 599, 5 P.3d 713 (2000) in support of the argument that the requirement to apply for coverage under the CSGP is subject to the vested rights doctrine. The Appellant argues that the project vested in 2004, before the more stringent requirements of the 2005 CSGP went into effect, and therefore concludes that there is no requirement that he obtain permit coverage for the construction site. Neither the statute nor the *Westside Business Park* case is applicable to the facts of this case.

The requirement to obtain coverage under the CSGP is not a mandatory prerequisite to approval of the plat or subdivision approval, and is not an applicable zoning or other land use ordinance subject to the vested rights doctrine. Rather, coverage under the CSGP is necessary to conduct the development and engage in construction activities once the division of land or subdivision has been approved at the local level. The County Hearing Examiner specifically recognized this distinction by informing the applicant that he was not relieved from obtaining other permits necessary to conduct the development. *Cox Decl, Ex. 1, p. 34.*

The CSGP regulates the manner in which water quality impacts related to construction at a site are managed under current best management practices and regulatory standards. It is not a "zoning and other land use control ordinance" as referenced in RCW 58.17.033 because local governments are not required to review and approve (nor do they have any authority to do so) the conditions or application of the CSGP prior to approval of the subdivision or plat. Like transportation impact fees, the CSGP requirements do not limit the use of the land, nor resemble a zoning ordinance. *New Castle Invs. v. City of LaCenter*, 98 Wn. App. 224, 989 P.2d 569 (1999). The facts of the *Westside Business Park* decision differ from those presented in this case. In *Westside Business Park*, the local government could approve the subdivision only after making a finding with respect to application of the local stormwater drainage ordinance. As a result, the court concluded the ordinance exerted a "restraining or directing influence" over land use and was, therefore a land use control ordinance. *Westside Business Park*, 100 Wn. App. at 607. See RCW 58.17.060; .110(1). Application of the CSGP does not exert any restraining or directing influence over land use, but rather applies current environmental best management control practices to the land-disturbing development of the site. While compliance with the current version of the CSGP may affect the ultimate cost of development, that factor alone does not subject it to application of the vested rights doctrine. *New Castle Invs.*, 98 Wn. App. at 232.

*5 Finally, we note that the requirement to obtain coverage under the CSGP is founded on the federal Clean Water Act. Ecology administers these requirements through the National Pollution Discharge and Elimination System (NPDES) permit system and is expected to impose increasingly stringent requirements to protect and improve water quality. *Southeast Alaska Conservation Council v. U.S. Army Corps of Engineers*, 486 F.3d 638, 644 (9th Cir. 2007); *Rybachek v. E.P.A.*, 902 F.2d 1276, 1282-83 (9th Cir. 1990). The Construction Stormwater General Permit is one such NPDES permit. Under federal law (made applicable through the state administered discharge permit system), small construction sites must have a permit to cover stormwater discharges. 40 C.F.R. § 122.26(b)(15)(i). These requirements were made applicable to construction projects that disturb one or more acres of land or that are part of a common plan of development that will ultimately disturb one or more acres of land as March 10, 2003, and implemented by Ecology in the 2005 permit cycle. Appellant's vested rights theory is

directly contrary to the purposes embodied in state and federal laws to improve water quality, and would thwart the application of current and continually improving best management practices, and *increasingly stringent permit requirements* to achieve water quality goals. Summary judgment is granted to Ecology on this issue.

2. Is Ecology's Order void for a lack of fairness based on "internal staff irregularities" (Issue No. 2)

Even viewing the facts presented by the parties in a light most favorable to Appellant, the Board finds this issue wholly irrelevant to the question of whether Mr. Cox was required to obtain coverage under the CSGP and the validity of Ecology's Order to do so. Ecology's decision to require or not require permit coverage is based on the terms of the permit itself and the size of the construction site. The evidence before us demonstrates that the Cox construction site was of a size that required coverage under the 2005 CSGP. Moreover, the undisputed facts before the Board on summary judgment demonstrate that the Ecology employee working on Cox construction site matters was not improperly influenced by any other Ecology employee, nor were there any other improper actions by Ecology employees in relation to the decision to require permit coverage in this case. *See Werkman Decl.* Mr. Cox and his counsel's assertions to the contrary are pure speculation and argumentative assertions, unsupported by any evidence, and insufficient to raise a factual issue meriting denial of summary judgment to Ecology. *Seiber*, 136 Wn. App. at 736. The Board grants summary judgment to Ecology on Issue No. 2.

3. Is Ecology equitably stopped from requiring the Appellant to seek coverage under the CSGP? (Issue No. 3)

The Appellant's equitable estoppel argument is based on the undisputed fact that between 2004 and 2008 Ecology changed its position as to the permit requirements applicable to development of the Cox construction site. In 2008, Ecology informed the property owner that construction sites of one acre or larger were subject to the general permit requirements which had become effective in November 2005, modifying its earlier statements that the five acre threshold applied to the development. Appellant asserts he acted to obtain plat approval in reliance on Ecology's initial representations. He asserts he is harmed because he will "be required to publish notice of the application and subject himself to further appeals and delays of his project ..." This, he claims, is a manifest injustice.

*6 In order to prevail on an equitable estoppel basis, a party must prove five key elements, with clear, cogent and convincing evidence. *Kramarevsky v. Dep't of Soc. & Health Servs.*, 122 Wn.2d 738, 744, 863 P.2d 535 (1993). The five elements Appellant must prove are as follows:

1. A party's admission, statement or act inconsistent with its later claim;
2. Action by another party in reliance on the first party's act, statement or admission;
3. Injury that would result to the relying party from allowing the first party to contradict or repudiate the prior act, statement or admission;
4. Equitable estoppel must be necessary to prevent a manifest injustice;
5. The exercise of governmental functions must not be impaired as a result of the estoppel.

Id. at 743.

Equitable estoppel against the government is not favored. *Kramarevsky*, 122 Wn.2d at 743. When asserted against the government, equitable estoppel must be necessary to prevent a manifest injustice, and cannot impair the exercise of governmental functions. *Id.* In addition, estoppel cannot be applied when the representation allegedly relied upon is a matter of law, rather than fact. *Department of Ecology v. Theodoratus*, 135 Wn.2d 582, 599, 957 P.2d 1241 (1998).

The Board finds Mr. Cox's equitable estoppel argument to be inadequate in the face of this applicable, and difficult, legal standard. While Ecology did change regulatory permit requirements after the initial plat application, such changes were based on changes in the governing law, and Ecology's implementation of those changes. Here, the representation allegedly relied upon involved the applicability of a particular permit to the site. This is a question of law, and the equitable estoppel principal cannot be invoked in the first instance. *Ecology v. Campbell & Gwinn*, 146 Wn.2d 1, 20, 43 P.3d 4 (2002); citing *Theodaratus; Welke v. Ecology*, PCHB No. 07-013 (2007).

Even if we were to conclude that the issue of the applicability of the permit to the site does not involve a question of law, Mr. Cox offers little more than conclusory statements to support his equitable estoppel argument, and fails to raise factual questions sufficient to defeat summary judgment on this issue. His claim that he relied on Ecology's initial information that the site did not need to be covered under the earlier CSGP, is not supported with any facts to demonstrate how the application of the CSGP effectively changed his interest in, or ability to develop the site. The Appellant offers no evidence of actual injury as a result of the change in regulatory requirements. The complained of requirement "to publish notice of the application" is not an injury sufficient to merit application of equitable estoppel against the government, and the potential for further delays due to possible appeal is unsubstantiated in any manner and amounts to speculation. As Ecology points out in reply, the process for obtaining coverage under the CSGP and the related appeals processes are simple and limited. *See Ecology's Reply in Support of Motion for Summary Judgment* at p. 14. With respect to the fourth prong of the equitable estoppel argument, the Board cannot conclude that Mr. Cox has shown anything close to "manifest injustice" as a result of application of the 2005 CSGP to his construction site. He has made only the barest and most conclusory statement of the same ("[I]t cannot be seriously contended that the Respondent's actions have not created a manifest injustice."). *See Appellant's Response* at p. 9. Finally, we conclude that application of equitable estoppel would impair Ecology's efforts to ensure construction sites comply with requirements of state and federal clean water laws. The Appellant's equitable estoppel argument is insufficient on its face and fails as a matter of law. Summary judgment is granted to Ecology.

4. Does the size of the construction project preclude Ecology's Order? (Issue No. 4)

*7 Appellant's response to the summary judgment motion does not address this issue or provide any argument to the Board. Because the issue is uncontested, summary judgment is appropriately granted to Ecology. However, even viewing the facts before us in a light most favorable to the Appellant, and construing other aspects of Appellant's response as related to this issue, we still grant summary judgment to Ecology. The undisputed facts clearly indicate that the amount of land disturbed by the six to nine home subdivision, including land disturbed for access and other infrastructure will be one acre or more. *Werkman Decl.* Mr. Cox has provided no evidence to the contrary, but rather argues which version of the CSGP is applicable to his construction activities. As such, and for the reasons stated in Issue No. 1, above, Mr. Cox must seek coverage under the 2005 CSGP, and Ecology's Order is proper in this regard.

5. Is Ecology's Order arbitrary and capricious because Appellant had completed site work necessary for final plat approval? (Issue No. 5)

As with Issue No. 4, Appellant's response to the summary judgment motion does not address this issue or provide any argument to the Board. On that basis, summary judgment is appropriately granted to Ecology. However, analyzing this issue based on the whole of other arguments advanced by the Appellant, we conclude that completion of site work preliminary to final plat approval does not obviate the need to comply with those portions of the CSGP which are applicable until the site has undergone final site stabilization. Under the CSGP permit coverage is required until the site is stabilized, which will occur after the homes are constructed, even if that is at a later time. *Werkman Decl., Ex. E (Permit Condition S10.A.1)*. Such a requirement is a reasonable exercise of Ecology's permitting discretion, as the condition ensures that there is not the potential for, or actual, ongoing water quality violations at a site where land has been disturbed for construction, but further work is yet to be done. Because there has been no final site stabilization of the Cox construction site, Ecology properly issued the Order to Mr. Cox.

D. Failure to Respond to Motion for Summary Judgment

The Board held a Pre-Hearing Conference with counsel for the parties on August 20, 2008. The Board issued a Pre-Hearing Order on the same date, including deadlines and procedures for filing dispositive motions. The Order stated that dispositive motions were due by November 12, 2008, and that the responding party had 14 days from the date of receipt to respond to such a motion (in bold print). A cover letter accompanying the Order also set out the various key deadlines of the Order including the dispositive motion deadline and the time-frames for response and reply. On November 12, 2008, Ecology filed a Motion for Summary Judgment and provided a Certificate of Service of the Motion on the Respondent. Counsel for Mr. Cox, did not file a response to the Motion for Summary Judgment.

*8 On December 3, 2008, counsel for Ecology wrote the Board a letter noting the lack of response and requesting that the Board grant Ecology's uncontested Motion for Summary Judgment. A copy of the letter was provided to Mr. Ditlevson at that time. On December 9, 2008, nearly one week later, Mr. Ditlevson filed the untimely response to the Motion for Summary Judgment. Mr. Ditlevson did not contact the Board before December 9, nor request a conference with the Presiding Board Member prior to filing the late response. The Board granted Ecology until December 31, 2008, to reply, and a reply was received by the Board on that date. The Board struck the January 12-13, 2009, hearing date pending resolution of the motion.

In the late response to the Motion for Summary Judgment Mr. Ditlevson requests a modification of the motion schedule, citing WAC 371-08-450(4)(d). That rule states that "in exigent or exceptional circumstances," a party may at any time request the board to modify the motion deadlines, which are set out in the rule and mirrored in the Pre-Hearing Order. Mr. Ditlevson also argues that the response to the motion should be allowed under Civil Rule 6(b), which allows an enlargement of time upon motion where the failure to act was the result of excusable neglect. Mr. Ditlevson offers that he erroneously assumed that Ecology's Motion for Summary Judgment would be "noted," consistent with his experience under the Civil Rules, so he did not respond, waiting instead "until receipt of a notice of hearing," which he expected to be 28 days out. He concedes that he neglected to review either the Board's rules of practice or the Pre-Hearing Order, and apologizes for the failure to file a timely response.

Mr. Ditlevson's failure to respond to the motion has placed the Board in a difficult position. While it is difficult to visit the consequences of counsel's failure to act on the appealing party, the reasons offered for the late response meet neither the standard of "exigent or exceptional circumstances" under the board's rules, nor that of "excusable neglect" under CR 6(b). Failure to review the rules of practice of this Board, failure to review and/or note the deadlines in Board orders and accompanying correspondence, and the "press of other matters," as offered by counsel, simply do not provide adequate justification for the failure to respond to a dispositive motion under either of these standards. Mr. Ditlevson's offer to accept "appropriate sanctions," while appreciated, is of little use to the Board in the circumstances of a summary judgment, as we cannot impose monetary sanctions, and no other sanctions appear appropriate. In circumstances where a party has failed to respond, the Board has concluded that the party is in default. *Ron Asmus Homes Inc. v. Benton Clean Air Authority*, PCHB No. 03-128 (2004). Here, while unjustified, a late response was ultimately filed with the Board. Accordingly, we conclude that no good cause has been shown for the failure to timely respond, but that Appellant's response will be considered by the Board for the purpose of an alternative decision, as noted above. Alternatively, we conclude that as a result of the late response and lack of good cause, the material facts are undisputed, and Ecology is entitled to summary judgment on all issues. For these procedural reasons, the appeal must also be dismissed.

ORDER

*9 Ecology's Motion for Summary Judgment is GRANTED and the appeal is DISMISSED.

SO ORDERED this 26th day of February, 2009.

Kathleen D. Mix
Presiding

William H. Lynch
Member
Andrea McNamara Doyle
Member

Footnotes

- 1 Mr. Cox's affidavit makes references to Mr. Ragsdale's involvement in the wetland delineation at the site and the relevance of that issue to the MDNS. However, there are no wetland or MDNS issues before the Board.
2009 WL 542494 (Wash.Pol.Control Bd.)

End of Document

© 2016 Thomson Reuters. No claim to original U.S. Government Works.

2008 WL 5510411 (Wash.Pol.Control Bd.)

Pollution Control Hearings Board

State of Washington

PUGET SOUNDKEEPER ALLIANCE; PEOPLE FOR PUGET SOUND; PIERCE COUNTY PUBLIC WORKS AND UTILITIES DEPARTMENT; CITY OF TACOMA; PORT OF SEATTLE; SNOHOMISH COUNTY; CLARK COUNTY; PACIFICORP; AND PUGET SOUND ENERGY, APPELLANTS

v.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, RESPONDENT

AND

CITY OF SEATTLE; KING COUNTY; PORT OF TACOMA; PACIFICORP; PUGET SOUND ENERGY; STATE OF WASHINGTON, DEPARTMENT OF TRANSPORTATION, INTERVENORS

PCHB Nos. 07-021, 07-026, 07-027, 07-028, 07-029, 0-030, 07-037 (Phase I)

PUGET SOUNDKEEPER ALLIANCE; PEOPLE FOR PUGET SOUND;
AND COALITION OF GOVERNMENTAL ENTITIES, APPELLANTS

v.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, RESPONDENT

AND

STATE OF WASHINGTON, DEPARTMENT OF TRANSPORTATION, INTEVENOR

PCHB Nos. 07-022, 07-023 (Phase II)

April 2, 2008

ORDER ON DISPOSITIVE MOTIONS: CONDITION S.4

*1 On January 16, 2008, the following parties filed motions for summary judgment on the Special Condition S.4 (S.4) Issues raised in the appeal of the Phase I and Phase II Municipal Stormwater General Permit: Pierce County, King County, Snohomish County, Clark County, Washington State Department of Transportation (WSDOT), City of Tacoma, Port of Seattle and Port of Tacoma (collectively, the "Phase I Permittees"), Department of Ecology (Ecology), Pacificorp and Puget Sound Energy (Utilities), Puget Soundkeeper Alliance and People for Puget Sound (PSA), City of Seattle, and the Phase II Coalition of Governmental Entities (Coalition). On February 4, 2008, the Phase I Permittees, King County, the Utilities, Ecology, PSA, City of Seattle, and the Coalition filed responses. On February 14, 2008, the Phase I Permittees, Ecology, PSA, the Utilities, King County, the City of Seattle, and the Coalition, filed replies.

The Board considering these motions was comprised of Kathleen D. Mix, Chair, William H. Lynch, and Andrea McNamara Doyle. Administrative Appeals Judge, Kay M. Brown presided for the Board.

The following documents were received and considered in ruling on this motion:

1. Intervenor WSDOT's Motion for Partial Summary Judgment Re: Special Condition S.4, Declaration of Larry E. Schaffner in Support of WSDOT's Motion for Partial Summary Judgment Re: Special Condition S.4;

2. Respondent Department of Ecology's Motion for Partial Summary Judgment Regarding Condition S.4;

3. King County's Motion for Partial Summary Judgment Re: Special Condition S.4, Declaration of Curt W. Crawford in Support of King County's Motion for Partial Summary Judgment Re: Special Condition S.4 with Attachments 1 & 2, Declaration of Joseph B. Rochelle in Support of King County's Motion for Partial Summary Judgment Re: Special Condition S.4 with Attachment 1;

4. Motion for Summary Judgment on Permit Condition S.4 by Pacificorp and Puget Sound Energy, Declaration of Kathy Hippie in Support of Motion for Summary Judgment on Permit Condition S.4 with Attachments A-F;

5. Puget Soundkeeper Alliance's Motion for Summary Judgment on Consolidated Condition S.4, Exhibits in Support of Puget Soundkeeper Alliance's Motion for Summary Judgment on Consolidated Condition S.4 (Exhibits A-AG), Declaration of Jan Hasselman in Support of Puget Soundkeeper Alliance's Motion for Summary Judgment on Consolidated Condition S.4 and Exhibits 1-36;

*2 6. Intervenor City of Seattle's Motion for Partial Summary Judgment Re Special Condition S.4, Declaration of Theresa R. Wagner in Support of Seattle's Motion for Partial Summary Judgment Re: Special Condition S.4 with Exhibit A-C, Declaration of Patricia D. Rhay in Support of Seattle's Partial Summary Judgment Re: Special Condition S.4 with Exhibits A-E;

7. City of Tacoma's Response in Support of Intervenor City of Seattle's Motion for Partial Summary Judgment Re: Special Condition S.4;

8. Phase I Permittees' Motion for Partial Summary Judgment Re: Special Condition S.4, Declaration of Heather Kibbey in Support of Phase I Permittees' Motion for Partial Summary Judgment Re: Special Condition S.4, Declaration of Karen R. Kerwin in Support of the Phase I Permittees' Partial Motion for Summary Judgment in Special Condition S.4 with Exhibits A-F, Declaration of Charles S. Wisdom, Ph.D., in Support of Phase I Permittees' Motion for Partial Summary Judgment on Special Condition S.4 with Curriculum Vitae, Declaration of Paul S. Fendt, P.E. in Support of Phase I Permittees' Motion for Partial Summary Judgment on Special Condition S.4 with Curriculum Vitae, Declaration of Lorna Mauren with Attachments A & B, Declaration of Doug Mosich in Support of Phase I Permittees' Motion for Partial Summary Judgment Re: Special Condition S.4, Declaration of Curt W. Crawford in Support of King County's Motion for Partial Summary Judgment Re: Special Condition S.4 with Attachments 1 & 2;

9. Phase II Coalition of Governmental Entities' Motion for Summary Judgment on S.4, Declaration of Lori A. Terry in Support of Phase II Coalition of Governmental Entities' Motion for Summary Judgment on S.4 with Exhibits A-Z, Declaration of Regan W. Sidie, P.E., in Support of Phase II Coalition's Motion for Summary Judgment on S.4 with Exhibits A-D, Declaration of David A. Tucker P.E., in Support of Phase II Coalition's Motion for Summary Judgment on S.4 with Exhibits A-C, Declaration of Peter Rogalsky P.E., in Support of Phase II Coalition's Motion for Summary Judgment on S.4 with Exhibit A, Declaration of John Ecklund, P.E., in Support of Phase II Coalition's Motion for Summary Judgment on S.4, Declaration of Charles S. Wisdom, Ph.D., in Support of Phase II Coalition's Motion for Summary Judgment on S.4 with Exhibit A and Curriculum Vitae, Declaration of Paul S. Fendt, P.E., in Support of Phase II Coalition of Governmental Entities' Motion for Summary Judgment on S.4 with Exhibit A and Curriculum Vitae, Declaration of Barbara Rothwell in Support of Phase II Coalition of Governmental Entities' Motion for Summary Judgment on S.4 with Civil Name Search Results;

10. Consolidated Response to Motions for Summary Judgment on Permit Condition S.4 by Pacificorp and Puget Sound Energy, Declaration of Kathy Hippie in Support of Consolidated Response to Motions for Summary Judgment on Permit Condition S.4 by Pacificorp and Puget Sound Energy with Exhibits A-Z;

11. Respondent Department of Ecology's Response in Opposition to Permittees' Motions for Summary Judgment on Condition S.4., Declaration of Bill Moore in Support of Ecology's Responses to Motions for Summary Judgment Re: Condition S.4 with attachments;

*3 12. Department of Ecology's Response to Puget Soundkeeper Alliance's and Puget Sound Energy's Motions for Summary Judgment on Consolidated Condition S.4, Declaration of Thomas J. Young in Support of Ecology's Response to Puget Soundkeeper Alliance's and Puget Sound Energy's Motions for Summary Judgment on Consolidated Condition S.4 with Exhibits 1-3;

13. Phase II Coalition of Governmental Entities' Response to Pacificorp and Puget Sound Energy's Motion for Summary Judgment on Permit Condition S.4;

14. King County's Response to Pacificorp and Puget Sound Energy's Motion for Summary Judgment on Permit Condition S.4, Puget Soundkeeper Alliance's Motion for Summary Judgment on Consolidated Condition S.4 (Phase I and II), Puget Soundkeeper Alliance's First Motion for Partial Summary Judgment (Issues F.1, F.2, F.5, F.6 and Proposed F.12) (Phase I) and Respondent Department of Ecology's Motion for Partial Summary Judgment Regarding Conditions S.4 with attachments, Declaration of Joseph B. Rochelle in Support of King County's Response to Pacificorp and Puget Sound Energy's Motion for Summary Judgment on Permit Condition S.4, Puget Soundkeeper Alliance's Motion for Summary Judgment on Consolidated Condition S.4 (Phase I and II), Puget Soundkeeper Alliance's First Motion for Partial Summary Judgment (Issues F.1, F.2, F.5, F.6 and Proposed F.12) (Phase I) and Respondent Department of Ecology's Motion for Partial Summary Judgment Regarding Conditions S.4;

15. Puget Soundkeeper Alliance's Opposition to Motions for Summary Judgment on Consolidated Condition S.4 (Phase I and II), Declaration of Richard Horner, PH.D. in Support of PSA's Opposition to Motions for Summary Judgment (Phase I and II) with Exhibit A, Declaration of Jan Hasselman in Support of PSA's Opposition to Motions for Summary Judgment on Consolidated Condition S.4 and Exhibits 37-39 (Phase I and II), Exhibits in Support of PSA's Opposition to Motions for Summary Judgment on Consolidated Condition S.4 (Exhibits AH-AI)(Phases I and II);

16. Phase I Permittees' Response to Pacificorp and Puget Sound Energy's Motion for Summary Judgment on Permit Condition S.4 with Exhibits A-J, Declaration of Doug Mosich in Support of Phase I Permittees' Response to Pacificorp and Puget Sound Energy's Motion for Summary Judgment on Permit Condition S.4;

17. The Phase I Permittees' and the Phase II Coalition of Governmental Entities' Memorandum of Law in Opposition to Puget Soundkeeper Alliance's Partial Motion for Summary Judgment on Special Condition S.4 and Respondent Department of Ecology's Motion for Partial Summary Judgment Regarding Condition S.4, Declaration of Catherine A. Drews in Support of Phase I Permittees' Memorandum of Law in Opposition to Puget Soundkeeper Alliance's Partial Motion for Summary Judgment on Special Condition S.4 and Respondent Department of Ecology's Motion for Partial Summary Judgment Regarding Condition S.4 with Exhibits A-AC;

18. Intervenor City of Seattle's Combined Response to Summary Judgment Motions By Puget Soundkeeper Alliance, Pacificorp, Puget Sound Energy and Ecology on Consolidated Condition S.4 (Phase I and II), Second Declaration of Theresa R. Wagner Re: Summary Judgment (Phase I and Phase II) with Exhibits AA-DD, Second Declaration of Patricia D. Rhay Re: Summary Judgment (Phase I and Phase II).

*4 19. Phase II Coalition of Governmental Entities' Reply to Pacificorp and Puget Sound Energy's Response to Motions for Summary Judgment on Permit Condition S.4.

20. Phase II Coalition of Governmental Entities' Reply in Support of Motion for Summary Judgment on Special Condition S.4, Declaration of Lori A. Terry in Support of Coalition's Reply in Support of Motion for Summary Judgment on S.4.

21. Respondent Department of Ecology's Reply in Support of Motion for Partial Summary Judgment Regarding Condition S.4 (Phase I and II).

22. Intervenor King County's Reply to Responses of Pacificorp and Puget Sound Energy, The Department of Ecology and Puget Soundkeeper Alliance and People for Puget Sound Regarding Permittees' Motions on Condition S.4;
23. Intervenor City of Seattle's Reply to Summary Judgment Motions Re: Condition S.4.
24. Puget Soundkeeper Alliance's Reply in Support of Motion for Summary Judgment on Consolidated Condition S.4 (Phases I and II),¹ Exhibit in Support of Puget Soundkeeper Alliance's Reply in Support of Motion for Summary Judgment on Consolidated Condition S.4 (Exhibit AJ)(Phases I and II);
25. Consolidated Reply to Motions for Summary Judgment on Permit Condition S.4 by Pacificorp and Puget Sound Energy, Declaration of Matthew Dalton in Support of Consolidated Reply to Motions for Summary Judgment on Permit Condition S.4 by Pacificorp and Puget Sound Energy; Declaration of Kathy Hippie in Support of Consolidated Reply to Motions for Summary Judgment on Permit Condition S.4 by Pacificorp and Puget Sound Energy with Exhibits A-D;
26. Phase I Permittees' Reply to Pacificorp and Puget Sound Energy's Consolidated Response to Motions for Summary Judgment on Permit Condition S.4 with Exhibits A-E, Declaration of Doug Mosich in Support of Phase I Permittees' Reply to Pacificorp and Puget Sound Energy's Consolidated Response to Motions for Summary Judgment on Permit Condition S.4;
27. Phase I Permittees' Reply to PSA, Ecology and PSE Re Permittees' Motion for Partial Summary Judgment Re Special Condition S.4;
28. City of Seattle Supplemental Designation of Evidence Re: S.4 Summary Judgment Motions, Third Declaration of Theresa R. Wagner Re: Supplemental Evidence for S.4 Summary Judgment with Attached Exhibits A through F;
29. City of Tacoma's Response in Support of Intervenor City of Seattle's Supplemental Designation of Evidence Re: S.4 Summary Judgment Motions; and,
30. Puget Soundkeeper Alliance's Response to Supplemental Designation of Evidence Re: S.4 (Phases I and II).

Based on the record and evidence before the Board on the motions for partial summary judgment, the Board enters the following decision.

I.

PROCEDURAL BACKGROUND AND DECISION SUMMARY

On January 17, 2007, the Department of Ecology (Ecology) issued National Pollutant Discharge Elimination System (NPDES) and State Waste Discharge General Permit (State Waste Permit) for discharges from Large and Medium Municipal Separate Storm Sewer Systems (Phase I Permit). The effective date of the Phase I permit is February 16, 2007.

*5 Appeals were filed by Puget Soundkeeper Alliance and People for Puget Sound (PSA) (PCHB No. 07-021), Pierce County Public Works and Utilities Department (PCHB No. 07-026), City of Tacoma (PCHB No. 07-027), Port of Seattle (PCHB No. 07-028), Snohomish County (PCHB No. 07-029), Clark County (PCHB No. 07-030), and PacifiCorp and Puget Sound Energy (PCHB No. 07-037), challenging various provisions of the permit. The Board granted leave to intervene to King County, the City of Seattle, and the Port of Tacoma, PacifiCorp and Puget Sound Energy, and The Washington State Department of Transportation (WSDOT), and consolidated all of the Phase I Appeals for hearing purposes.

On the same date as the issuance of the Phase I Permit, Ecology also issued NPDES and State Waste Permit for discharges from Small Municipal Separate Storm Sewer Systems in Western Washington (WW Phase II Permit) and NPDES and State Waste Permit for discharges from Small Municipal Separate Storm Sewer Systems in Eastern Washington (EW Phase II Permit). The effective date of both of the Phase II Permits, like the Phase I Permit, is February 16, 2007.

PSA and the Coalition of Governmental Entities filed appeals of the WW Phase II Permit (PCHB No. 07-022 and PCHB 07-023, respectively).² The Coalition of Governmental Entities filed an appeal of the EW Phase II Permit.³ The Board consolidated the appeals of the WW Phase II and EW Phase II Permits for purposes of hearing only, and granted the WSDOT leave to intervene in both of the consolidated cases.

The Board conducted Pre-hearing conferences, and entered separate pre-hearing orders setting forth 36 issues for the Phase I Appeals, and 31 issues for the Phase II Appeals. The parties raise seven overlapping issues related to the permits' Special Condition S.4, which is an identical condition in all three permits. The S.4 issues identified by the parties, which are the subject of this order, include the following:

1. Did Ecology act unreasonably, unjustly, or unlawfully in imposing Special Condition S.4 in the Permits to the extent it imposes requirements beyond Maximum Extent Practicable (MEP) and/or requires permittees to comply with standards that are not legally required, or are otherwise unreasonable unjust, or invalid?
2. Whether Special Condition S.4.F. and conditions that refer to it, are unlawful, unreasonable, unjust, or invalid in a municipal stormwater discharge permit, (a) by characterizing a violation of water quality standards as permit noncompliance and as a permit violation, and (b) by failing to clarify that the management process stated in S.4.F.2 is a means to comply with the permit rather than action taken in response to a permit violation, and, (c) by imposing timeframes that do not allow sufficient time within which to accomplish required actions?
3. Whether Special Condition S.4 is unlawful, unreasonable, unjust, or invalid because it fails to state specifically that compliance with the terms and conditions of this permit constitutes compliance with all applicable legal standards?
- *6 4. Does the permit unlawfully exempt permittees that comply with the process established in Permit Condition S.4.F from the requirement to ensure that discharges do not cause or contribute to violations of water quality standards?
5. Does the process established in Permit Condition S.4.F unlawfully fail to include standards and/or timelines necessary to ensure that discharges will comply with water quality standards?
6. Does the prohibition on violations of water quality standards contained in Permit Condition S.4 unlawfully or unreasonably conflict with the other provisions of the permit?
7. Does Permit Condition S.4 unlawfully fail to prohibit violations of water quality standards?

In this order, the Board concludes that only Issue 1 is amenable to summary judgment. Before deciding Issues 2 through 5 and Issue 7 of the S.4 issues, the Board requires more factual context as to the scope, interpretation, and expected application of Special Condition S.4.F. Therefore, the Board denies summary judgment to all parties on these issues. The Board concludes that Issue 6 involves and requires a factual review of other permit provisions contained in both the Phase I and Phase II permits, and should therefore be addressed in the Phase I and Phase II specific cases.

II.

FACTS

A. The Stormwater Problem

Stormwater is runoff that occurs during and following precipitation events and snowmelt events, including surface runoff, drainage, and interflow. Municipal separate storm sewers are the conveyances, or system of conveyances, including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, manmade channels or storm drains, owned or operated by municipalities, that are designed or used for collecting or conveying stormwater. Municipal separate storm sewers cannot, by definition, include sewers that collect and convey sewage as well as stormwater. *Potter Decl., Ex. 9, at 63, 64, Terry Decl., Ex. D (WW at 46-49, EW at 51-54)*.

The Phase I and Phase II permits regulate discharges of municipal stormwater into waters of the state from municipal separate storm sewer systems, referred to as MS4s. The permits do not regulate stormwater that discharges directly to a water body without passing through a regulated MS4. *Potter Decl., Ex. 9, at 61, Ex. 10, at 4, Terry Decl., Ex. C (EW at 1, WW at 3)*.

Stormwater in general is difficult to manage because discharges are intermittent and weather-dependent (i.e. from rainfall and snowmelt). Municipal stormwater is even more difficult to manage than other types of stormwater because it is discharged from such a large number of outfalls. Most existing MS4s were not built with water quality protection in mind, but instead were built for the purpose of draining water as efficiently as possible, managing peak flows, and protecting the public from flooding and disease. *Wisdom Decl., Fendt Decl., Potter Decl., Ex. 10 at 13, 14, Terry Decl., Ex. C (EW at 9, 10, WW at 14-15)*.

*7 MS4s are large and complex, even those belonging to the "small" municipalities. An example of a large municipality MS4 is that of Pierce County. Pierce County's MS4 includes 540 linear miles of enclosed public pipes/culverts, 1,229 linear miles of open channels, 3,260 stormwater outfalls, and 1,553 lineal miles of roads with 18,828 associated stormwater catch basins. *Kibbey Decl.* An example of a "small" municipality MS4 is that of the City of University Place. Its MS4 covers approximately 8.4 square miles and receives runoff from 13 different drainage basins, drains 216 lane miles of road and includes more than 10 miles of open ditch, 70 miles of pipes, approximately 3800 catch basins and 14 outfalls. *Ecklund Decl.*

Municipalities differ from other regulated stormwater managers in two key aspects. First, they have limited control over the sources of pollutants that find their way into their MS4s, and they cannot stop the discharges coming out of their systems. Second, they are not the primary generators of the pollutants that are being discharged. Instead, the source of the pollutants is more often citizens and businesses, engaged in legal activity and the activities of daily life that also generate pollutants. *Fendt Decl., Wisdom Decl.*

Stormwater is the leading contributor to water quality pollution in urban waterways. Common pollutants in stormwater include lead, zinc, cadmium, copper, chromium, arsenic, bacterial/viral agents, oil & grease, organic toxins, sediments, nutrients, heat, and oxygen-demanding organics. Municipal stormwater also causes hydrologic impacts, because the quantity and peak flows of runoff are increased by the large impervious surfaces in urban areas. Stormwater discharges degrade water bodies and, consequently, impact human health, salmon habitat, drinking water, and the shellfish industry. *Potter Decl., Ex. 10 at 8-13, Terry Decl., Ex. C (EW at 5-9, WW at 8-14)*.

B. The Phase I and Phase II Permits

The Phase I and Phase II Permits are both NPDES permits, as required by the Federal Water Pollution Control Act, also known as the Clean Water Act (CWA), 33 U.S.C. §§ 1251 et seq. and State Waste Discharge Permits issued pursuant to the Washington State Water Pollution Control Act (WPCA), Chapter 90.48 RCW. The Permits are "general permits," which provide an alternative to individual NPDES discharge permits. General permits allow regulators to efficiently administer a permit process covering multiple discharges of a point source category within a designated geographical area. *Potter Decl., Exs. 9 at 61, Ex. 10 at 17, Terry Decl., Exs. C (EW at 13, WW at 18) & Ex. D (EW at 49, WW at 45), WAC Ch. 173-226*.

The purpose of the Phase I Permit is to authorize the discharge of stormwater into waters of the State of Washington from large and medium sized municipal separate storm sewers. *Potter Decl., Ex. 10 at 4*. The purpose of the two Phase II Permits is the same, but the permits apply to small municipal separate storm sewers, and are divided geographical into eastern and western Washington permits. *Coalition's Motion, Terry Decl., Ex. C (EW at 1, 15-17, WW at 3, 21-23)*. The permittees under all three permits are the municipalities that own and operate the storm sewers.

*8 Special Condition S.4 is entitled "Compliance with standards," and is identical in the Phase I Permit and both of the Phase II Permits. Parts A through E of S.4 establish the legal standards applicable to the management of stormwater. Part F establishes the required response to violations of water quality standards pursuant to parts A and B. Parts A, B, and F are the provisions challenged in these motions.

S.4.A states:

In accordance with RCW 90.48.520, the discharge of toxicants to waters of the State of Washington which would violate any water quality standard, including toxicant standards, sediment criteria, and dilution zone criteria is prohibited. The required response to such violations is defined in section S.4.F., below.

S.4.B states:

This permit does not authorize a violation of Washington State surface water quality standards (Chapter 173-201A WAC), ground water quality standards (Chapter 173-200 WAC), sediment management standards (Chapter 173-204 WAC), or human health-based criteria in the national Toxics Rule (Federal Register, Vol. 57, NO. 246, Dec. 22, 1992, pages 60848-60923). The required response to such violations is defined in section S.4.F, below.

S.4.F states:

Required response to violations of Water Quality Standards pursuant to S.4.A. and/or S.4.B:

1. Pursuant to G20 *Non-Compliance Notification*, the Permittee shall notify Ecology in writing within 30 days of becoming aware that a discharge from the municipal separate storm sewer is causing or contributing to a violation of Water Quality Standards. For ongoing or continuing violations, a single written notification to Ecology will fulfill this requirement.
2. In the event that Ecology determines that a discharge from a municipal separate storm sewer is causing or contributing to a violation of Water Quality Standards in a receiving water, and the violation is not already being addressed by a Total Maximum Daily Load or other water quality cleanup plan, Ecology will notify the Permittee in writing that:
 - a. Within 60 days of receiving the notification, or by an alternative date established by Ecology, the Permittee shall review their Stormwater Management Program and submit a report to Ecology The report shall include:
 - i. A description of the operational and/or structural BMPs that are currently being implemented to prevent or reduce any pollutants that are causing or contributing to the violation of Water Quality Standards, including a qualitative assessment of the effectiveness of each BMP.
 - ii. A description of additional operational and/or structural BMPs that will be implemented to prevent or reduce any pollutants that are causing or contributing to the violation of Water Quality Standards.
 - iii. A schedule for implementing the additional BMPs including, as appropriate: funding, training, purchasing, construction, monitoring, and other assessment and evaluation components of implementation.

*9 b. Ecology will, in writing, either approve the additional BMPs and implementation schedule or require the Permittee to modify the report. If modifications are required, the Permittee shall submit a revised report to Ecology.

c. The Permittee shall implement the additional BMPs, pursuant to the schedule approved by Ecology, beginning immediately upon receipt of written notification of approval.

d. The Permittee shall include with each subsequent annual report a summary of the status of implementation, and any information from assessment and evaluation procedures collected during the reporting period.

e. Provided the Permittee is implementing the approved BMPs, pursuant to the approved schedule, the Permittee is not required to further modify the BMPs or implementation schedule unless directed to do so by Ecology.

Potter Decl., Ex. 9 at 45, Terry Decl. Ex. D (EW at 7-9, WW at 7-9).

III.

ANALYSIS

A. Summary Judgment

Summary judgment is a procedure available to avoid unnecessary trials on formal issues that cannot be factually supported and could not lead to, or result in, a favorable outcome to the opposing party. *Jacobsen v. State*, 89 Wn.2d 104, 107, 108, 569 P.2d 1152 (1977). The summary judgment procedure is designed to eliminate trial if only questions of law remain for resolution. Summary judgment is appropriate when the only controversy involves the meaning of statutes, and neither party contests the facts relevant to a legal determination. *Rainier Nat'l Bank v. Security State Bank*, 59 Wn.App. 161, 164, 796 P.2d 443 (1990), *rev. denied*, 117 Wn.2d 1004(1991).

The party moving for summary judgment must show there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Magula v. Benton Franklin Title Co., Inc.*, 131 Wn.2d 171, 182, 930 P.2d 307 (1997). A material fact in a summary judgment proceeding is one that will affect the outcome under the governing law. *Eriks v. Denver*, 118 Wn.2d 451, 456, 824 P.2d 1207 (1992). In a summary judgment, all facts and reasonable inferences must be construed in favor of the nonmoving party as they have been in this case. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002).

Here, the Phase I Permittees and the Coalition challenge S.4.A and B., contending that they exceed the mandatory requirements imposed by federal and state law, and that Ecology lacks the authority to impose these requirements under those laws. Alternatively, they argue that even if Ecology has the discretionary authority to impose these requirements, it has acted arbitrarily or unreasonably in choosing to exercise its discretion in the manner reflected in Special Condition S.4.

PSA and the Utilities, on the other hand, argue that S.4.A and B are invalid because, when taken together with S.4.F, these permit conditions fail to achieve compliance with state water quality standards.

A fundamental legal question that lies at the heart of all of the parties' arguments is whether federal or state law requires, or may require, discharges from MS4s to comply with state water quality standards. The Board concludes that federal law does not, but that state law does require such compliance.

B. Federal regulation of municipal stormwater discharges

*10 The Federal Clean Water Act (FCWA) was enacted by Congress “to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.” 33 U.S.C. § 1251(a). Under the FCWA it is unlawful to discharge any pollutant to navigable waters of the United States unless the discharge is in compliance with an NPDES permit. 33 U.S.C. §§ 1311 and 1342.

The FCWA established the NPDES permit program which authorizes EPA, or approved states, to issue permits which allow discharges, subject to permit conditions. 33 U.S.C. § 1342(a). First, the permit conditions must require the application of the best practicable control technology currently available to achieve effluent limitations. 33 U.S.C. § 1311(b)(1)(A). Second, the conditions must require the permit-holder to meet effluent limitations that will ensure compliance with state water quality standards. 33 U.S.C. § 1311(b)(1)(C).

Prior to 1987, there was much controversy over whether municipalities were subject to NPDES permitting requirements under federal law. See e.g., *Natural Resources Defense Council v. Costle*, 568 F.2d 1369, 1374-1377 (D.C. Cir. 1977)(invalidating EPA regulation exempting MS4 discharges from NPDES). This controversy was resolved in 1987 when Congress enacted the Water Quality Act amendments to the FCWA. Pub. L. No. 100-4, 101 Stat. 7 (1987)(codified throughout 33 U.S.C.). At the core of the 1987 amendments was 33 U.S.C. § 1342 (p)(3), which resolved the question of whether municipal storm sewer systems required NPDES permits and established the federal standards for municipal stormwater discharges. That section provides as follows:

Permits for discharges from municipal storm sewers ... shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.

33 U.S.C. § 1342(p)(3)(B)(iii).

This provision required a NPDES permit for municipal storm sewer discharges and directed that municipal stormwater dischargers must reduce the discharge of pollutants “to the maximum extent practicable,” which was a lesser standard than had previously been in federal law for all other industrial or other stormwater dischargers. *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1166 (9th Cir. 1999) *amended by* 197 F.3d 1035 (9th Cir. 1999). However, with this new standard, the law also created a second controversy: whether such discharges must comply with state water quality standards. The Ninth Circuit directly addressed this issue in the *Browner* decision. The court first determined that “the Water Quality Act unambiguously demonstrates that Congress did not require municipal storm sewer discharges to comply strictly with 33 U.S.C. § 1311(b)(1)(C) [state effluent limitations, including those necessary to meet water quality standards]. *Browner*, 191 F.3d at 1164. The *Browner* court, nevertheless, held that 33 U.S.C. § 1342 (p)(3)(B)(iii) authorizes the EPA [or a state with delegated NPDES permitting authority] to require municipal stormsewer discharges to comply strictly with water quality standards even though it does not require that it do so. The *Browner* court concluded that while EPA had the authority to determine that strict compliance with water quality standards was necessary to control pollutants, it also had the authority to require less than strict compliance, and had done so through an interim regulatory approach in the first round of municipal stormwater permitting. That interim approach was one of using “best management practices” (BMPs) to provide for the attainment of water quality standards. *Browner* at 1166.

*11 PSA and PSE argue that EPA, through its policy and rulemaking process, has exercised its discretion under 33 U.S.C. § 1342 (p)(3)(B)(iii) to require all discharges from municipal stormwater systems to now comply with state water quality standards.⁴ PSA and PSE fail to cite any federal Phase I or Phase II rule, however, that explicitly requires compliance with state water quality standards. Instead, they focus on a 1991 Opinion from EPA's Office of General Counsel, an interim permitting policy document that expressly applies only to EPA, and guidance to that same policy document. They also argue that strict compliance is required because the rules themselves do not carve out an exception to EPA's general requirements that all NPDES permits must ensure compliance with water quality standards. See *Hasselmann Decl., Ex. 13* (EPA General Counsel, Jan. 9, 1991); U.S.EPA, *Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits*, 61 Fed.

Reg. 43761 (Aug. 26, 1996); *Hasselman Decl., Ex. Q*, U.S. EPA, *Questions and Answers Regarding Implementation of an Interim Permitting Approach for Water Quality Based Effluent Limitations in Storm Water permits*, 61 Fed. Reg. 57425, 57426 (Nov. 6, 1996); 40 C.F.R. § 122.44(d) (prohibiting issuance of a NPDES permit “when imposition of conditions cannot ensure compliance with the applicable water quality requirements of affected states.”)

In light of the language of 33 U.S.C. § 1342(p)(3)(B)(iii) and its interpretation by the Ninth Circuit Court of Appeals in *Browner*, the Board concludes that the EPA has not clearly expressed an intent to require MS4s to comply with state water quality standards. In any event, we conclude the question of whether compliance with Washington's state water quality standards is required is answered by reference to state law.

C. State regulation of MS4s

I. State WPCA

Washington State's Water Pollution Control Act, Ch. 90.48 RCW (WPCA), originally promulgated in 1945, expresses a strong intent by Washington State to protect the quality of its waters. Laws 1945, ch. 216. In RCW 90.48.010, the Legislature makes the following statement of policy:

It is declared to be the public policy of the state of Washington to maintain the highest possible standards to insure the purity of all waters of the state consistent with public health and public enjoyment thereof, the propagation and protection of wild life, birds, game, fish and other aquatic life, and the industrial development of the state, and to that end require the use of all known available and reasonable methods by industries and others to prevent and control the pollution of the waters of the state of Washington. Consistent with this policy, the state of Washington will exercise its powers, as fully and as effectively as possible, to retain and secure high quality for all waters of the state.

The WPCA has been the vehicle through which Washington has implemented the requirements of the FCWA. RCW 90.48.260, RCW 90.48.262(1). Under FCWA, the federal regulatory structure creates the minimum level of requirements for regulation of water quality; however states may authorize requirements related to water quality that are more stringent than federal law. 33 U.S.C. § 1370. Since the Board has concluded that the FCWA requires municipalities to “reduce the discharge of pollutants to the maximum extent practicable,” and authorizes, but does not require, either the EPA or the states to require compliance with state water quality standards, the question presented by these motions becomes whether the state has, through its laws, demonstrated an intent to go beyond the minimum requirements of federal law and require compliance with state water quality standards. The Board concludes that it has.

*12 The statutory provisions pertaining to the state waste disposal permit requirements are scattered throughout Ch. 90.48 RCW, including RCW 90.48.160 through .200, and 90.48.520. RCW 90.48.180 directs that Ecology shall issue a permit unless it finds:

that the disposal of waste material as proposed in the application will pollute the waters of the state in violation of the public policy declared in RCW 90.48.010.

RCW 90.48.520 states that:

In order to improve water quality by controlling toxicants in wastewater, the department of ecology shall in issuing and renewing state and federal wastewater discharge permits review the applicant's operations and incorporate permit conditions which require all known, available, and reasonable methods to control

toxicants in the applicant's wastewater In no event shall the discharge of toxicants be allowed that would violate any water quality standard, including toxicant standards, sediment criteria, and dilution zone criteria.

The Legislature has also given broad authority to Ecology to promulgate rules:

relating to standards of quality for waters of the state and for substances discharged therein in order to maintain the highest possible standards of all water of the state in accordance with the public policy as declare in RCW 90.48.010.

RCW 90.48.035. Pursuant to this authority, Ecology has adopted the state water quality standards. See WAC Ch. 173-201A (Water quality standards for surface waters,). WAC 173-201A-510(1) states:

The primary means to be used for controlling municipal, commercial, and industrial waste discharges shall be through the issuance of waste discharge permits, as provided for in RCW 90.48.160, 90.48.162 and 90.48.260. Waste discharge permits, whether issued pursuant to the National Pollutant Discharge Elimination System or otherwise, must be conditioned so the discharges authorized will meet the water quality standards. No waste discharge permit can be issued that causes or contributes to a violation of water quality criteria, except as provided for in this chapter.

The Waste Discharge General Permit Program mirrors these requirements, stating, "No pollutants shall be discharged to waters of the state from any point source, except as authorized by an individual permit ... or as authorized through coverage under a general permit. WAC 173-226-020. General permits issued by Ecology are to ensure compliance with AKART, water quality-based effluent limitations, and any more stringent limitations or requirements, including those necessary to meet water quality standards. WAC 173-226-070.

The Board has previously addressed the extent to which stormwater discharges must meet water quality standards in several general permit appeals. In 2007, the Board held that both the FCWA and *Ch. 90.48 RCW* required Ecology to impose more specific discharge conditions to achieve water quality standards when the permit's adaptive management approach (benchmarks and BMPs) failed to do so. *PSA v. NWMTA*, PCHB Nos. 05-150, 05-151, 06-034, 06-040, CL 27 (2007). Later that same year, the Board concluded that state waste discharge permitting laws require construction stormwater discharges to achieve compliance with state water quality laws. *Associated General Contractors of Washington v. Ecology*, PCHB No. 05-157, 05-158, 05-159, CL 4 (2007)(citing RCW 90.48.080). The 2002 version of the Industrial Stormwater General Permit required compliance with water quality standards. *PSA v. Ecology*, PCHB Nos. 02-162, 02-163, 02-164 P-II ((2003). In its review of that permit, the Board relied on both the CWA and the state WPCA to invalidate permit conditions that allowed noncompliance with the state's water quality standards for pollutants discharged at locations on the FCWA 303(d) list of impaired water bodies. Each of these cases involved industrial or construction discharges, not municipal discharges, leaving open the question of whether state law sets a different standard for municipal discharges, or in some manner limits the responsibility of municipalities to comply with water quality standards. The Board concludes that if the state waste discharge permitting standards apply to MS4s, compliance with state water quality standards is required of municipal dischargers. The issue currently before the Board, then, is whether the state has chosen to treat discharges from MS4s differently than other waste discharges, or whether the state waste permitting scheme applies to these discharges.

2. Does WPCA apply to discharges from MS4s?

*13 The parties point to RCW 90.48.160, .162 and .180 to establish that the state waste disposal permit requirements are intended (or not intended) to apply to municipal storm sewer systems. These provisions contain various terms and phrases called out by the parties on all sides as either support for, or opposition to, the proposition that the legislature intended that MS4s are subject to the state waste discharge permitting standards. See *e.g.* RCW 90.48.160 (“Any person who conducts a commercial or industrial operation ... which results in the disposal of solid or liquid waste material ...”); RCW 90.48.162 (Any county or any municipal ... corporation operating ... a sewerage system, including any system which collects only domestic sewerage, which results in the disposal of waste material.); RCW 90.48.180 (“The department shall issue a permit unless it finds that the disposal of waste material ... will pollute the waters of the state in violation of the public policy declared in RCW 90.48.010.”)

As pointed out by the permittees, all of these provisions predated the 1987 amendments to the FCWA which added 33 U.S.C. § 1342 (p)(3), the provision expressly addressing discharges from MS4s, and some even predated the 1972 FCWA itself. See RCW 90.48.160, 180 (originally enacted in 1955, 1955 c 71, §§ 1, 3); RCW 90.48.162 (originally enacted in 1972, 1972 ex.s.c 140 § 1). The permittees argue, based on the timing of enactment that the Washington Legislature could not have intended these statutes to apply to discharges from MS4s because they pre-dated regulation of municipal stormwater discharges on the federal level. Ecology responds that the Washington Legislature’s lack of response to the amendment of the FCWA specifically addressing MS4s, which occurred more than 20 years ago, means that the Legislature did not think existing statutes that regulate the discharge of waste material into waters of the state needed to be amended to establish separate rules for discharges from MS4s. Instead, Ecology argues that the Washington Legislature’s inaction indicates that the Legislature believes existing laws establish the appropriate legal standards for regulating all discharges of waste materials into waters of the state, including the waste materials discharged by MS4s. In interpreting a statute, the courts give great weight to the construction placed upon it by officials responsible for its enforcement, especially where the Legislature has silently acquiesced in that construction over a long period of time. *In re Sehome Park Center v. Washington*, 127 Wn.2d 774, 780, 903 P.2d 443 (1995).

The one statutory provision contained in the WPCA adopted closest in time to 33 U.S.C. § 1342 (p)(3), is RCW 90.48.520. It is this provision Ecology references in the permit as specific support for Condition S.4.A.

RCW 90.48.520 states:

90.48.520. Review of operations before issuance or renewal of wastewater discharge permits—Incorporation of permit conditions

*14 In order to improve water quality by controlling toxicants in wastewater, the department of ecology shall in issuing and renewing state and federal wastewater discharge permits review the applicant’s operations and incorporate permit conditions which require all known, available, and reasonable methods to control toxicants in the applicant’s wastewater Such conditions shall be required regardless of the quality of receiving water and regardless of the minimum water quality standards. In no event shall the discharge of toxicants be allowed that would violate any water quality standard, including toxicant standards, sediment criteria, and dilution zone criteria.

The permittees make much of the fact that the Legislature used the word “wastewater,” and they argue that based on a dictionary definition of the term, wastewater is different than stormwater. Ecology responds by focusing on the last sentence of this provision, which refers to all discharges without limitation by the word wastewater; by arguing that wastewater includes stormwater; and by pointing out that the Legislature must have been using the term wastewater broadly, since as a technical matter there are no state or federal “wastewater” discharge permits.⁵

The parties then turn to a review of the legislative history of the bill, which they provide for the Board if the Board concludes RCW 90.48.520 is ambiguous. There is an extensive amount of legislative history pertaining to RCW 90.48.520. See *Potter Decl, Exs. 1- 7*. This history reveals that RCW 90.48.520 arose out of an effort by the Legislature to address standards for industrial wastewater that is discharged into sewage treatment plants and to address the separation of sewage and stormwater

transport systems. Washington Laws, 1985, Ch. 249, Sections 1 and 2. During this same time period (1985 through 1987), the Puget Sound Water Quality Authority⁶ published their 1987 Puget Sound Water Quality Management Plan (Plan), which focused on the need to effectively control contaminants from multiple pollutant sources in order to protect Puget Sound. This Plan is referenced in the Senate Bill Report for ESHB 499, the Bill that eventually became RCW 90.48.520. *See Potter Decl., Ex. 4.* The Plan addresses urban stormwater runoff in several places. A key reference from the Water Quality Plan, cited by Ecology in its brief, states:

Although urban runoff has traditionally been considered a nonpoint source, as a result of a lawsuit brought by the National Resources Defense Council against EPA in 1976, urban runoff is now coming to be considered a pointsource. Pursuant to the results of the lawsuit, revised EPA regulations require dischargers of urban runoff to apply for an NPDES permit by December 31, 1987.

Potter Decl., Ex. 5A, at 4-11.

This reference reflects that RCW 90.48.520 was debated and adopted at a time when the status of discharges from MS4s under federal law had recently been clarified as point source discharges subject to NPDES permitting.

*15 From all of the material presented to the Board regarding the scope of the WPCA, the Board finds most persuasive that the WPCA, unlike the FCWA, makes no distinction between municipal stormwater, other types of stormwater, and other types of polluted discharges. To reach the conclusion advocated for by the municipalities, that MS4 discharges are not covered under the WPCA, the Board must conclude that none of the general WPCA statutes apply to any stormwater discharges—industrial, construction, or municipal.⁷ This interpretation is not consistent with the Board's past precedent, nor with the regulatory efforts of Ecology to place increasingly more stringent requirements on stormwater management in each of these sectors through general permits, many of which have been reviewed by this Board. *See, for example, Puget Soundkeeper Alliance and Northwest Marine Trade Association v. Ecology*, PCHB Nos. 05-150, 05-151, 06-034, & 06-040 (2007) (Findings of Fact, Conclusions of Law, and Order) (discussing the regulatory history of boatyards.)

Ecology's longstanding interpretation, expressed through its water quality regulations, its past permitting decisions, and the position it has taken in the current permits is that all waste discharge permits, federal or otherwise, must be conditioned so the discharges authorized will meet water quality standards. WAC 173-201A-510(1); *Port of Seattle v. Pollution Control Hearings Board*, 151 Wn.2d 568, 603, 90 P.3d 659 (2004). The first MS4 permits issued by Ecology in 1995 acknowledge the application of the state water quality standards to the permit, and the use of the compliance schedule exception to address the anticipated violations of those standards by MS4 discharges under the permit. *See Terry Decl., Ex. E.* (see generally, the Compliance with Standards Section of the submitted permits.). The current permits, Special Conditions S.4. A and B, state that discharges of toxicants to waters which would violate water quality standards are prohibited, and that the permit does not authorize violation of Washington State surface water quality standards. All of these actions reflect Ecology's interpretation that MS4 discharges are subject to the same requirements as any other stormwater discharge. This interpretation, coming from the agency charged with administering the WPCA and the state water quality standards, is entitled to great weight. *Port of Seattle, at 593-594.*

Ecology's actions are significant in two ways: First, stated above, they indicate Ecology's interpretation, which is entitled to weight. Second, in the face of these actions by Ecology to include discharges from MS4s under the WPCA, the Legislature appears to have acquiesced in Ecology's interpretation of RCW 90.48.520, which is that this statute did not need to be amended to establish separate rules for discharges from MS4s. Although it is a rule of statutory construction that absent evidence of the Legislature's knowledge of an administrative interpretation, legislative inaction does not indicate acquiescence in the interpretation, *Department of Labor and Industries v. Landon*, 117 Wn.2d 122, 127, 814 P.2d 626 (1991), the Legislature's knowledge of Ecology's interpretation of this statute can be reasonably inferred. The Legislature adopted RCW 90.48.555 and other sections pertaining to stormwater discharges during the 2004 legislative session. The Legislature's adoption of this legislation in 2004 would necessarily make it aware of Ecology's general approach in regulating stormwater discharges. As

stated earlier, to conclude that MS4 discharges are not covered under the WPCA, it is necessary to conclude that none of the general WPCA statutes apply to any stormwater discharges. The Legislature did not deem it necessary to amend RCW 90.48.520 or otherwise enact explicit statutory authority for Ecology to regulate stormwater discharges during the 2004 session. The Legislature's lack of action during that time, or since, can reasonably be construed as acquiescence in Ecology's interpretation. Therefore, the Board concludes that the WPCA does apply to discharges from MS4s, and prohibits discharges that violate water quality. RCW 90.48.160, .162, .180 and .520.

3. RCW 94.54.020(3)(b)

*16 A final piece of the state statutory scheme cited by the parties is RCW 90.54.020(3)(b), the state's anti degradation policy. *Port of Seattle*, at 590. This statutory provision, which was adopted as part of the state Water Resources Act of 1971, identifies water quality as a fundamental goal in utilizing and managing the state's waters. RCW 90.54.020(3)(b). It states:

Waters of the state shall be of high quality. Regardless of the quality of the waters of the state, all wastes and other materials and substances proposed for entry into said waters shall be provided with all known, available, and reasonable methods of treatment prior to entry. Notwithstanding that standards of quality established for the waters of the state would not be violated, wastes and other materials and substances shall not be allowed to enter such waters which will reduce the existing quality thereof, except in those situations where it is clear that overriding considerations of the public interest will be served.

Permittees argue⁸ against application of this statute to discharges from MS4s, asserting that it is a general statement of policy, not a permitting statute, and that all it requires is treatment of discharges with all known and reasonable treatments (AKART). This argument ignores the second sentence of the provision which prohibits discharges that will reduce existing water quality even if they do comply with water quality standards. Thus, the antidegradation policy actually requires more than compliance with water quality: It requires no reduction of existing quality absent overriding considerations.

Permittees' second argument is that even if a discharge from an MS4 impairs water quality, it does not violate the statute because MS4 permits meet the public interest exception allowed by RCW 90.54.020(3)(b). Ecology responds, stating that WAC 173-201 A-320(4) sets out the actual process for meeting the "overriding public interest" exception, and that process has not been followed here. Ecology contends that this provision calls for the applicant to make a request for a determination of public interest and submit information to Ecology as required by the rule, and then Ecology will make a determination. Ecology states that there has never been a request from the permittees to start this process. The Board agrees with Ecology that, absent an initial determination by Ecology, this argument is not ripe for review.

A comprehensive reading of WCPA, along with the state's antidegradation statute, and a review of Ecology's rulemaking in response to this legislative direction, leads the Board to the conclusion that state law does not treat municipal stormwater any differently than any other storm water discharges to state waters. Other permitted discharges must comply with state water quality standards, and so must permitted discharges from MS4s.

Even if we were to read state law in a more limited fashion, we would still conclude, alternatively, that Ecology has more than ample discretion to require compliance with water quality standards. As the concurrence so well states, this discretion is well-based in the provisions of the FCWA that allow states to enforce more stringent standards for the discharge of pollutants, as well as those specific provisions of state law that provide Ecology broad authority to administer the permit program intended to eliminate pollution from state waters. *33 U.S.C. § 1370; RCW 90.48.260*. Ecology has imposed such standards through both the regulations cited above, and the terms of this general permit.

*17 That the Board reads these provisions of state law to require municipalities to comply with water quality standards, does not mean that Ecology lacks discretion to define the manner, method and timing for requiring compliance with these standards.

To the contrary, Ecology has considerable leeway in defining permit terms that will effect compliance over the short and long-term, discretion to fashion enforcement methods, ability to define the manner in which compliance schedules should be utilized, and powers to define, through permit terms, the ongoing iterative process necessary to achieve ultimate compliance with water quality standards. In *Waste Action Project v. Ecology*, PCHB No. 97-69 (1997) (Order Granting Summary Judgment), the Board upheld Ecology's issuance of a new NPDES permit to Foss Maritime Company for its stormwater discharges. Ecology determined that previous effluent standards were unattainable with the requisite BMPs, so it suspended the effluent limits for certain metals and allowed a compliance schedule to determine and implement AKART. The Board found that this did not violate the anti-backsliding provisions governing NPDES permits or the state's antidegradation policy. In a challenge to the NPDES permit issued to the Port of Seattle for stormwater discharges associated with SeaTac Airport, the Board upheld the permit over the allegation that the permit impermissibly failed to require more stringent limitations necessary to assure stormwater discharges met water quality standards. *Port of Seattle v. Ecology*, PCHB Nos. 03-140, 03-141, 03-142 (2004) (Findings of Fact, Conclusions of Law, and Order). The Board noted the meaningful efforts underway to obtain information regarding the sources of copper and zinc runoff, Ecology's requirement in the permit for a receiving water study, and the permit's requirement for the Port to use enhanced BMPs as needed once the necessary information became available. Division I of the Court of Appeals recognized the discretion of Ecology to administer the NPDES discharge permit program, and stated that "the statutory scheme envisions that effluent limitations will decrease as technology advances." *Puget Soundkeeper Alliance v. State*, 102 Wn. App. 783, 790-791, 9 P.3d 892 (2000). While Ecology must not allow an impermissible self-regulatory system, *Environmental Defense Center v. United States Environmental Protection Agency*, 344 F. 3d 832, 854 - 856 (9th Cir. 2003), it can use the general permit regulatory process to define what will be considered adequate permit compliance, and what is adequate progress toward compliance with water quality standards. Whether the terms of this permit, and particularly Special Condition S4.F are an adequate or legally correct exercise of Ecology's discretion, is discussed below.

In light of this analysis, the Board concludes that both Condition S4.A and B are appropriate statements of state law, and therefore, appropriate permit standards and conditions. The second sentence of both of these provisions is the "link" to Condition S4.F., the permit condition that sets out the required response to violations of the statements of state law set forth in S4. A and B. All parties take issue with the operation of S4.F, and to the manner in which it works in relation to expected violations. We next address this issue.

D. S4.F

*18 S.4.F sets out a notification and response process for what the permit labels "violations of water quality standards pursuant to S.4.A and/or S.4.B" Ecology refers to this notification and response process as "the compliance pathway." The parties raise two challenges to this process. The first challenge involves the proper characterization of an S.4.A or S.4.B event that triggers the S.4.F notification and response process. Are these events properly characterized as permit violations, or does a permit violation occur only if the permittee fails to follow the process outlined in S.4.F? Stated another way, is every discharge that is prohibited by S.4.A or not authorized by S.4.B a violation of the permit, even if the permittee responds as required by those provisions and fully complies with the S.4.F "compliance pathway?"

Concern about this question appears to be the driver behind much of this case. Municipalities are fearful that, under one reading of the permit language, they will be subject to citizen lawsuits for FCWA violations whenever a discharge that causes or contributes to a violation of water quality standards is reported. PSA and the utilities, on the other hand, are concerned that under a different reading of the same permit language, municipalities will be allowed to continually and indefinitely violate state water quality standards—but still be in compliance with their permits—so long as they notify Ecology and follow the "compliance pathway."

The permit on its face presents somewhat contradictory language on this point. *See* S.4.A and B ("The required response to such violations is defined in section S.4.F. below." Emphasis added); S.4.F.2.e. ("Provided the Permittee is implementing the approved BMPs, pursuant to the approved schedule, the Permittee is not required to further modify the BMPs or implementation schedule unless directed to do so by Ecology.")

The second challenge raised by the parties involves both procedural and substantive requirements of S.4.F. Disputes exist regarding the reasonableness of the timeframes, the sufficiency of the standards to ensure ultimate compliance with water quality standards, and the legal implications for permittees that fully comply with the S.4.F process but continue to have discharges that cause or contribute to violations of state water quality standards. *See* S.4.F.2.e.

The Board declines to address the issues surrounding the validity of Special Condition S.4.F on summary judgment. While in the end some of these issues may be questions of law, the Board hesitates to address them without a more complete understanding of the intended meaning and operation of S.4.F. Answering the many questions involving interpretation of S.4.F clearly requires factual testimony.

E. S.4 Issue 6

S.4 Issue 6 questions whether the prohibition on violations of water quality standards contained in Special Condition S.4 unlawfully or unreasonably conflict with the other provisions of the permit. This issue is based on a misstatement of the relationship between S.4 and the other conditions of the permits.

*19 Condition S.4 establishes the legal standards that permittees must meet and establishes a process for permittees to use to come into compliance with those standards. The purpose of the Board's review of S.4.A and B is to first determine whether the legal standards they express are correct (we conclude that they are), and whether S.4.F establishes an appropriate compliance mechanism (the Board has deferred this issue to factual hearing). If other provisions of the permit conflict with the legal standards established in Condition S.4 (and affirmed by the Board), it is these provisions that must be modified, not Condition S.4. Thus Issue 6 is really a challenge to other unnamed provisions of the Phase I permit, and not to Condition S.4. For that reason, Issue 6 is more appropriately left to the Phase I and Phase II hearings.

The issues statements for both the Phase I and Phase II permit appeals already contain issues that capture PSA's contention that the permit provisions will not achieve compliance with water quality standards. *See Phase I Third Pre-hearing Order, issue F.4 and Phase II Third Pre-hearing Order, issue 16a.* Therefore, the Board defers consideration of S.4 Issue 6 until we consider Phase I, Issue F.4 and Phase II, Issue 16a.

Based on the foregoing analysis, the Board enters the following:

ORDER

Summary Judgment on S.4 Issue 1 is granted in favor of Ecology to the extent we conclude Ecology has the legal authority to include requirements beyond MEP in Special Condition S.4 of the Permit.

The Board does not grant summary judgment to any party on S.4 Issues 2 through 5, and 7, and instead directs that these issues proceed to hearing. The Board requests factual testimony on the process and operation of S.4.F.

Ruling on S.4 Issue 6 is deferred to the permit specific Phase I and Phase II hearings. *See* Phase I Issue F.4 and Phase II, Issue 16a.

SO ORDERED this 2nd day of April 2008.

Kathleen D. Mix
Chair
William H. Lynch
Member

Andrea McNamara Doyle
Member
Kay M. Brown
Presiding
Administrative Appeals Judge

CONCURRING OPINION

*20 I write separately because I am not persuaded that Ecology had a “non-discretionary obligation” to include RCW 90.48.520 as a condition of these permits (as Ecology states in the permit fact sheets), or that discharges from MS4s are necessarily “subject to the same requirements as any other stormwater discharge” (as my colleagues conclude in the majority). That being said, I concur in the result reached by the majority because I find Ecology has the discretionary authority to include Special Conditions S.4.A and S.4.B as permit requirements, subject to our review of the reasonableness of the exercise of that discretion.

In administering the NPDES program, Washington State has the authority under the FCWA to adopt and enforce more stringent requirements related to water quality than the federal law provides. 33 U.S.C. § 1370. This section provides:

Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State ... to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard or standard of performance is in effect under this chapter, such State ... may not adopt or enforce any ... [limitation, prohibition, or standard] which is less stringent... 33 U.S.C § 1370 (emphasis added).

The State, acting through both the Legislature and Ecology, has done so on many occasions through enactment of numerous statutory and regulatory provisions, including several of the provisions discussed at length by the majority.⁹ Ecology has explicitly incorporated some of these requirements into the municipal stormwater permits at issue here, most notably the prohibition in RCW 90.48.520, and the parties have identified nothing in federal or state law that *expressly* precludes it from doing so.

The National Association of Clean Water Agencies and the National Association of Flood and Stormwater Management Agencies (the Amici) urge us to find that the discretion to apply “such other provisions as the [EPA] Administrator or the State determines appropriate for the control of such pollutants” provided in the CWA § 402 (p)(3)(B)(iii) is necessarily limited to those other provisions that are “practicable” within the MEP standard contained in the preceding clause of that subsection. *Amici brief at 9*. This argument fails to address the FCWA's overarching approach to water quality regulation that allows states to regulate water quality more stringently than the federal minimums established by the Act. Under this framework, § 402 (p) (3)(B)(iii) does not amount to an express proscription or denial of the state's right to adopt or enforce more stringent standards or prohibitions than Congress enacted for municipal storm sewer systems in 1987.

*21 An equally plausible reading of this subsection, and one that is more consistent with the broad reservation of authority in 33 U.S.C. § 1370, is as an expression of Congressional intent to preserve EPA's and the States' discretion to require more than the what is spelled out in § 402 (p)(3)(B) when they determine it is “appropriate” for the control of pollution. In evaluating the appropriateness of additional requirements, practicability is an obviously relevant consideration given the context in which this provision appears, but there is no indication that Congress intended to make that the only consideration.

In the end, this analysis leads in the same direction and reaches nearly the same conclusion as was reached by the majority: Ecology has the legal authority to include Special Conditions S.4.A and S.4.B, provided its decision to do so was an appropriate exercise of discretion in this case.

Under either approach, key to the Board's decision about the validity of Special Condition S.4 is the relationship between S.4.A and .B to the process outlined in S.4.F, by which permittees and Ecology will respond to discharges that are otherwise prohibited

by RCW 90.48.520 or that amount to unauthorized violations of state surface and groundwater quality standards, sediment management standards, or national Toxics Rule human-health based criteria. Whether every MS4 discharge that is prohibited by S.4.A or not authorized by S.4.B is intended to be *a per se* permit violation, or whether it is the *response* to such discharges that is intended to be determinative of a permit compliance will influence the ultimate judgment about the condition's validity.

I agree with my colleagues that the permits themselves are unclear on this point, but would find the former reading unreasonable in light of the fact that most if not all permittees will have intermittent or ongoing discharges that are prohibited or not authorized by S.4.A and B during this life of these permits. *Decl. of Fendt*, at ¶ 18,¹⁰ *Decl. of Wisdom*, at ¶ 14,¹¹ *Potter Decl.*, Ex. 8; *Moore Dep.*, pp. 79:19 - 80:5.¹² Reading Conditions S.4.A and S.4.B as triggering *per se* permit violations also contradicts the direction Ecology reported to the Legislature that it intended to take in these permits. *Municipal Stormwater NPDES Permit Program Report to the Legislature, January 2004*, at 9 (“Direction — Compliance and Compliance Measures: Ecology has made the following decisions: Permit compliance will be based on actions, not outcomes ...”) (*Terry Decl.*, Ex. Z).

While I would find Condition S.4 unreasonable as a matter of law if it triggers *per se* permit violations, I also agree with my colleagues that this issue is not suitable to summary judgment since the facts and circumstances surrounding the intent and operation of the Permits’ “compliance pathway” require further development, which should be done at hearing.

*22 Andrea McNamara Doyle

Member

Footnotes

- 1 The Presiding Officer finds good cause to grant PSA's motion for leave to file this over-length brief because PSA is replying to five separate response briefs. No parties oppose this motion. Therefore, PSA's motion is granted.
- 2 Additional appeals were filed by City of Pacific (PCHB No. 07-031), Whatcom County (PCHB No. 07-032), and Sammamish Plateau Water & Sewer District (PCHB No. 07-024), but they are not part of this consolidated action.
- 3 Washington State University filed two appeals of the EW Phase II Permit (PCHB No. 07-025, PCHB No. 07-058) which are not part of these consolidated appeals.
- 4 The National Association of Clean Water Agencies and the National Association of Flood and Stormwater Management Agencies (the Amici) argue in their amicus brief that the discretion provided in the last clause of 33 U.S.C. § 1342(p)(3)(B)(iii) is limited by the “maximum extent practicable” (MEP) standard in the first clause of that same provision. Since the Board concludes that the EPA has not in fact exercised its discretion to require compliance with state water quality standards, and since Washington state has the authority under other provisions of the FCWA to authorize requirements related to water quality that are more stringent than federal law, the Board does not need to decide whether EPA's discretion is limited by the “MEP” standard to decide the issues before it in this motion. *See* 33 U.S.C. § 1370.
- 5 Federal permits under FCWA regulate the discharge of “pollutants” and are referred to as “national pollutant discharge elimination system permits.” 13 U.S.C. § 1311, 1342. State permits regulate the discharge of “waste materials” and are referred to as “state waste discharge permits”. RCW 90.48.160.
- 6 The Puget Sound Water Quality Authority (PSWQA) was a planning body originally established by the Legislature in 1983 to develop a comprehensive plan to identify actions to restore and protect the biological health and diversity of Puget Sound. RCW 90.71.005, *Potter Decl.*, Ex. 5A, p. 1-1. It was charged with developing, adopting and overseeing the implementation of the Puget Sound Water Quality Management Plan. RCW 90.71.020(2)(a). PSWQA was eventually replaced with the Puget Sound Action Team, which in turn, has been replaced with the Puget Sound Partnership. *See* RCW 90.71.210.
- 7 In 2004, the Legislature passed legislation aimed specifically at the requirements for construction and stormwater general permits. *See* Laws of 2004 c 225, codified in part at RCW 90.48.555, .560, and .565. However, the use of general permits to regulate discharges of both industrial and construction stormwater predated this 2004 enactment, and was based on both state waste discharge laws and the FCWA. *See* Laws of 2004 c 225 (4) (“The legislature finds the department of ecology has been using general permits to permit categories of similar dischargers, including stormwater associated with industrial and construction activities.”)
- 8 Permittees also make the same type of timing argument in relation to this statutory provision that they did in relation to the WPCA provisions. Permittees' response brief to PSA and Ecology at 22. For the same reasons stated with regard to the WPCA provisions timing argument, the Board rejects the argument here.

- 9 The Legislature has designated Ecology the state's water pollution control agency for all purposes of the FCWA, and has granted it "complete authority to establish and administer a comprehensive state point source waste discharge or pollution discharge elimination permit program ..." RCW 90.48.260.
- 10 "In my opinion, requiring municipalities to meet water quality standards at all time[s], for all storms, at all places imposes an unreasonable and impracticable permit condition because permittees are unlikely to be able to predict how to comply or to demonstrate consistent compliance with water quality standards."
- 11 "[I]t is my professional opinion that discharges from municipal separate storm water sewer systems cannot consistently meet water quality standards and will not be able to do so for decades."
- 12 "Q: Do you think it is possible for permittees to comply with water quality standards? A: In the short term, I don't think it's possible. Certainly in this five year permit cycle for which we are writing these permits, no."

2008 WL 5510411 (Wash.Pol.Control Bd.)

End of Document

© 2016 Thomson Reuters. No claim to original U.S. Government Works.

2008 WL 5510413 (Wash.Pol.Control Bd.)

Pollution Control Hearings Board

State of Washington

PUGET SOUNDKEEPER ALLIANCE; PEOPLE FOR PUGET SOUND; PIERCE COUNTY PUBLIC WORKS AND UTILITIES DEPARTMENT; CITY OF TACOMA; PORT OF SEATTLE; SNOHOMISH COUNTY; CLARK COUNTY; PACIFICORP; AND PUGET SOUND ENERGY, APPELLANTS

v.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, RESPONDENT
CITY OF SEATTLE; KING COUNTY; PORT OF TACOMA; PACIFICORP; PUGET SOUND ENERGY; STATE OF WASHINGTON, DEPARTMENT OF TRANSPORTATION, INTERVENORS

PCHB Nos. 07-021, 07-026, 07-027, 07-028, 07-029, 0-030, 07-037

August 7, 2008

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

PHASE I

*1 These consolidated appeals involve the regulation of stormwater discharges from municipal storm sewer systems under a National Pollutant Discharge Elimination System (NPDES) and State Waste Discharge General Permit (State Waste Permit). In these appeals, multiple parties challenge the validity of the Department of Ecology's (Ecology) 2007 Phase I Municipal Stormwater General Permit (Phase I Permit). This permit was issued pursuant to the Federal Water Pollution Control Act, commonly known as the "Clean Water Act" (CWA), 33 U.S.C. § 1251 *et seq.* and the state Water Pollution Control Act, (WPCA), Chapter 90.48 RCW.

The Pollution Control Hearings Board (Board) held a multiple day hearing between April 29, 2008 and May 8, 2008. Attorneys Todd True and Jan Hasselman represented Appellants Puget Soundkeeper Alliance and People for Puget Sound (PSA). Attorney Tad H. Shimazu represented Appellant Pierce County. Assistant City Attorney Doug Mosich represented Appellant City of Tacoma. Attorneys Susan Ridgley and Tanya Barnett represented Appellant Port of Seattle. Catherine A. Drews and Elizabeth E. Anderson, Deputy Prosecuting Attorneys, represented Appellant Snohomish County. E. Bronson Potter, Senior Deputy Prosecuting Attorney and Rodney Swanson, Clark County Department of Public Works represented Appellant Clark County. Attorneys Loren R. Dunn and Blake Mark-Dias represented Appellants Pacificorp and Puget Sound Energy (Utilities). Ronald L. Lavigne, Senior Counsel, and Thomas J. Young, Assistant Attorney General represented Respondent Ecology. Assistant City Attorney Theresa R. Wagner represented Intervenor City of Seattle. Senior Deputy Prosecuting Attorney Joseph B. Rochelle and Deputy Prosecutor Verna P. Bromley represented Intervenor King County. Attorney Carolyn Lake represented Intervenor Port of Tacoma. Stephen Klasinski, Assistant Attorney General represented Intervenor Washington State Department of Transportation (WSDOT).

Chair, Kathleen D. Mix, William H. Lynch, and Andrea McNamara Doyle comprised the Board. Administrative Appeals Judge Kay M. Brown, presided for the Board. Randi Hamilton and Kim L. Otis of Gene Barker and Associates of Olympia, Washington provided court reporting services.

PROCEDURAL BACKGROUND

On January 17, 2007, Ecology issued the Phase I Permit for discharges from large and medium municipal separate storm sewer systems (called MS4s). The Phase I Permit went into effect on February 16, 2007.

*2 PSA, Pierce County, City of Tacoma, Port of Seattle, Snohomish County, Clark County, and the Utilities appealed the Phase I Permit.¹ The Board conducted pre-hearing conferences, and entered pre-hearing orders for the Phase I Appeal. The parties raised multiple issues. The Board addressed many of these issues in a separate summary judgment order² and has resolved others through orders on summary judgment and after a hearing on the merits related to the Permit's Special Condition S4.³ The parties also withdrew some of the issues. This decision resolves the remaining issues, which include the following:⁴

C. Special Condition 8 re: Monitoring (challenged only by Clark and Pierce County)⁵

1. Whether the requirements imposed in Special Condition S8 are lawful, practicable, reasonable, and/or designed to achieve the goals of the statutory municipal stormwater permit program?

3. Whether the monitoring requirements imposed in Special Condition S8 are overly broad, overly prescriptive, and cost-ineffective so that requiring implementation of such requirements as written is unlawful, impracticable, and/or unreasonable?

E. Issues Specific to the Ports of Seattle and Tacoma

5. Whether the requirement in Special Condition S6.E.7 to prepare and implement SWPPP(s) for "all Port-owned lands," regardless of their capacity to generate pollutants or other site-specific characteristics, is unlawful, unreasonable, unjust, or invalid?

F. Joint Environmental Legal Issues

1. Low-Impact Development:

a. Does the permit fail to require maximum on site dispersion and infiltration of stormwater, through the use of "low impact development" techniques, basin planning, and other appropriate technologies, and if so, does that failure unlawfully cause or contribute to violations of water quality standards?

b. Does the permit fail to require maximum onsite dispersion and infiltration of stormwater, through the use of "low impact development" techniques, basin planning, and other appropriate technologies, and if so, does that failure unlawfully allow permittees to discharge pollutants that have not been treated with all known available and reasonable methods of treatment ("AKART"), and/or fail to reduce the discharge of pollutants to the maximum extent practicable ("MEP")?

2. Existing Development:

a. Does the absence of any standard and/or technology requirements for reducing stormwater discharges from existing development and existing stormwater systems unlawfully cause or contribute to violations of water quality standards?

b. Does the absence of any standard and/or technology requirements for reducing stormwater discharges from existing development and existing stormwater systems unlawfully allow permittees to discharge pollutants that have not been treated with AKART, and/or fail to reduce the discharge of pollutants to MEP?

*3 3. Monitoring: Is the monitoring required under Permit Condition S.8 unlawful because it is inadequate to determine whether: (i) the permittee is in compliance with water quality standards; (ii) discharges are causing or contributing to violations of water quality standards; or (iii) discharges are being treated with AKART and/or MEP?⁶

4. Water Quality Standards Violations:

a. Does the Phase I permit fail to ensure that discharges will not cause or contribute to violations of water quality standards?⁷

5. Compliance:

a. Does the permit unlawfully provide for compliance with permit terms on a schedule that is indefinite and unenforceable, not as expeditious as possible, and/or in excess of statutory deadlines?

b. Does the permit unlawfully allow a permittee to create and implement permit requirements without Ecology's oversight or involvement?

Based on pre-filed testimony, multiple days of sworn testimony of witnesses, extensive exhibits submitted into the record, and argument from counsel representing the numerous parties that participated in these consolidated appeals, and having fully considered the record, the Board enters the following decision:

SUMMARY OF THE DECISION

The Board concludes that the monitoring program established in Special Condition S8 and required of all permittees is a valid exercise of Ecology's technical expertise and discretion. (Issues C. 1 and 3, and F.5). The Board upholds the permit term requiring that Stormwater Pollution Prevention Plans (SWPPPs) be prepared on all port-owned lands, but directs that Ecology modify the condition to exempt environmental mitigation sites owned by the Port of Tacoma from the SWPPP preparation requirement. (Issue E.5). The Board concludes that the Phase I Permit fails to require that the municipalities control stormwater discharges to the maximum extent practicable, and does not require application of all known, available, and reasonable methods to prevent and control pollution, because it fails to require more extensive use of low impact development (LID) techniques. (Issue F.I.b). To remedy this problem, the Board directs Ecology to make specific changes to some provisions in the permit, and also remands the permit with direction to Ecology to require the permittees to develop methods for use of low impact development at parcel and subdivision levels in their jurisdictions. The Board concludes that permittees must provide information in their annual report to Ecology on the extent to which basin planning is being undertaken or should be considered in their jurisdiction in order to assist with future phases of the permit. The areas identified should be relatively undeveloped where new development is occurring, and from which discharges may impact aquatic resources. The Board concludes that the structural stormwater control program provisions of the permit, as drafted, constitute impermissible self regulation. (Issues F.2 and F.5.b). To remedy this deficiency, the Board directs modification of the permit to require permittees to describe the prioritization of their selected structural control projects. The Board affirms the source control program requirements without change. Finally, the Board concludes that PSA and the Utilities failed to prove that any of the conditions of the permit violate the timing requirements of 33 U.S.C. § 1342(p)(4)(A) (Issue F.5.a).

FINDINGS OF FACT

A. History of Phase I Permit

1.

*4 Ecology developed the current Phase I Permit through an eight year long process. The 2007 Phase I Permit replaced the first municipal stormwater NPDES and State Waste Permits, which were issued in 1995 and expired in July of 2000. *Testimony of Wessel, Moore, Exs. Muni 0002, p. 17, 0006, 0007, 0008, 0009.*

2.

On January 19, 1999, Ecology filed a Notice of Intent to reissue the 1995 permits. *Ex. Muni 0002, p. 6*. Ecology formed an advisory committee, which included representatives from cities, counties, state and federal agencies, environmental groups, and the public, to assist with development of the revised permit. This committee met several times during 1999 and 2000. *Testimony of Wessel, Moore, Exs. Muni 0002, p. 6-7*. The 1995 Phase I Permit closely followed the EPA Phase I Regulations, which allowed the permittees to propose what was contained within their own stormwater programs. Ecology was dissatisfied with this approach and decided that more detailed requirements were needed for the 2007 Phase I Permit. *Testimony of Moore*.

3.

Completion of the new permit was delayed at several junctures as a result of a number of intervening events and shifting priorities, including the federal listing of Puget Sound Chinook Salmon in 1999, the adoption of EPA's Phase II rules, and Ecology's decision to revise the state's Stormwater Management Manuals and develop the first Phase II municipal stormwater permits in tandem with the Phase I permit update. *Testimony of Wessel, Moore, Exs. ECY 6 (Phase I), Muni 0002, p. 7*.

4.

In response to legislative interest in the new federal requirements for municipal stormwater permits, Ecology convened two advisory groups during the summer of 2003: one for Eastern Washington and one for Western Washington. Each advisory group submitted a report of its findings to Ecology in early December, 2003. Ecology developed its own recommendations and published these, together with the recommendations from both advisory groups, in a report to the Legislature dated January, 2004. *Testimony of Moore, Exs. ECY 6 (Phase I), Muni 0002, p. 7*.

5.

Ecology filed a notice of intent to issue the Phase I and Phase II Permits in June of 2004. The agency released the first preliminary draft of the Phase I Permit for public comment in May, 2005, and the first formal draft in February, 2006. *Exs. PSA 018, Muni-0100*. Ecology received and reviewed thousands of pages of public comment, and responded to those comments in a 205 page document when it released the revised, final permit in January, 2007. *Exs. Muni 002, p. 7-8, ECY 3 (Phase I)*. Ecology issued the Phase I permit, in its current form, on January 17, 2007. It became effective on February 16, 2007, and expires on February 15, 2012. *Ex. Muni 001, Testimony of Moore*.

B. Overview of the permit

6.

The Phase I Permit regulates discharges from municipal separate storm sewer systems (MS4s) owned or operated by the following large and medium municipalities statewide: City of Seattle, City of Tacoma, Clark County, King County,⁸ Pierce County and Snohomish County.⁹ It also allows coverage of "secondary permittees," including the Ports of Seattle and Tacoma, for discharges from other publicly owned or operated municipal separate sewer systems located within the primary permittee cities and counties. Secondary permittees as a group are subject to somewhat different terms under the permit than primary permittees, and the permit also has specific terms applicable only to the Ports of Seattle and Tacoma and not other secondary permittees. The Phase I permit does not cover direct discharges into waters of the state from privately owned stormwater systems, nor does it cover the storm sewers owned and operated by the Washington State Department of Transportation (WSDOT).¹⁰ Unlike traditional NPDES permits, the Phase I permit is a "programmatic permit," meaning it requires the municipal permittees to implement area-wide stormwater management programs rather than establishing benchmarks or other numeric or narrative effluent limits for stormwater discharges from individual outfalls. *Testimony of Moore, Exs. Muni 0001, p. 1, 2, 60-65, Muni 0002, p 20-24*.

7.

*5 The heart of the Phase I Permit requires that permittees implement a Stormwater Management Program (SWMP). Special Condition S5 contains the SWMP requirements for the primary permittees, and Special Condition S6 sets out the SWMP requirements for secondary and co-permittees. The required elements of the SWMP track closely with EPA's Part II Application rules but contain much more detailed minimum performance standards for the municipalities' programs. This approach avoids the need for separate review and approval by Ecology of each SWMP prior to coverage under the Phase I Permit. Instead, a permittee is required to submit the SWMP with the permittee's first year annual report. S5.A. *Testimony of Moore, Wessel; Exs. Muni 0001, p. 6-25; Muni 0002, p. 18, 28-42.*

8.

Ecology views these SWMP requirements, in the aggregate, to represent the MEP standard; that is, permittees who implement all of the program requirements in combination with one another are considered by Ecology to be reducing the discharge of pollutants to the maximum extent practicable, even though it may be possible for a permittee to do more in a specific program element or at a specific outfall if the individual requirements were evaluated in isolation from the rest of the program requirements. *Testimony of Moore.*

9.

Under Special Condition S5 the SWMP must include ten component parts, which are mandatory to the extent allowable under state and federal law. These program components address the following topics, and the minimum requirements for each are set out in S5.C. 1 through 10 of the Phase I Permit: (1) Legal authority; (2) System mapping and documentation; (3) Coordination; (4) Public involvement; (5) Controlling runoff from new development, redevelopment, and construction; (6) Structural stormwater controls (retrofits); (7) Source control for existing development; (8) Illicit connections, illicit discharge detection and elimination; (9) Operations and maintenance; and (10) Education and outreach. *Muni 0001, p. 6-25.*

10.

More specifically, S5.C.1 requires the permittee to demonstrate by the effective date of the Phase I Permit that it has the legal authority to control discharges to and from its MS4s.¹¹ S5.C.2 requires the permittee to map, by specific dates, prescribed parts of its MS4. S5.C.3 requires the permittee to establish coordination mechanisms to remove barriers to stormwater management created by the need to coordinate efforts both internally within one governmental entity, and externally with jurisdictions that share drainage basins. S5.C.4 requires the permittee to provide ongoing opportunities for public involvement in its stormwater management program. S5.C.5 requires the permittee to develop a program to prevent and control impacts of runoff from new development, redevelopment, and construction activities. S5.C.6 requires the permittee to include a program to construct structural stormwater controls to prevent or reduce impacts from discharges from its MS4s. This element is applicable to existing development, as well as new development, and addresses impacts that are not already adequately controlled by other required actions under the SWMP. S5.C.7 requires the permittee to include a source control program for existing development that reduces pollutants in runoff from these areas. S5.C.8 requires the permittee to have an ongoing program to detect, remove and prevent illicit connections and illicit discharges, including spills, into its MS4s. S5.C.9 requires the inclusion of a program to regulate maintenance activities and to conduct maintenance activities by the permittee that prevent or reduce stormwater impacts. S5.C.10 requires that the permittee's SWMP include an education program with the goal of reducing or eliminating behaviors and practices that cause or contribute to adverse stormwater impacts. The performance measures associated with S5.C.2 through 10 must be completed within specific time periods. *Testimony of Moore, Wessel, Exs. Muni 0001, p. 6-25, Muni 0002, p. 28-42.*

11.

*6 Special Condition S6 (S6), which is similar but not identical to S5, establishes the components required for SWMPs from secondary permittees. Parts of this condition apply to all secondary permittees (S6. A, B and C), all secondary permittees other than the Ports of Seattle and Tacoma (S6.D), and just the Ports of Seattle and Tacoma (S6.E). *Testimony of Moore, Exs. Muni 0001, p. 25-39, Muni 0002, p. 42-47.*

12.

Special Condition S8 (S8) addresses monitoring. It requires the primary permittees and the Ports to develop and implement long-term monitoring programs for the purpose of meeting two of the four monitoring objectives identified in the first round of the Phase I municipal stormwater permits issued in 1995: (1) estimating pollutant concentrations and loads from representative areas or basins; and (2) evaluating the effectiveness of selected Best Management Practices (BMP). The permit does not require monitoring to identify specific sources of pollutants or the degree to which stormwater discharges are impacting selected receiving waters and sediments. *Testimony of Moore, O'Brien, Exs. Muni 0001 p. 40-49; Muni 0002, p. 49-50.*

C. Monitoring provisions in S8

13.

Special Condition S8.C.1 specifies that the primary permittees' and the Ports' monitoring programs must contain three components: 1) stormwater outfall monitoring, which is intended to characterize stormwater runoff quantity and quality at a limited number of locations 2) Targeted stormwater management program effectiveness monitoring, which is intended to improve stormwater management efforts by evaluating at least two stormwater management practices that significantly affect the success of, or confidence in, stormwater controls, and 3) BMP evaluation monitoring, which is intended to evaluate the effectiveness and operation and maintenance requirements of stormwater treatment and hydrologic management BMPs. S8.D, E, and F set out the requirements for each of the three components. *Testimony of Moore, O'Brien, Exs. Muni 0001, p. 40-49; Muni 0002, p. 49-56.* A Quality Assurance Project Plan (QAPP) must be prepared for each of the components of the monitoring program in accordance with Ecology guidelines and submitted to Ecology for review. Ecology must review and approve the QAPPs for stormwater monitoring conducted under S8.D and F prior to monitoring. *Ex. Muni 0001, p. 40-41.*

14.

The first component of the Special Condition S8 monitoring involves outfall monitoring for the purpose of developing local knowledge of pollutant loads and average event mean concentrations from representative areas drained by MS4s. Developing a baseline of local data is important because some variations are emerging between stormwater characterization data from the Pacific Northwest and other areas around the county and world, with examples of both higher and lower concentration levels present regionally, differing from national averages. To accomplish this objective, the Permit requires permittees to select three sites that represent different land uses and then to monitor a certain percentage of storm events per year for a wide range of constituents and parameters. The permit requires storm events to be sampled using flow-weighted composite storm sampling. S8.D.2.b. The seasonal first-flush must be tested for toxicity. S8.D.2.d. Grab samples from each storm must be taken and tested for total petroleum hydrocarbon and fecal coliform bacteria, and one to three sediment samples must be collected each year at each site and analyzed for a variety of parameters. S8.D.2.e, f. *Testimony of O'Brien, Moore, Ex. Muni 0001, p. 41-45.*

15.

*7 The number of samples is intended to establish a sufficient database from which to discern annual and seasonal loading trends over a long time period. Performing a toxicity test on the "seasonal first-flush storm" provides an annual worst case scenario. Ecology believes this data is necessary to evaluate whether stormwater management programs are making progress towards the goal of reducing pollutants discharged and protecting water quality. The data would also be useful when establishing

Water Clean-up Plans (TMDLs) for water bodies not currently achieving water quality standards, and in other efforts to identify sources of toxicant loading to Puget Sound. *Testimony of O'Brien, Ex. Muni 0002, p. 49-53.*

16.

The second component of the S8 required monitoring, described in detail in S8.E, is the targeted stormwater management program effectiveness monitoring. In this section, each permittee must conduct monitoring designed to determine the effectiveness of (1) a targeted action (or narrow suite of actions) from their SWMP, and (2) achieving a targeted environmental outcome. The monitoring must, at a minimum, include stormwater, sediment or receiving water monitoring of physical, chemical and/or biological characteristics, and may also include other kinds of data collection and analysis. Ecology anticipates that the targeted environmental outcomes permittees will chose to evaluate will be measured in the receiving water and, therefore, may involve receiving water monitoring. *Testimony of O'Brien, Moore, Exs. Muni 0001, p. 45-46; Muni 0002, p. 53-54.*

17.

The third component of the S8 monitoring provisions is BMP effectiveness monitoring, the requirements of which are set out in S8.F. The purpose of this third component of the S8 monitoring is to develop local performance data on the effectiveness of specific treatment BMPs in reducing pollutant discharges and the effectiveness of various low impact development (LID) practices in reducing the quantity of runoff. This section requires the primary permittees and Ports to select and monitor two treatment BMPs in use at a minimum of two sites in their jurisdiction. S8.F.2. The permittees are also required to monitor the effectiveness of one flow reduction strategy¹² that is in use or planned for installation in their jurisdiction. S8.F.7. Though many of these treatment BMPs have been in common use for many years, and the 2005 Stormwater Management Manual for Western Washington relies on them as presumptively effective, Ecology has only incomplete information about their actual pollutant removal capabilities. *Testimony of O'Brien, Exs. Muni 0001, p. 46-47; Muni 0002, p. 54-56.*

18.

In the absence of local data, Ecology had relied on an existing national stormwater treatment BMP database,¹³ as its primary source of BMPs for the 2005 Stormwater Management Manual for Western Washington (The Manual) *Testimony of O'Brien, Tobiason, Exs. PI 0059, 0060, 0064 and 0065.* The national database is of limited utility, however, in evaluating the effectiveness of BMPs because the performance of treatment BMPs varies greatly depending on specific design criteria, loading criteria, different rainfall patterns, and the types and sizes of solids to which a site gets exposed. These factors vary widely across the country, and therefore BMP performance data from one area is not always useful for another area. This has been a specific concern for Washington because, until recently, there has been little Washington data in the database. In some instances, this national database lacks also data quality, and relies on an insufficient number of samples at a particular site or from a particular BMP to be statistically useful. So, while there exists national data that allows Ecology to make some general assumptions about how well BMPs perform, Ecology still lacks site-specific, region-specific data to verify that the BMPs perform the way Ecology anticipates they will perform. As a result, Ecology required permittees to evaluate BMP effectiveness in an effort to learn and apply the information in future settings and permit iterations. *Testimony of O'Brien, Tobiason, Kibbey, Exs. PI 0059, 0060, 0064, 0065, Muni 0002, p. 54-56.*

19.

*8 Ecology considered requiring receiving water monitoring in the Phase I Permit, but the municipalities as a group opposed the requirement. The 1995 Phase I Permit identified one monitoring objective as evaluating the degree to which stormwater discharges impact selected receiving waters and sediments, and Ecology concedes this continues to be a valid long-term objective for the municipal stormwater general permits. In the current iteration of the Phase I Permit Ecology decided, however, that receiving water monitoring data would not be the most helpful monitoring data because 1) receiving water monitoring data

is more complex data to obtain, 2) samples can be hard to collect during storms, and 3) it is difficult to tie the receiving water data back to a specific discharger. Ecology agreed with the municipalities that certain receiving waters may receive pollution from multiple upland sources, and monitoring the receiving water would not provide permittees with useful data by which they could develop or tailor their stormwater management programs. Ecology also does not typically require receiving water monitoring under several other general stormwater discharge permits, including the construction and industrial permits, except for certain impaired water bodies where there have been violations of discharge limitations. *Testimony of Moore, O'Brien, Ex. Muni 0002, p. 49.*

20.

The monitoring required by S8 is primarily aimed at developing a uniform baseline of information about the pollutant loading discharging from MS4s, and evaluating the effectiveness of the BMPs that permittees use to control and reduce the pollutants discharging from those systems. Ecology determined this data will be the most useful for establishing what constitutes maximum extent practicable reduction in pollutants from MS4 discharges for future iterations of the municipal stormwater permits. Allowing some municipalities to opt out of these requirements, by substituting different kinds of monitoring, would reduce the robustness of the data set Ecology seeks for establishing this baseline for future permits. *Testimony of Moore, O'Brien.*

21.

Ecology intends to rely on its own monitoring programs, coordinated with and supplemented by other monitoring efforts, to accomplish the receiving water monitoring objectives identified in the 1995 permit. Ecology received an \$800,000 state appropriation to begin work with a collaborative monitoring consortium to identify the elements of a comprehensive receiving water monitoring program, outside of the permit process. Such a monitoring consortium could more fairly distribute the cost of monitoring among all of the entities with an interest in receiving water data and form the basis for effective, region-wide monitoring of receiving water quality in relation to discharge points. Although Ecology is currently organizing the consortium, no water monitoring has been started to date through this program, and inadequate funding currently exists to do so. Outside the consortium, some receiving water monitoring occurs through statewide ambient water quality monitoring and pollutant specific monitoring where a water body is subject to a TMDL. *Testimony of Moore, O'Brien, Wessel.*

D. Pierce and Clark Counties Monitoring Plans

22.

*9 Two primary permittees, Pierce and Clark Counties, already have water quality monitoring programs which differ significantly from the monitoring required in the Phase I Permit. The key difference between both of the counties' programs, and the Phase I Permit monitoring requirements, is that the county programs focus on monitoring in the receiving water environment. However, neither of the County programs monitors the chemical composition or toxicity of stormwater discharges from their MS4, nor relates stormwater management actions to a reduction in the pollutant characteristics of stormwater. *Testimony of Tobiason, O'Brien, Exs. PSA 018, PI 0042.*

23.

Pierce County began working with a consultant in 2004 to develop its monitoring program. The County developed the program based on the proposed monitoring requirements in an early draft of the Phase I permit, which included a receiving water monitoring component, as well as ongoing communications with Ecology personnel. The 2005 draft of the Phase I permit prescribed two of the five monitoring methods that Pierce County incorporated into its monitoring plan. *Ex. PI 0041.* Pierce County published its final program in March, 2007. *Testimony of Tobiason, O'Brien, Ex. PI 0042.*

24.

The overall goal of the Pierce County monitoring program is to implement a comprehensive monitoring program that will provide meaningful data to support the County's efforts to protect receiving waters from stormwater impacts. Although developed primarily in anticipation of the NPDES permit requirements, it also serves other county water quality objectives. In order to accomplish its goal, the program uses a three level receiving water monitoring approach. It includes long term status and trends monitoring, which includes a triad of bioassessments, physical channel characterization, and in-situ bioassays at existing County monitoring sites in selected streams, and may also include flow monitoring where gauges exist. Pierce County includes the sampling of the stream bottom as part of this long-term monitoring in order to determine the presence and health of benthic invertebrates. Monitoring benthic invertebrates provides a good indicator of watershed health because these organisms respond to physical and chemical stresses at the stream bottom. Pierce County applies these monitoring methods over a five year period to characterize the receiving waters in up to nine watersheds with regards to the receiving waters' physical stability, habitat, biological health, and susceptibility to toxicants in stormwater. This will enable Pierce County to prioritize responses to watersheds that exhibit vulnerability. It also includes targeted development monitoring, which compares upstream and downstream conditions to assess impacts of stormwater discharges on the receiving waters over finite periods before and after specific development. Targeted development monitoring includes continuous turbidity, conductivity and hydraulic stage monitoring and *in-situ* bioassay upstream and downstream of discharges from targeted development, and assessment of physical channel conditions downstream. Some aspects of the County's monitoring program, particularly the real-time data, will also assist the county in detecting spills and illicit discharges. The third level of receiving water monitoring included is a special studies monitoring. This method provides for adaptive management to be employed as needed on a site specific basis to develop cause-effect relationships that lead to focused stormwater management response. As part of this method, chemical analysis may be conducted if other programs indicate a need for such study to determine the cause of a problem discovered through receiving water monitoring. This is the only aspect of the Pierce County Program that provides for the use of chemical analysis. *Testimony of Tobiason, Kibbey, Exs. PI 0042, Ex. PI 0055, PI 0094.*

25.

*10 Clark County, like Pierce County, has its own monitoring plan which is focused on receiving water monitoring. Clark County developed its plan in response to its first NPDES/State Waste permit which was issued July, 1999 and expired December, 2000.¹⁴ *Muni 0140, Special Condition S5.B.4, p. 7, 8.* Its plan has three elements: a long-term index site project, hydrologic monitoring, and a stormwater needs assessment program. The index site project involves nine stream stations which are influenced by stormwater, and a forested reference site. A suite of stream health characteristics are monitored at each site. Water quality monitoring takes place on a monthly basis. The hydrologic monitoring consists of monitoring stream flow continuously through the use of storm gauges at several locations, including some of the site index locations. The stormwater needs assessment program is a system created to make an assessment of needs for each sub-basin in the county that contains parts of the MS4. Currently, Clark County is in the process of completing reports on 12 urbanizing and rural sub-watersheds. *Testimony of Swanson, Ex. Muni 0140, p. 7-8.*

26.

The monitoring required under the Phase I Permit is fundamentally different than the monitoring contained in the Pierce and Clark County monitoring programs. The Counties' monitoring programs do not routinely look at the chemical content or toxicity of stormwater discharges, nor do they look at the effectiveness of treatment BMPs. *Testimony of O'Brien, Tobiason, Kibbey.*

27.

Ecology stated that it was extremely important to be able to answer whether our stormwater programs are adequate to protect aquatic resources and uses in its 2004 report to the Legislature. Therefore, Ecology included recommendations that certain types of environmental monitoring be conducted at the local and regional levels, including monitoring of the biological, chemical, and physical health of receiving waters. *Ex. ECY 6 (Phase I), p. 31-32.*

28.

Ecology does not oppose the Counties continuing on with their own monitoring programs in addition to the S8 monitoring. However, it has not allowed Pierce and Clark Counties to substitute their programs for the required S8 monitoring. Ecology witness Edward O'Brien did not rule out the possibility that Ecology could allow Pierce and Clark to substitute their monitoring programs for some parts of the required S8 monitoring. Pierce County witness Heather Kibbey testified that Pierce County could not afford to do both its receiving monitoring program and the required S8 monitoring. *Testimony of O'Brien, Tobiason, Kibbey.*

E. Ports

29.

One of the required elements of the SWMP for all Phase I permittees is the preparation of a stormwater pollution prevention plan (SWPPP). The permit requires all primary permittees to prepare SWPPS for "all heavy equipment maintenance or storage yards, and material storage facilities owned or operated by the Permittee(s)" that are not already covered by another stormwater discharge permit. S5.C.9.b.xi, p. 23, 24. The primary permittees are allowed 24 months to complete the development of their SWPPPs. The secondary permittees, other than the Ports, are required to prepare SWPPPs for "material storage areas, heavy equipment storage areas, and maintenance areas" not covered by another stormwater discharge permit. S6.D.6.a.vi, p. 32. Their SWPPPs must also be completed within three years from the date of permit coverage. *Testimony of Moore, Ex. Muni 0001, p. 23, 24, 32.* In contrast, the Ports' SWPPP preparation requirement, found in S6.E.7, requires the Ports to prepare SWPPPs "all Port-owned lands" that are not covered by another stormwater discharge permit. The Ports are allowed 24 months to develop and implement their SWPPPs. *Ex. Muni 0001, p. 38.*

30.

*11 The Port of Seattle estimates this requirement will involve the preparation of SWPPPs for approximately 44 properties covering approximately 27 percent of its total Seaport acreage (286 acres).¹⁵ Some of these sites include port-controlled and operated facilities with multiple tenants, such as Shilshole Marina and Fisherman's Terminal, and several others consist of tenant-controlled container areas. *Testimony of Guthrie, Exs. PI 0020, 0022.* The Port of Tacoma has identified several port-owned sites that are not covered by other stormwater discharge permits, some of which include buildings and parking lots leased to other businesses, others of which consist of environmental mitigation sites. *Testimony of Graves, Ex. PI 0039.*

31.

The Phase I fact sheet explains Ecology's general thinking regarding SWPPP preparation for the primary permittees. It states: Ecology has determined that activities at certain sites owned or operated by permittees are potentially similar to activities at sites regulated under the Industrial Stormwater General Permit. For this reason this provision of the permit calls for developing Stormwater Pollution Prevention Plans (SWPPPs) for these sites.

Ex. Muni 0002, p. 41.

32.

In the 2005 draft of the Phase I Permit, Ecology required SWPPP preparation for "all Port-owned lands with potential pollutant-generating sources." *Ex. PSA 018, p. 37.* The final permit eliminated the qualifier because Ecology expected that all port-owned lands would be pollutant-generating sources, although Ecology did not consider wetland mitigation areas owned by the Port of Tacoma when it made this decision. *Testimony of Graves, Moore, Exs. PSA 018, p. 37; PI 0022, 0025-0027.*

33.

The Port of Tacoma owns several environmental mitigation sites (i.e. wetlands). Most of these sites probably discharge directly to surface or ground waters of the state, and not to the MS4. For the ones that do discharge to the MS4, there is only a small potential that the discharges would carry pollutants. Therefore, preparation of SWPPPs on these sites is unlikely to result in any corresponding water-quality benefits. *Testimony of Moore, Graves.*

34.

Ecology also explains in the fact sheet its reasons for providing a slightly different standard for the Ports regarding SWPPP preparation. It states:

Ecology has determined that special consideration is needed for the Ports of Seattle and Tacoma, distinguishing them from the broader group of Secondary permittees such as diking and drainage districts and public universities. These ports are both located on urban bays with documented water quality and sediment contamination problems that may be linked to stormwater discharges. The infrastructure in both Seattle and Tacoma is fairly old and the MS4s are heavily interconnected between each port and the respective city. Also, both ports lease properties to tenants, of whom many, but not all, are required to have coverage under the Industrial Stormwater General Permit. For these reasons this permit establishes SWMP components that are specific to these two entities.

*12 *Ex. Muni 0002, p. 43.*

35.

In general, the permit has more requirements for primary permittees SWMPs than it does for the Ports. *Contrast* S5.C. 1 through 10 (establishing 10 components for primary permittees SWMPs) p. 6-25 with S6.E (establishing 7 components for Ports SWMPs) p. 32-39. The source control program for existing development, which is a component of both primary permittees and the Ports SWMPs, also imposes more requirements on the primary permittees than it does the Ports. *Contrast* S5.C.7, p. 13-15, with S6.E.7, p. 38-39. Further, the scope of the primary permittees source control obligation is much wider than that of the Ports, because the primary permittees are dealing with thousands of different sources, compared to a much more limited number for the Ports. Therefore, the Ports will be preparing a much smaller number of SWPPPs than the primary permittees. While Ecology suggests that the Guidance Manual for Preparation of SWPPPs for Industrial Facilities can be used to assist in preparation of Port SWPPPs, it also encourages the use of generic SWPPP provisions for sites grouped by type of activity, such as parking lots. *Testimony of Moore, Guthrie, Exs. Muni 0001, p. 6-25, 33-39, Muni 0002, p. 44, PI 0021.*

36.

The Port of Seattle expects its tenant businesses to be involved in the preparation of the required SWPPPs because they have the most familiarity with the pollution-generating activities and source control opportunities at the individual sites, but the port, in its role as property manager, will work cooperatively with tenants through its routine compliance assessment process. For example, it has already provided its tenants with templates for preparing the SWPPPs. This process will involve some cost and effort on the part of the tenants, but can also serve as an opportunity for educating and training tenants in issues related to stormwater management. *Testimony of Guthrie.* The Port of Tacoma intends to prepare the SWPPPs for its existing tenant facilities which will require the port to become better informed about the details of its tenant operations and pollutant-generating activities. For new facilities, the Port of Tacoma intends to direct tenants to prepare the SWPPPs. *Testimony of Graves.*

F. Low Impact Development (LID)

37.

The major contention of PSAs' challenge to the Phase I permit is that traditional structural engineered stormwater management practices are inadequate to address the municipal stormwater problem and that the Permit should have also required greater use of Low Impact Development (LID) practices on a broader and more comprehensive scale.

38.

In the Phase I Permit, Ecology chose to regulate stormwater discharges from new development and redevelopment primarily through the imposition of a flow control standard. S5.C.5.b.i. *Ex. Muni 0001, p. 9, Testimony of O'Brien*. The flow control standard generally requires new and redeveloped sites that discharge to surface waters to control the rate at which stormwater is released from their sites so that the discharges do not cause accelerated stream channel erosion. The flow control standard is not a LID concept, because, in contrast to LID techniques, it is based on the premise that there will be discharges of stormwater from particular sites, and it attempts to control the duration and frequency of high stormwater runoff flows. Conventional stormwater management criteria frequently incorporate a post development peak discharge rate for a 2- and 10-year storm event based upon possible property damage due to flooding and stream bank erosion. These are becoming more recognized as insufficient because they do not address the loss of storage volume to provide for groundwater recharge, they do not adequately protect downstream channels from accelerated erosion, and the inspection and maintenance costs are an increasing burden for local governments. The goal of LID, on the other hand, is to minimize or prevent entirely the discharge of stormwater from the site. While utilization of LID techniques may be useful (or even in some cases necessary) to meet the flow control standard on a particular site, the flow control standard does not require the use of LID techniques. *Testimony of O'Brien, Booth, Exs. ECY 4 (Phase I) p. 2-30 through 2-35, Ex. PSA-053, p. 7*.

39.

*13 In order to meet the Permit's flow control standard(s), facilities must be engineered so that discharges are not predicted to exceed the predevelopment flow "durations" for a range of storm events. The Stormwater Management Manual gives detailed design specifications for sizing and constructing detention/retention facilities to meet the flow control standard. The Manual itself recognizes the shortcomings of the use of engineered stormwater conveyance, treatment and detention systems to control stormwater. It states, at page 1-25:

[These techniques] can reduce the impacts of development to water quality and hydrology. But they cannot replicate the natural hydrologic functions of the natural watershed that existed before development, nor can they remove sufficient pollutants to replicate the water quality of pre-development conditions.

The primary focus of detention standards is on mitigating the worst impacts of large storm events. These standards have little or no effect on small storm events, which can also cause damaging increase in flows. Stated another way, the flow control standard addresses large stormwater flow rates only, which occur only a small percentage of time (1%), and provides only residual control to runoff the remainder of the time. *Testimony of O'Brien, Booth, Ex. ECY 4 (Phase I), p. 1-25, 2-30 through 2-35*.

40.

Another limitation of the flow control standard comes from a significant exception to the requirement to achieve pre-developed discharge rates for basins that have had at least 40 percent total impervious area since 1985. Phase I permit, Appendix 1, p. 25-27, and Manual, Section 2.5.7 Minimum Requirement # 7, pp. 2-33. For sites in these basins, the pre-developed condition to be matched is the existing land cover. Most areas located within the Seattle city limits, many areas within the City of Tacoma, and some areas in Bellevue and Everett would qualify for this exception. *Testimony of O'Brien, Booth, Exs. ECY 4 (Phase I), p. 2-33, Muni 0001, Appendix 1, p. 25-27*.

41.

The Phase I Permit defines LID as follows:

stormwater management and land development strategy applied at the parcel and subdivision scale that emphasizes conservation and use of on-site natural features integrated with engineered, small-scale hydrologic controls to more closely mimic pre-development hydrologic functions.

Ex. Muni 0001, p. 62. Ecology adopted this definition from the Puget Sound Action Team's Low Impact Development Manual (PSAT Manual), which is a technical manual published in 2005 to "provide stormwater managers and site designers with a common understanding of LID goals, objectives, specifications for individual practices, and flow reduction credits that are applicable to the Puget Sound region." *Ex. PSA 050, p.2*¹⁶ Other definitions of LID offered in testimony at the hearing differ from this definition primarily in the scale of application of LID. Thomas Holz offers an almost identical definition to the one quoted above, but includes application at the watershed scale in addition to the parcel or subdivision scale. *Testimony of Holz, Ex. PSA 050, p. 11.*

42.

*14 While specific definitions of LID may vary, the concept of LID is well-established, and the basic BMPs that constitute LID are well-defined. LID techniques emphasize protection of the natural vegetated state, relying on the natural properties of soil and vegetation to remove pollutants. LID techniques seek to mimic natural hydraulic conditions, reducing pollutants that go into stormwater in the first instance, by reducing the amount of stormwater that reaches surface waters. *Testimony of Horner, Booth, Holz.*

43.

LID techniques store, infiltrate and evaporate stormwater where it falls rather than collect and convey it to surface waters off site, and can be implemented at an individual development site level, as well as part of a broader strategy employed at a basin or watershed level. Site-level LID BMPs include, but are not limited to, maintenance of natural vegetation on site; reduction of impervious surfaces; protection of natural drainage patterns, use of minimal excavation foundations such as pin foundation for structures; use of vegetated swales to capture and retain runoff; use of green roofs, and storage and reuse of runoff. At a watershed or landscape scale, LID strategies can include basin planning, water shed-wide limits on imperviousness, and protection of sensitive areas like riparian zones, wetland and steep slopes. *Testimony of Holz, Booth, Ex. PSA 050.*

44.

Although many LID techniques are not new ideas (i.e. grass roofs, rain gardens), LID as a formal stormwater management concept was developed in the late 1980's. *Testimony of Booth, Holz.* Prince George's County, Maryland, a pioneer in the area of LID in the United States, began working on bioretention or rain gardens during the 1980's, and published a comprehensive LID technical manual and an accompanying volume providing detailed hydrologic analysis and computational procedures in 1999. *Exs. PSA 052 and 053.* Two federal agencies, the U.S. Department of Defense and Department of Housing and Urban Development, adopted LID Manuals in 2003 and 2004. *Exs. PSA 054 and 055.* The Puget Sound Action Team and the Washington State University Pierce County Extension published The PSAT Manual, a 247 page, comprehensive, technical guidance manual for the use of LID in the Puget Sound Area, in January of 2005 with funding provided by the Ecology. *Ex. PSA 050.* The PSAT Manual was intended to provide a menu of treatment options and direction for site design techniques, but it does not attempt to identify a performance standard for any of the included LID strategies. *Testimony of O'Brien.*

45.

The Environmental Protection Agency (EPA) has not required the use of LID in its stormwater rules or EPA permits, but it is increasingly supporting and encouraging the use of LID approaches in municipal stormwater programs on its website and through numerous publications. *See for example, Ex. PSA 057 (EPA National Pollutant Discharge Elimination System (NPDES), Post-Construction Stormwater Management in New Development and Redevelopment)(posted on EPA's website); PSA Ex. 058, (EPA National Pollutant Discharge Elimination System (NPDES), Low Impact Development (LID) and Other Green Design Strategies) (posted on EPA's website); PSA 056 (EPA Fact Sheet for Stormwater Phase II Final Rule, Post-Construction Runoff Control Minimum Control Measure (Jan. 2000, rev'd 2005); Ex. PSA 066 (EPA Low Impact Development (LID), A Literature Review (Oct. 2000); Ex. PSA 059 (EPA 833-F-04-033, Resource List for Stormwater Management Programs (May 2004); Ex. PSA 060 (EPA National Management Measures to Control Nonpoint source Pollution for Urban Areas (Excerpts: Cover, Table of Content, Chapters 1-4, 10); Ex. PSA 061 (Memorandum from Benjamin Grumbles (Assistant Administrator, EPA) to EPA Regional Administrators Re: Using Green Infrastructure to Protect Water Quality in Stormwater, CSO, Nonpoint Source and Other Water Programs (Mar. 5, 2007); Testimony of Holz.*

46.

*15 Ecology's 2005 Stormwater Management Manual addresses the use of LID techniques in several ways, as part of the manual's Minimum Technical Requirements and Site Planning (Volume I), its Hydrologic Analysis and Flow Control Design/BMPs (Volume III), and its Runoff Treatment BMPs (Volume V). *Ex. ECY 4.*¹⁷ One of the most significant changes during the 2005 update to the Manual included the addition of a "credit" system for projects that use LID techniques. *Ex. PSA 064.*

47.

Volume I covers several key elements of developing a stormwater site plan, including identifying the minimum requirements for stormwater management at all new development and redevelopment projects. Minimum Requirement # 5, which directs on-site stormwater management for the purpose of using inexpensive practices on individual properties to reduce the amount of disruption of the natural hydrological characteristics of the site, requires the use of certain LID BMPs such as roof downspout control and dispersion and soil quality BMPs. This minimum requirement applies to single-family home sites and larger properties. *Testimony of O'Brien, Ex. ECY 4 (Phase I), Vol I, at 2-26; Ex. Muni 0001, Appendix I at p. 10 and 19.* The Phase I permit requires that permittees' local ordinances must meet Minimum Requirement # 5, including requiring specified LID BMPs to reduce the hydrologic disruption of developed sites. *Testimony of O'Brien, Ex. Muni 0001, Condition S5.C.5 (at p. 9) and Appendix I (at p. 19).*

48.

Stormwater site planning requirements, also contained in Volume I, direct that site layouts minimize land disturbance and maximize on-site filtration by considering a number of LID strategies and techniques such as preserving areas with natural vegetation (especially forested areas) as much as possible, minimizing impervious areas, and maintaining and utilizing natural drainage patterns. *Testimony of O'Brien, Ex. ECY 4 (Phase I), Vol I, at 3-2.*

49.

Volume III of the Manual focuses primarily on BMPs to address the volume and timing of stormwater flows from developed sites, for the purpose of providing guidance on the estimation and control of stormwater runoff quantity. Appendix III-C of this volume is Ecology's guidance explaining how Low Impact Development techniques can be represented in approved runoff models so that their benefits in reducing surface runoff can be estimated and credited in the flow duration model. It identifies seven categories of LID techniques, including permeable pavements, vegetated roofs, rainwater harvesting, reverse slope sidewalks, minimal excavation foundations, and rain gardens, and lists the basic design criteria Ecology considers necessary in order to justify use of the suggested runoff credit. *Testimony of O'Brien, Ex. ECY 4 (Phase I), Vol III, at Appendix III-C.*

50.

Finally, Volume V of the Manual identifies and discusses BMPs designed to treat runoff to remove sediment and other pollutants at developed sites, for the purpose of providing guidance on the selection, design and maintenance of permanent runoff treatment facilities. LID techniques are included in both the basic and advanced treatment options available to developers, and the method for determining the treatment credits for each technique is explained. Chapter 5 of this volume is devoted to the methods for analysis and design of on-site LID BMPs that serve to both control runoff flow rates as well as provide runoff treatment and, since 2005, has directed readers to use the PS AT Manual for various LID BMPs. *Testimony of O'Brien, Ex. ECY 4, Vol V.*

51.

*16 Ecology wrote the first draft of the current Phase I Permit in 1999. At that time, LID was recognized as a stormwater management strategy, but there was not the same body of work available on its use as there is today. Although much of the work and literature cited above postdated the initial draft of the current Phase I Permit, Ecology recognized that a large body of work existed on LID as it finalized the Phase I permit. Despite the existence of many LID source or reference materials, Ecology believed that it could not at that time define minimum LID requirements, and was unable to define a regulatory performance standard to hold municipalities to, should LID requirements be imposed by the permit. The agency also recognized that local governments had adopted other land use and development standards that were obstacles to the implementation of LID on a broader scale. Some local governments also have limited experience with LID techniques and are reluctant to approve them. *Testimony of O'Brien.*

52.

Early drafts of the permit included requirements for basin or watershed planning as a LID technique. Use of a basin planning approach in the permit would, among other things, require municipalities to consider the effects of loss of impervious cover to water quality in larger, watershed, basin, and sub-basin areas (potentially measured in many square miles). The ideal area size for basin planning is two to ten acres. WRIA-scale (Water Resources Inventory Area) planning efforts are too large to address the impervious surface problem. *Testimony of Wessel.* Basin planning can also lead to the development of better site specific strategies, and some Ecology staff advocated for its inclusion into the Permit. *Testimony of O'Brien.*

53.

Ultimately, Ecology drafted a permit that requires municipalities to identify barriers to use of LID, and to take steps to also "allow" LID. Specific requirements for basin planning were not included in the final permit, although the Endangered Species Act listing of various salmon species, and efforts of the Puget Sound Partnership are reasons to reexamine the need for basin planning as a permit requirement. *Testimony of Wessel, Moore; Ex. PSA 31.* Ecology rejected basin or watershed planning as a permit requirement, in part because the agency could not require a comprehensive planning effort, given that not all jurisdictions within a given watershed or basin were covered by the Phase I permit. Ecology also concluded that imposing both site level LID and basin planning requirements would move the agency too far into the land use regulatory arena, although Ecology witnesses conceded that imposition of more detailed LID requirements and a basin planning process could be harmonized with a parallel Growth Management Act land use process, thereby elevating water quality as a growth management planning priority. *Testimony of Moore, Wessel, O'Brien.*

54.

Ecology stated in its 2004 report to the Legislature that:

*17 Compact style development, with a smaller footprint, reduced impervious surfaces, natural areas within the urban core, and improved water detention can help local communities meet the Growth Management Act's goals of accommodating growth while protecting the environment.

Ex. ECY 6 (Phase I), p. 31. This same 2004 report to the Legislature highlighted the importance of stormwater basin planning in areas which are relatively undeveloped where new development is occurring. Ecology stated that in these areas:

site specific controls alone cannot prevent impacts and preserve aquatic resources. Recent research should be used to identify development strategies that may protect the resources. Scientific modeling of the basin can help predict the extent of potential impacts and the effectiveness of alternative land development options to help avoid or minimize those impacts.

Id. at 28. Ecology also recommended in its report to the Legislature that state and local governments consider basin planning to address the known shortcomings of the stormwater permits. Ecology stated that:

Stormwater basin planning is needed to quantify flow-related impacts and sources of pollution to urban water bodies. This information is needed to target resources spent on structural and non-structural controls (such as maintenance and public education) so that goals for urban water bodies can be met. In many basins, this planning can be combined with the planning for new development described earlier.

Id. at 30. Other types of water quality planning are taking place on a WRIA basis. The Board finds that information developed by permittees regarding their use of basin planning, and its possible interface with other planning efforts, would be very valuable to Ecology in its development of the next phase of the Permit.

55.

The Phase I Permit includes several conditions that address LID in various ways, nearly all of which are in the nature of encouraging or promoting rather than requiring LID by municipalities. In contrast to other permit terms, the final permit does not require municipalities to implement ordinances or other measures to use LID as a primary tool to manage stormwater within their jurisdictions. *See* S5.C.5.b.i (allowing local governments to tailor certain requirements applicable to new development through the use of basin plans or other similar water quality and quantity planning efforts); S5.C.5.b.iii (requiring SWMPs to allow non-structural preventative actions and source reduction approaches such as LID techniques); S5.C.6.a (stating that permittees should consider other means to address impacts from existing development “such as reduction or prevention of hydrologic changes through the use of on-site (infiltration and dispersion) stormwater management BMPs and site design techniques, riparian habitat acquisition, or restoration of forest cover and riparian buffers ...”); S5.C.10.b.(3) and (4) (requiring the inclusion of LID techniques in education and outreach programs); S8.F.1 and 7 (requiring monitoring of the effectiveness of one flow reduction strategy that is in use or planned for installation in their jurisdiction); and Appendix 1 § 4.5 (imposing, as a minimum requirement, on-site stormwater management where feasible, including use of roof downspout controls and dispersion and soil quality BMPs or their functional equivalent).¹⁸ *Exs. Muni 0001, p. 9, 10, 12, 24, 25, 46, 47, and Appendix 1, p. 19.*

56.

*18 Some commentors on the draft Phase I Permit criticized the lack of more mandatory LID requirements. The National Marine Fisheries Service and the U.S. Fish and Wildlife Service (jointly the Services) offered comments on the Draft Phase I Permit in May, 2006. While they supported many elements of the draft Permit, the Services recommended that the Permit employ methods to help ensure that several LID projects are completed within the permit term and strongly encouraged the use of basin planning to make better linkage with salmonid recovery plans organized at the watershed level. *Ex. PSA 030.* EPA offered its comments on the draft Phase I Permit in October, 2006. *Ex. PSA 067.* While EPA praised many aspects of the permit, it also recommended strengthening the permit by “promoting] the implementation of low impact development and non-structural best management practices,” and “add[ing] a basin planning program requirement.” Similarly, a group of Washington Scientists sent an “open letter” to Ecology on October 26, 2006, in which they criticized the draft Phase I Permit for its continued

focus on “end of pipe” management of stormwater, emphasizing the need to preserve existing “least-disturbed” watersheds, to limit forest loss, and to halt runoff from new impervious areas in the Puget Sound Basin. They recommended broad application of LID principles within the context of land use planning and development regulations efforts to prevent runoff to surface water. *Ex. PSA 010*.

57.

Ecology staff who developed the Phase I permit, as well as a number of stormwater experts who testified before the Board, agreed that no one stormwater management technique could solve the problem of polluted runoff from municipal stormwater systems. Even the extensive use of site-level LID is not sufficient, on its own, to fully protect aquatic resources. Rather, a combination of aggressive use of LID techniques, best conventional engineering techniques to manage high flows (such as the flow duration standard), and land use actions to preserve a high percentage of native land cover, are necessary to reduce pollutants in stormwater to the maximum extent, and to preserve water quality. Although there is considerable dispute about the attainable performance of particular LID strategies and engineering techniques, there is no dispute that *in combination* these approaches offer the best available, known and tested methods to address stormwater runoff. *Testimony of O'Brien, Holtz, Booth*.

58.

There are existing design criteria for many LID techniques, just as there are for traditional BMPs employed to manage stormwater run-off used at the parcel or subdivision scale (for example, pond size or thickness of a liner). These aspects of LID can be employed at a site specific level. However, at this time there are no universal or broadly endorsed performance standards for LID, at either the parcel, subdivision, or watershed scale. Nor were experts before the Board willing to endorse or recommend such standards from among the many potential options identified, although it was undisputed that any permit condition requiring permittees to meet a new stormwater performance standard based on LID would implicate many other local government regulatory schemes, and require modification to local government GMA planning processes and requirements, zoning and development regulations, and building codes. *Testimony of Holz*.

59.

*19 A zero runoff outcome from the use of LID techniques is one such performance standard, but actions to meet that standard would implicate a range of land use planning actions and watershed level assessments. It is possible to create other, more specific performance standards for LID, although the process would involve time and effort. Other jurisdictions are currently using such standards, or have proposed standards for use. For example, jurisdictions can require that LID BMPs be designed in accordance with guidelines in technical manuals, impose specific minimum technical requirements for buildings or roads, require protection of a specific amount of native vegetation at the site or basin level, limit the amount of effective impervious surface, protect the natural hydrograph through various parameters, require maintenance of a certain percentage of predevelopment evapotranspiration capacity or minimize or eliminate surface runoff, or require that developers prioritize LID BMPs as the first choice before conventional BMPs. The Phase I Municipal Stormwater Permit for San Diego County, which was reissued in January, 2007, requires all new and redevelopment projects to implement LID BMPs where feasible. The Permittees are given the responsibility of defining the applicability and feasibility of LID BMPs, including the minimum standards to ensure maximum implementation. Another example of an NPDES permit from another jurisdiction that incorporates a LID performance criteria is the Ventura County MS4 Permit. This permit, which was in draft form at the time of the hearing, requires that developers prioritize LID BMPs as the first choice before conventional BMPs. *Testimony of Booth, Hot, Homer, Exs. PSA 048, p. 13-18; PSA 069, p. 49; PSA 070, 072, 080, Snohomish County Code 30.63C*

60.

Requiring municipalities to impose parcel and subdivision-level LID best management practices represents a cost effective, practical advancement in stormwater management. Use of LID techniques at the parcel and subdivision level would not be

feasible on every type of site, or under all rainfall conditions present in Western Washington. Use of LID techniques could in some instances allow pollutants to enter groundwater. LID BMPs require maintenance. All of these limitations are also applicable to the more traditional end of pipe BMPs. In fact, site attributes that make implementation of LID techniques difficult also typically make implementation of conventional techniques difficult. In the absence of watershed or basin level efforts to utilize LID, parcel and subdivision-level use of LID will be less effective in overall stormwater management efforts, but still a substantial advancement. *Testimony of O'Brien, Booth, Hot, Horner, Exs. ECY 3 (Phase I), p. 34-36, PSA 066, p. 2, 3.*

61.

In many cases, implementation of LID techniques on the ground for new or redevelopment, or even retrofitting existing development, is less costly, or no more costly, than conventional engineered BMPs. Structural stormwater controls, such as detention ponds, curbs, gutters and pipes, require significant hardware and capital investment. LID techniques eliminate or reduce the need for these structural controls by reducing the volume of water to be managed. LID techniques may also require less space than these traditional methods. *Testimony of Hot, Booth, Horner, Exs. PSA 047, p. 6-10, PSA 066, p. 1, ECY 3 (Phase I), p. 35-36.*

62.

*20 A major cost consideration in utilizing LID techniques at a site level is not the engineering or construction associated with the LID techniques, but rather the costs associated with navigating a system of regulation and development that was not created with LID in mind. To fully incorporate LID principles into this system will require review, consideration, and in some instances modification, of existing zoning and building regulations that create obstacles to the use of LID. Some examples of common local government ordinances that could make it difficult to utilize certain LID techniques include requirements related to road width, curbs and gutters, vegetation clearing, and parking spaces. *Testimony of Hot, Horner.* The cost of implementing LID across a broader land use spectrum, through basin or watershed planning is more speculative, and the Board was presented with no clear evidence on costs associated with broader scale implementation of LID in this manner. Although such planning is underway in certain areas, a longer public and political process could be expected to accompany such an effort.

63.

The cost of not expanding the application of LID strategies to manage municipal stormwater is very high. The biological health of Puget Sound is declining, and a significant cause of the decline is stormwater run-off. This decline carries with it a variety of environmental, economic, and social costs. *Ex. PSA 087, p. 1.* The Puget Sound Water Quality Plan, which is a plan mandated by the Legislature to be the state's long term strategy for protecting and restoring the Puget Sound, stated as early as 2000 that local governments needed to adopt ordinances that allow and encourage LID practices. *Ex. PSA 078, p. 101.* Many leading scientists concluded, in a paper submitted to the Puget Sound Partnership in July of 2007, that the problem of stormwater must be addressed in the land use context if the health of Puget Sound, the species that inhabit it, and its various important beneficial uses to the region, are to be protected and/or recovered. The group concluded that:

We have well documented evidence that the impairment associated with stormwater runoff is primarily a **land use problem**, and that we cannot fully mitigate its effects if we approach it only site-by-site. We know that the problems must be addressed at a basin or landscape level-but we continue to manage land use and stormwater primarily on a site-by-site, end of pipe basis. At the same time, we also know that current site-by-site development techniques that result typically in wholesale loss of vegetation, compaction of native soils and connected impervious surfaces, can and should be improved upon significantly if we are to address stormwater problems.

Ex. PSA -012, p. 3 (emphasis in original).

64.

Recently, many local governments have begun incorporating LID techniques into their storm water manuals, and/or adopting LID stormwater requirements. Exs. PSA 072 (*City of Olympia, Engineering Design and Development Standards, Ch. 9, Green Cove Basin*); PSA 073 (*Graham Community Plan, A Component of the Pierce County Comprehensive Plan, Excerpts: pp. Cover, Table of Contents, p. 70, 87, 109, 149, 208*); PSA 074 (*Gig Harbor Peninsula Community Plan, Excerpts: pp. cover, 29, 41, 63, 117, 210*); PSA 076 (*King County, Washington, Surface Water Design Manual, Jan. 4, 2005, Excerpts: pp. cover, Table of Contents, 5-1 through 5-16*); PSA 051 (*Pierce County, Stormwater Management and Site Development Manual, Excerpts: Ch. 10, p. 10-1 to 10-82*).

65.

*21 Examples of the approaches already being used by Phase I Permittees to encourage or require the use of LID techniques include reducing charges for surface water rates with the use of an approved LID stormwater and surface water runoff systems (*City of Tacoma, Ex. PSA 085, p. 4*); promoting LID during project scoping meetings with potential developers (*City of Tacoma, Ex. PSA 085, p. 4*); adopting LID Ordinances (*Snohomish County, PSA Ex. 077, p. 8*); incorporating LID Development Design concepts into existing regulations (*Snohomish County, Ex. PSA 077, p. 9*); and providing public outreach and education about LID (*City of Tacoma, Ex. PSA 085, p. 5, Snohomish County, Ex. PSA 077, p. 10-14, City of Seattle, Ex. PSA 079, p. 12, 13*). Other, more stringent examples include requiring project proponents to use LID techniques for all proposed Fully Contained Community developments in rural areas (*Snohomish County, Ex. PSA 077, p. 9*); requiring LID for any UGA docket expansions proposals within the Little Bear Creek watershed (*Snohomish County, Ex. PSA 077, p. 10*); and requiring LID to be used on a large project in the Mill Creek pocket expansion (*Snohomish County, Ex. PSA 077, p. 9*).

66.

The Board finds that LID methods are at this time a known and available method to address stormwater runoff at the site, parcel, and subdivision level. Numerous reference documents, technical manuals, expert testimony, and Ecology's own Stormwater Management Manual, discussed above, support this finding. The Board also finds that LID methods are technologically and economically feasible and capable of application at the site, parcel, and subdivision level at this time. Because application of these methods at the basin and watershed level involves additional cost and practical considerations, we find Ecology must be ready for the eventual use of this known and available method of stormwater treatment for future iterations of the permit, consistent with its obligation to impose increasingly stringent requirements on discharges covered by NPDES permits.

G. Existing development

67.

The Phase I Permit addresses stormwater runoff from existing development through the implementation of structural stormwater controls and source controls. Both of these are required components of Permittees' SWMPs, and the Permit includes minimum requirements for each which are based on EPA's stormwater rules.¹⁹ *Testimony of Wessel, Ex. Muni 0001, p. 12-15, Ex. Muni 0002, p. 34-36.*

68.

The structural stormwater control program, also referred to as the "retrofit" component, is targeted at discharges not adequately controlled by other aspects of the SWMP. S5.C.6. Through this program, permittees must consider construction of stormwater control projects, as well as other means to address impacts to state waters caused by MS4 discharges. The permit directs that the program "shall consider the construction of projects such as: regional flow control facilities; water quality treatment facilities; facilities to trap and collect contaminated particulates, retrofitting of existing stormwater facilities; and rights-of-way, or other

property acquisition to provide additional water quality and flow control benefits.” The Permit also provides that permittees “should consider” other means to address impacts, including LID techniques such as “reduction or prevention of hydrologic changes through the use of on-site (infiltration and dispersion) stormwater management BMPs and site design techniques ...” S5.C.6.a. *Testimony of Wessel, Ex. Muni 0001, p. 12, 13.*

69.

*22 The permit establishes minimum performance measures for the structural stormwater control program, including development of the program within 1 year of the effective date of the permit, and implementation of the program within 18 months from the effective date of the permit. S5.C.6.b.i. Permittees are required to provide a list of planned individual projects that are scheduled for implementation during the term of the permit. Municipalities are not required to prioritize the planned projects in any manner. Permittees are required to submit a description of their structural stormwater control program to Ecology along with the written documentation of their SWMP, but the permit does not set a minimum level of effort for this requirement or provide for Ecology review and/or approval of the structural stormwater control program. S5.C.6.b.ii. *Testimony of Wessel, Dalton, Ex. Muni 0001, p. 12, 13, Ex. Muni 0002, p. 35.*

70.

The requirements for the Source Control Program for existing development are set out in S5.C.7. Through this program, the permittee must “reduce” pollutants in runoff from areas that discharge to MS4s, through application of operational and structural source control BMPs, and if necessary treatment BMPs to pollution generating sources associated with existing land uses and activities. S5.C.7.a. The program required in this section also must include inspections, application and enforcement of local ordinances at applicable sites, and reduction of pollutants associated with application of pesticides, herbicides and fertilizer discharging to MS4s. S5.C.7.b.ii-iv. While reduction of pollutants is mandated, no objective standard is set for the amount of reduction, although Ecology must review and approve the source control program. S5.C.7.b.i. *Testimony of Wessel, Muni 0001, p. 13-15.* Under this section of the permit, permittees must also implement a progressive enforcement policy to assure compliance with stormwater requirements within a reasonable time period. S5.C.7.b.iv. *Testimony of Wessel, Ex. Muni 0001, p. 13-15.*

H. Timing of Compliance

71.

PSA challenges the validity of several Phase I Permit provisions on the grounds that they do not require implementation of the permit within three years. PSA provides several examples of permit conditions that allow implementation after three years. Some of these examples include S5.C.2.b.ii (requiring outfalls to be mapped no later than four years from the effective date of the permit); S5.C.8.b.vi (requiring screening for illicit discharges in portion of each jurisdictions to be completed within four years.); and S.5.C.9.b.ii (3) (allowing permittees up to four years after the effective date of the permit to develop a schedule to inspect treatment and flow control facilities). PSA also provides examples of conditions that impose duties that are tied to the expiration of the permit. Some examples of these conditions include Condition S6.A.3 (full development of the co-permittee and secondary permittees' SWMPs no later than 180 days prior to the expiration of the permit); and S6.D.1. a.ii (Secondary permittees shall label all inlets 180 days prior to expiration of the permit). *Ex. Muni 0001, p. 7, 18, 20-21, 25, and 27.*

72.

*23 Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.

CONCLUSIONS OF LAW

1.

The Board has jurisdiction over the parties and the issues in the case pursuant to RCW 43.21B.110(1)(c). The burden of proof is on the appealing party(s) as to each of the legal issues, and the Board considers the matter *de novo*, giving deference to Ecology's expertise in administering water quality laws and on technical judgments, especially where they involve complex scientific issues. *Port of Seattle v. Pollution Control Hearings Board*, 151 Wn.2d 568, 593-594, 90 P.3d 659 (2004). Pursuant to WAC 371-08-540(2), "In those cases where the board determines that the department issued a permit that is invalid in any respect, the board shall order the department to reissue the permit as directed by the board and consistent with all applicable statutes and guidelines of the state and federal governments."

A. Monitoring (Issues C.1, C3, and F.3.)

2.

Two counties, Pierce and Clark, challenge the monitoring requirements imposed by Special Condition S8.²⁰ They contend that their own monitoring programs, which focus on receiving water monitoring, are more advanced than the monitoring required by S8. While they support Ecology's S8 monitoring approach as a starting point for municipalities that do not already have well developed receiving water monitoring programs, Pierce and Clark Counties argue that compliance with the S8 monitoring will hinder their own efforts to protect water quality.

3.

The Utilities also challenge the validity of the S8 monitoring program. They contend that it is deficient because it does not require receiving water or "compliance" monitoring. They argue that receiving water monitoring is necessary to establish whether the permittees have complied with water quality standards and whether they have treated their discharges with AKART or to the maximum extent practicable.²¹

4.

WAC 173-226-090(1) establishes monitoring requirements for general waste discharge permits. The Board has concluded in its past decisions that this regulation provides Ecology with the discretion to impose *reasonable* monitoring requirements. WAC 173-226-090(1); *Puget Soundkeeper Alliance v. Ecology*, PCHB Nos. 05-150, 0151, 06-034, -040 (Jan. 26, 2007) (CL 22). Further, since a decision pertaining to monitoring requirements in a general permit falls within an area of Ecology's technical expertise, and involves complex scientific issues, the agency's decision is entitled to deference. *Port of Seattle* at 593-594. The disagreement between appellants and Ecology reflects different sides of a long-standing debate regarding the relative merits of instream versus outfall monitoring, and the most advantageous sequencing of the two. *Ex. P1 0048*. It is clear there is no one right approach, as the type and timing of monitoring that is best in any given situation depends on the particular purpose, context, and available resources, among other factors.

5.

*24 Neither the Utilities nor the Counties have cited to any law requiring the Phase I Permit to require receiving water monitoring. The federal stormwater rules require only that municipalities propose a monitoring program for the term of the permit, but list few specific requirements. 40 C.F.R. 122.26(d)(2)(iii)(D).²² The Board concludes that Ecology's decision not to require receiving water monitoring during this permit cycle is lawful and reasonable. Ecology's decision to require monitoring designed to understand the pollutants discharging from MS4s, and to evaluate the effectiveness of the BMP's in use, will provide the most useful data to establish what constitutes maximum extent practicable reduction in pollutants in discharges

from MS4s for future permits. Further, as pointed out by Ecology, the counties are not prohibited from conducting receiving water monitoring in addition to the S8 monitoring required under the permit.²³

6.

In light of the discretion Ecology has in this area, the deference its technical decisions are entitled to, and the fact that the burden of proof rests on the party challenging the permit, neither the Counties nor the Utilities have presented a sufficient case to convince the Board that it should reverse Ecology's decision to select the S8 monitoring program and require all permittees to participate in it.

B. Ports (Issue E.5)

7.

The Ports contend that it is “unlawful, unreasonable, unjust, or invalid” to require them to prepare SWPPPs on all port owned land not covered by another discharge permit. The Ports argue that the primary permittees have to prepare SWPPPs only on areas on which industrial type activities occur (maintenance areas and material and heavy equipment storage) that are not covered by another discharge permit. The Ports assert that it is unreasonable to require SWPPPs without consideration to how property is used, it is unreasonably burdensome to the Ports because of the cost to prepare SWPPPs, and it is unnecessary because not all port-owned lands have polluting generating characteristics. The evidence presented, however, does not support these arguments.

8.

The evidence presented at the hearing establishes that lands owned by the Ports of Seattle and Tacoma are located close to vulnerable urban waters with documented water quality and sediment contamination problems. Almost all of the port-owned lands that discharge to MS4s have pollutant-generating characteristics. Therefore preparation of SWPPPs for these properties will have environmental benefits. The only exception is those few environmental mitigation sites owned by the Port of Tacoma. Most of these environmental mitigation sites probably do not discharge to the MS4s, and therefore would not require coverage under the Phase I Permit. For the ones that do, however, there is no environmental benefit gained by requiring the preparation of a SWPPP, and it is appropriate to exempt these sites from preparation of SWPPPs.

9.

*25 The Board concludes that it not an unreasonable burden to require the Ports to prepare a SWPPP for all port-owned lands which discharge to the MS4 and are not already covered by another discharge permit. Based on the permit's inventory of types of sites with potential pollutant generating sources (*Muni 0001, Appendix 8*), it was reasonable for Ecology to conclude that the Ports owned most or all of these type of pollution sources, and that the Ports needed to prepare plans to manage stormwater from such port-owned property. The Ports also have fewer requirements under the Phase I Permits than other primary permittees. They will have fewer SWPPPs to prepare than the primary permittees. For SWPPP preparation, they can use some generic conditions for sites with identical uses, such as commercial buildings or parking lots. This will reduce the amount of time it takes to prepare each SWPPP and the cost of preparation. The ports can also work cooperatively with their tenants who share some responsibility for the proper management of stormwater on port-owned properties, which will have the added environmental benefit of educating site operators about stormwater BMPs.

10.

The Board concludes that Special Condition S6.E.7, which requires the Ports to prepare SWPPPs on all port-owned lands is appropriate and valid. However, the permit should not mandate SWPPP preparation for environmental mitigation sites owned by the Port of Tacoma, as the Port of Tacoma has shown that such sites are unlikely to generate untreated stormwater pollution.

C. LID (Issue F. 1.a & b)

11.

The LID issues raised in this appeal involve the question of whether the Phase I Permit fails to meet the required treatment standard of reducing pollutants to the “maximum extent practicable” (MEP) and applying “all known, available and reasonable methods of treatment” (AKART), because the permit does not require more extensive use of LID techniques.

12.

The Board has previously ruled in this appeal (on summary judgment in the Special Condition S4 proceeding) the CWA requires that NPDES permits issued for discharges from MS4s must reduce pollution to the maximum extent practicable (the “MEP” standard). The Board also concluded the WPCA contains a similar requirement, in that all wastewater discharge permits must incorporate permit conditions requiring all known, available and reasonable methods of treatment to control the discharge of toxicants and protect water quality (the “AKART” standard). Order on Dispositive Motions: S.4 issued on April 2, 2008.

13.

The MEP standard in the CWA provides:

Permits for discharges from municipal stormsewers ... (iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.

*26 33 U.S.C. § 1342(p)(3)(B)(iii).

Neither Congress nor the EPA have defined the meaning of MEP in the municipal stormwater context, nor do the parties cite to federal court cases interpreting the MEP standard in the municipal stormwater context.²⁴ The Board, in a prior decision pertaining to the first round of the municipal stormwater permits, stated:

The MEP standard is unique under water pollution laws and applicable only to municipal stormwater discharges. MEP reflects the difficulty of addressing stormwater on a system wide basis and the focus of regulating municipal stormwater discharges on prevention and control. This approach by its nature requires extensive planning and *prioritization* to achieve the underlying goal of meeting water quality standards.

Save Lake Sammamish v. Ecology, PCHB Nos. 95-78 & 121, Order Granting Summary Judgment (Dec. 12, 1995) (emphasis added).

14.

The AKART standard originates in state law, but the Legislature has not explicitly defined the term. Ecology has incorporated the state AKART standard into several of its regulatory programs (*e.g.*, the state surface and ground water quality standards, state waste discharge and NPDES permit programs, sediment management standards, and domestic wastewater facilities regulations), and has defined the AKART standard through rulemaking. In the state's surface water quality standards, “AKART” is defined as “the most current methodology that can be reasonably required for preventing, controlling, or abating the pollutants associated with a discharge.” WAC 173-201A-020. The Washington Supreme Court has further clarified that the “reasonableness” prong of AKART involves both technological and economic feasibility. *Puget Soundkeeper Alliance v. Ecology*, 102 Wn. App. 783, 792-793, 9 P.3d 892, 897 (2000).

15.

In evaluating MEP and AKART for the Phase I Permit, we start with the context that this is a “programmatic” permit that regulates the discharge from MS4 systems on a jurisdiction-wide basis, through the municipalities' implementation of their Stormwater Management Programs. In several instances the permit requires that through these Stormwater Management Programs, municipalities enact ordinances or orders, or adopt other enforceable documents, to control pollution in stormwater. *See, e.g.*, Condition S5.C.1. The nature and scope of the LID provisions in the Permit, and what can be required through the permit, must therefore be evaluated within the broader context of the SWMP requirements and the programmatic nature of this permit.

16.

The permit's reliance on a flow control standard as the primary method to control stormwater runoff from MS4s fails to reduce pollutants to the federal MEP standard, and without greater reliance on LID, does not represent AKART under state law. The permit's reliance on terms that simply require “removal of obstacles” and actions to “allow” use of LID is insufficient to meet these same federal and state pollution control standards. The testimony presented by PSA, the Utilities, and Ecology's technical experts leads to the indisputable conclusion that application of LID techniques, at the parcel and subdivision level, is a currently known and existing methodology that is reasonable both technologically and economically to control discharges entering into MS4s covered by the Phase I Permit. The great weight of testimony before the Board, from various experts and Ecology witnesses, was that in order to reduce pollution in urban stormwater to the maximum extent practicable, and to apply AKART, it is necessary to aggressively employ LID practices *in combination with* conventional stormwater management methods. Thus, we conclude that under state law, the permit must require greater application of LID techniques, where feasible, in combination with the flow control standard, to meet the AKART standard. The permit must also require the application of LID, where feasible, and conventional engineered stormwater management techniques to remove pollutants from stormwater to the maximum extent practicable in order to comply with federal law. Our recognition that use of LID is to be employed where feasible recognizes that, like all stormwater management tools, it too is subject to limitations in its practical application by site or other constraints. *See Findings of Fact 49-51.* We do not change the applicable legal standard by use of this term. Accordingly, the permit must be remanded for modification in light of this conclusion.

17.

*27 Although we conclude that the permit must require municipalities to employ broader use of LID at the parcel and subdivision level, we stop short of concluding that the permit must, at this time, require use of LID at a basin and watershed level. Based on the evidence before the Board, we cannot conclude that the current iteration of the permit must require implementation of LID on a basin or watershed scale in order to meet federal and state water quality standards. Little evidence was presented as to the elements and cost of basin or watershed planning that would be necessary to implement LID at this level. Ecology testified that the current Phase I and Phase II permits result in a patchwork of regulation of municipal stormwater, and jurisdictions are at greatly varying degrees of readiness to manage stormwater on basin or watershed levels. The Phase II permittees themselves are at greatly varying degrees of readiness and capacity to undertake LID on a basin and watershed level, and would need to work with Phase I and other jurisdictions to do so. Given these several factors, the Board concludes that a permit condition requiring municipalities to implement LID at a basin or watershed level is not, at this time, reasonable or practicable. This is not to say that no steps can or should be taken at this time. Ecology has identified the particular importance of basin planning in areas which are relatively undeveloped where new development is occurring. The Board concludes that city and county permittees should identify such areas where potential basin planning would assist in reducing the harmful impacts of stormwater discharges upon aquatic resources. This will assist Ecology in readying for the next round of permits when such a requirement may be necessary to meet the state AKART standard and, under federal law, to reduce pollutants in municipal stormwater to MEP. As we discuss in further conclusions, we do not find the Growth Management Act to be an impediment to Ecology requiring greater use of LID than represented by the current permit, including at the basin and watershed planning level. Because the CWA and state

water quality laws anticipate that there will be increasingly stringent requirements imposed on those that discharge pollutants to the state's waters, including municipalities, efforts to further basin and watershed planning efforts in order to incorporate the known and available LID techniques should begin in anticipation of the next permit cycle.

18.

No party challenges Ecology's authority to require LID techniques if they are necessary to meet the AKART or MEP standards. The Board affirmed this point in its summary judgment order. Order on Dispositive Motions: (Phase I Municipal Stormwater Permit) (April 8, 2008). The Board further stated:

As pointed out by PSA, it is impossible to untangle stormwater management from land use. Even the commonly accepted water quality technique of requiring a stormwater retention pond at a site takes up significant area in a development, potentially reducing the number of buildable sites and constituting a land use restriction. The challenge, as recognized by both Ecology and PSA, is to most effectively harmonize Ecology's authority over site design and land use standards under the water pollution laws with other state laws that are specifically aimed at addressing land use on a broader scale.

*28 *Id.* While Ecology does not dispute that it has the authority to require the use of LID techniques, it was constrained in the full exercise of this authority because of concerns about intruding too far into local government land use planning efforts under the Growth Management Act. Ecology's position is somewhat puzzling, as it has, through various requirements of its Stormwater Management Manual, and the permit itself, already required a number of LID techniques, and has required local government to remove obstacles to use of the same.²⁵ The Board concludes that contrary to the concerns raised by Ecology during permit development, that the GMA is not a barrier to greater use of LID but rather complements the efforts of Ecology to move forward with requiring the use of LID techniques under the Phase I Permit.

19.

The Legislature enacted the Growth Management Act (GMA), Ch. 36.70A RCW in 1990 and 1991, largely "in response to public concerns about rapid population growth and increasing development pressures in the state, especially in the Puget Sound region." *Quadrant Corp. v. State Growth Management Hearings Bd.*, 154 Wn.2d 224, 231-232, 110 P.3d 1132, 1136 (2005) (citations deleted). The GMA includes a broad statement of goals to guide local governments in their development and adoption of comprehensive plans including a goal to "Protect the environment and enhance the state's high quality of life, including air and water quality ..." RCW 36.70A.020(10).

20.

The GMA mandates that local governments adopt comprehensive plans which include, among other elements, a land use element addressing, "drainage, flooding, and stormwater runoff in the area and nearby jurisdictions" and providing "guidance for corrective action to mitigate or cleanse those discharges that pollute waters of the state, including Puget Sound or waters entering Puget Sound." RCW 36.70A.070(1); *Swinomish Indian Tribal Community v. Skagit Co.*, 138 Wn. App. 771, 774, 158 P.3d 1179 (2007) (concluding that the GMA mandates that local governments adopt comprehensive plans to protect surface and ground water resources.)

21.

The state WPCA predated the GMA, with the specific purpose of protecting the waters of the state. RCW 90.48.010. The Legislature tasked Ecology with the job of implementing the WPCA. RCW 90.48.030, .035. Clearly, there is an area of interface and overlap between the GMA and the WPCA.

22.

The Washington Courts have stated that statutes are to be read together harmoniously whenever possible. "The construction of two statutes shall be made with the assumption that the Legislature does not intend to create an inconsistency." *Peninsula Neighborhood Ass'n v. Dep't of Transportation*, 142 Wn.2d 328, 342, 12 P.3d 134 (2000). Further, as the Washington Supreme Court recently stated: "We do not favor repeal by implication, and where potentially conflicting acts can be harmonized, we construe each to maintain the integrity of the other". *Anderson v. State, Dept. of Corrections*, 159 Wash.2d 849, 859, 154 P.3d 220, 225 (2007)(citing *Misterek v. Washington Mineral Products, Inc.*, 85 Wn.2d 166, 168, 531 P.2d 805 (1975)). See also *Kariah Enterprises, LLC v. Ecology*, PCHB No. 05-021, Corrected Order Granting Partial Summary Judgment (Jan. 6, 2005).

23.

*29 The Board has addressed the interface between the GMA and the WPCA in the *Kariah* decision, cited above. In that case, the appellant challenged Ecology's denial of a CWA Section 401 Water Quality Certification for a proposed residential development. The Appellant argued that the Legislature, through GMA, had delegated Ecology's authority over wetlands under the WPCA to local governments. The Board rejected this argument, concluding that neither chapter 90.48 RCW nor 36.70A RCW contained any express provisions delegating Ecology's authority over protecting water quality in wetlands to cities and counties. The Board went on to conclude that the WPCA and the GMA should be harmonized, and that:

The legislative policy articulated in RCW 36.70A.010 indicates the GMA was directed at addressing uncoordinated and unplanned growth, not at shifting the responsibility to regulate wetlands from the state government to local governments.

Kariah, CL 33.

24.

Similarly, in a Shoreline Hearings Board decision addressing the interaction between the Shoreline Management Act (SMA) and the GMA, the Board concluded that Ecology's newly adopted shoreline rules did not improperly usurp the authority of local governments planning under the GMA, despite venturing into land use controls. *Association of Washington Businesses v. Ecology*, SHB No. 00-037, Order granting and denying appeal (2001)(Issue 9).²⁶

25.

The Legislature has not expressed any intent, either through the GMA, SMA, or amendments to the WPCA, to redirect Ecology's role in water quality protection to the local governments. The Department of Community, Trade and Economic Development (CTED), the agency charged with implementing and interpreting the GMA, has considered the interaction between the GMA and pre-existing laws not specifically addressed in the GMA. In WAC 365-195-700, CTED's GMA regulations state: For local jurisdictions subject to its terms, the Growth Management Act mandates the development of comprehensive plans and development regulations that meet statutory goals and requirements. These plans and regulations will take their place among existing laws relating to resource management environmental protection, regulation of land use, utilities and public facilities. Many of these existing laws were neither repealed nor amended by the act.

This circumstance places responsibilities both on local growth management planners and on administrators of preexisting programs to work toward producing a single harmonious body of law.

WAC 365-195-700 (emphasis added).²⁷

CTED's regulations further explain that:

Overall, the broad sweep of policy contained in the act implies a requirement that all programs at the state level accommodate the outcomes of the growth management process wherever possible. State agencies are rarely concerned solely with the rote application of fixed standards. The exercise of statutory powers, whether in permit functions, grant funding, property acquisition or otherwise, routinely involves such agencies in discretionary decision-making. The discretion they exercise should now take into account the new reality of legislatively mandated local growth management programs.

*30 WAC 365-195-765(4).

26.

The Phase I permittees are all cities and counties required to plan under the GMA. RCW 36.70A.040. Their planning must address protection of surface and ground water. RCW 36.70A.070(1). CTED has identified the Ecology Stormwater Management Manual as best available science in regard to stormwater management under the GMA. Ecology, as a state agency, must also work toward implementation of the GMA. We conclude that there is no conflict between GMA and the WPCA, nor the roles of local governments and Ecology under these statutes. These roles support and complement each other and can be harmonized to allow water quality efforts to be considered and integrated into the growth management process outlined in the GMA.

27.

The Board concludes Ecology may, within the bounds of the GMA, require use of LID as a water quality management tool. The Board further concludes that the Phase I Permit must be modified to require use of LID where feasible, as it is necessary to meet the MEP and AKART standards of federal and state law, respectively. RCW 36.70A.070(1) already provides the mandate for local governments planning under the GMA to address drainage, flooding, and stormwater runoff in order to mitigate or cleanse discharges of water pollution. The Permit, including the Manual, merely sets forth the methods to accomplish this requirement.

D. Existing Development (Issue F.2)

28.

PSA and the Utilities contend that the permit provisions addressing existing development are inadequate to meet the MEP and AKART standards. Their primary complaint is that both the structural and source control provisions applicable to existing development require only that programs "reduce" impacts from discharges (S5.C.6) or that the permittees "reduce" pollutants in runoff (S5.C.7). They contend that these sections do not set any minimum expectation for the level of effort required and allow the permittees to make de minimus reductions in polluting discharges, and thus constitute impermissible self regulation. *PSA v. Ecology*, PCHB Nos. 02-162, -163, and -164, Order Granting Partial Summary Judgment (June 6, 2003)(CL XVI)(citing *Environmental Defense Center v. Environmental Protection Agency*, at U.S. App. 497, at 57-62 (9th Cir., Jan. 14, 2003)).

29.

The Board agrees the structural stormwater control program, as drafted, amounts to impermissible self-regulation. First, the permit fails to require a minimum level of effort for the permittees in the selection and prioritization of structural stormwater projects, and provides no review and approval role for Ecology. Second, the permit fails to comply with the applicable EPA rule and therefore amounts to impermissible self regulation on this basis as well. 40 C.F.R. 122.26(d)(2)(iv) requires that "Proposed management programs shall describe priorities for implementing controls." Condition S5.C.6 merely requires the permittees to develop a program within 12 months and provide Ecology a "list of planned individual projects that are scheduled for implementation" during the term of the permit. S5.C.6.b.i. While initial project selection is presumably subject to the MEP and

AKART standard of the permit, Ecology plays no role in ensuring these standards are met, even through simple review of the selected projects. The permit does not contain any requirement that permittees describe their project priorities or require that Ecology review the permittees' structural stormwater control program. Ecology is not expected to approve the municipalities' prioritization of projects in relation to the pollution reduction requirements of the permit. While Ecology testified that the permit "implied" there needs to be a prioritization of planned structural stormwater control projects, and a schedule reviewed by Ecology (*Moore testimony*), the permit does not expressly state this requirement and the fact sheet explicitly states that "review and approval by Ecology is not a permit requirement." *Ex. Muni 0002*, p. 35. Thus, the structural stormwater control program is left entirely to the discretion of the municipalities, not only with respect to which projects they initially select, but also in the timing and manner in which they implement the selected projects. Prioritization of projects is particularly important given that Conditions S5 and S6 are based upon actions taken by the permittees and not outcomes, and this structural stormwater control provision is to "address impacts that are not adequately controlled by the other required actions of the SWMP." Prioritization helps to ensure that the sites where the permittees choose to "act" are meaningful in providing environmental protection. It can also assist to engage the public as a partner in reducing pollutants in discharges and the overall volume of discharges. A community, for example, could request a permittee to focus a project in an area which discharges near shellfish beds. While the Board recognizes that local funding will influence the selection of planned projects and that municipalities must therefore retain local control in the selection process, we conclude that the permit must require permittees to describe the prioritization of their selected projects in order to comply with federal rules, demonstrate compliance with the MEP and AKART standards, and facilitate oversight by Ecology to ensure the legal standards of the permit are applied on a programmatic level. *See Save Lake Sammamish v. Ecology*, PCHB Nos. 95-78 & -121, Order Granting Summary Judgment (Dec. 12, 1995).

30.

*31 In contrast to the structural stormwater control program provisions, the source control program for existing development requires a more rigorous program to reduce pollutants in runoff from areas that discharge to MS4s owned or operated by the permittee, and does not suffer from the same flaws as the structural stormwater control program. The permit requires that Ecology must review and approve the source control program. S5.C.7.b.i. Therefore, the Board concludes that the source control program as drafted meets the MEP and AKART standard.

E. Water quality violations (Issues F.1.a., F.2.a., and F.4)

PSA and PSE argue, through several different issues, that the permit fails to prevent discharges that violate water quality. *See* F. 1.a (permit fails to require LID techniques which results in discharges that violate water quality); F.2.a (permit allows discharges from existing development that violate water quality); F.4 (Permit as a whole allows discharges that violate water quality standards; Prohibition on violations of water quality standards contained in Special Condition S4 conflicts with other provisions of the permit). The Board concludes that the permit, with the amendments directed by the Board to meet AKART and MEP, and with the amendments directed by the Board to the S4.F compliance process,²⁸ is adequately conditioned to comply with state law.

F. Timelines for Compliance (Issue F.5)

31.

The CWA sets out a number of deadlines related to NPDES permits for industrial and large municipal dischargers, including a deadline for EPA to establish regulations setting forth permit application requirements, a deadline for filing permit applications, and a deadline for EPA's approval or denial of the permits. 33 U.S.C. § 1342 (p)(4)(A). The final sentence in 33 U.S.C. § 1342 (p)(4)(A) states: "Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit." PSA contends that the Phase I Permit violates this provision.

32.

The Board has addressed this specific sentence before, in a case involving a challenge to a renewal of the Industrial Stormwater General NPDES Permit. *PSA v. Ecology*, PCHB Nos. 02-162, -163, -164, Order Granting Partial Summary Judgment (June 6, 2003). In that case, involving industrial stormwater discharges, the Board concluded that the reference to “compliance” in the sentence referred to compliance with the permit requirement contained in 33 U.S.C. § 1342 (p)(3)(A)(the provision pertaining to industrial stormwater discharges). *PSA* at CL XXI. Applying that same analysis to this case, involving municipal stormwater discharges, the reference to “compliance” is to 33 U.S.C. § 1342 (p)(3)(B)(the provision establishing the MEP standard for municipal stormwater discharges). Therefore, the question becomes whether the permit allows any actions to occur later than three years after the date of issuance of the permit that are necessary to reduce discharges of pollutants to the maximum extent practicable.

33.

*32 Several of the conditions of the Phase I Permit allow actions required by the permit to occur more than three years after the date of issuance of the permit. PSA and the Utilities contend that this establishes that the permit violates 33 U.S.C. § 1342 (p)(4)(A). However, this fact alone does not establish a violation of 33 U.S.C. § 1342 (p)(4). PSA and the Utilities, as the parties with the burden of proof, must bring forth evidence establishing that earlier compliance with one of the permit provisions currently allowing implementation outside of the three year statutory window is necessary to meet the MEP standard. Ecology has developed a programmatic permit with multiple components to be implemented throughout the permit cycle which, collectively, represent MEP and AKART. To read the statute as suggested by PSA and the Utilities would inappropriately limit Ecology's ability to include within the permit additional conditions or requirements that may not be practicable within three years but which are reasonable within a longer time frame. The Board concludes that PSA and the Utilities have failed to meet their burden on this issue. The record does not contain sufficient evidence on any specific permit condition to convince the Board that the permit violates 33 U.S.C. § 1342 (p)(4)(2)

34.

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such.

Having so found and concluded, the Board enters the following

ORDER

Having concluded that portions of the Phase I Permit are invalid, the Board remands the Phase I Permit to Ecology pursuant to WAC 371-08-540, for modifications consistent with this opinion.

1. Ecology shall modify Special Condition S6.E.7 as follows:

7. Source Control in existing Developed Areas

The SWMP shall include the development and implementation of one or more Stormwater Pollution Prevention Plans (SWPPPs). A SWPPP is a documented plan to identify and implement measures to prevent and control the contamination of discharges of stormwater to surface or ground water. SWPPP(s) shall be prepared and implemented for all Port-owned lands, **except environmental mitigation sites owned by the Port of Tacoma**, that are not covered by either a General Permit or an individual NPDES permit issued by Ecology that covers stormwater discharges.

(modified language is in bold and underlined)

2. With respect to the use of LID, in addition to the specific modifications identified in No. 1 above, Ecology shall also modify the permit consistent with this opinion as follows:

a. Modify Permit Condition S5.C.5.b to read as follows:

iii. The program must (()) **require** non-structural preventive actions and source reduction approaches (()), **including** Low Impact Development Techniques (LID), to minimize the creation of impervious surfaces, and measures to minimize the disturbance of soils and vegetation **where feasible**.

*33 b. Require permittees to identify barriers to implementation of LID and, in each annual report, identify actions taken to remove barriers identified.

c. Require permittees to adopt enforceable ordinances that require use of LID techniques where feasible in conjunction with conventional stormwater management methods.

d. Require permittees to address in their annual report to Ecology under the Phase I Permit, information on the extent to which basin planning is being conducted in their jurisdiction, either voluntarily, or pursuant to GMA or any other requirement.

e. Require permittees to identify, prior to the next permit cycle or renewal, areas for potential basin or watershed planning that can incorporate development strategies as a water quality management tool to protect aquatic resources.

3. Ecology shall modify Special Condition S5.C.6.b.ii, related to structural Stormwater control programs minimum performance measures, to require that permittees describe the prioritization of their selected projects as required by federal rules, in order to facilitate oversight by Ecology to ensure that the MEP and AKART standards are met on a programmatic level.

SO ORDERED this 7th day of August, 2008.

Kathleen D. Mix
Chair
William H. Lynch
Member
Andrea McNamara Doyle
Member
Kay M. Brown
Presiding
Administrative Appeals Judge

Footnotes

- 1 City of Pacific (PCHB No. 07-031), Whatcom County (PCHB No. 07-032), and Sammamish Plateau Water & Sewer District (PCHB No. 07-024) filed additional appeals, but they are not part of this consolidated action.
- 2 See Order on Dispositive Motions (Phase I Municipal Stormwater Permit), issued on April 7, 2008.
- 3 See Order on Dispositive Motions: Condition S4, issued on April 2, 2008 and Findings of Fact, Conclusions of Law and Order, Condition S4, issued on August 7, 2008.
- 4 The numbering of these issues was retained from the numbering system used in the Third Pre-Hearing Order issued on December 11, 2007.

5 All of the permittee appellants initially raised issues related to the S8 monitoring provisions. These issues were resolved through
an agreement between Ecology and all of the permittee appellants except Clark and Pierce County. *See* Ex. Ecy 11 (Phase I). The
agreement also resolves issues raised by Snohomish County related to Special Condition S7.

6 PSA is not challenging the monitoring provisions of the permit. This issue is brought by the Utilities only.

7 This issue also includes the issue originally stated as S4.6: Does the prohibition on violations of water quality standards contained in
Permit Condition S4 unlawfully or unreasonably conflict with the other provisions of the permit?

8 King County Department of Metropolitan Services (METRO) is covered as a “co-permittee” with the City of Seattle for discharges
from outfalls King County owns or operates in the City of Seattle. *Special Condition S1.C, Exs. Muni 0001, p. 1, Muni 0002, p. 21.*

9 An MS4 consists of all of the conveyances, or systems of conveyances (including roads with drainage systems, municipal streets,
catch basins, curbs gutters, ditches manmade channels or storm drains) designed or used for collecting or conveying stormwater. By
definition, these systems cannot be combined with sanitary sewer systems. *Exs. Muni 0001, p. 61, 63, Muni 0002, p. 22-24.*

10 The Phase I permit does not cover the storm sewers owned and operated by the Washington State Department of Transportation
(WSDOT). WSDOT's system is covered under an individual permit. *Ex. Muni 0002, p. 19, 21.*

11 An illicit connection is any man-made conveyance that is connected to a MS4 without a permit, excluding roof drains and other
similar type connections. An illicit discharge is any discharge to a MS4 that is not composed entirely of stormwater except discharges
pursuant to a NPDES permit and discharges resulting from fire fighting activities. *Ex. Muni 0001, p. 61.*

12 A flow reduction strategy is an approach that reduces the volume of runoff coming off a landscape. Ecology witness Ed O'Brien
indicated in his testimony that this referred to the use of low impact development techniques.

13 The purpose of the database, called the International Stormwater Treatment Database, is to facilitate understanding about how
particular BMPs perform database and contains studies from both inside and outside the United States. *Testimony of O'Brien.*

14 Clark County was not informed of the need to submit a permit application until January of 1995, because of confusion over whether
Clark County met the requirements of the Phase I Permit, i.e. urbanized area with a population greater than 100,000. *Ex. Muni 0141,*
p. 8.

15 By agreement with Ecology, SWPPPs will not be required on “no discharge” properties, which include Port-owned parks and
properties with connections to Metro Stormwater Conveyances.

16 The advisory committee for the development of the PSAT Manual included Edward O'Brien, Tom Holz, and Derek Booth. These
three experts also testified at the Phase I hearing, *Testimony of Moore, Ex. PSA 050, Acknowledgements page and p. 2.*

17 The Manual is not a regulation but rather a guidance document that presents a presumptive approach to meeting requirements
established through other means, such as permits. Washington is somewhat unique in its reliance on the Stormwater Management
Manual for directing how stormwater management is to be conducted. *Testimony of Moore. Testimony of O'Brien.* The Manual
represents Ecology's generalized determination of what constitutes AKART for stormwater management, without regard to how
much horizontal development should be allowed (*i.e.*, whether a particular parcel, subdivision, or watershed should be developed or
a particular project should be undertaken). The manual is also considered by the Department of Community, Trade, and Economic
Development, the agency charged with state oversight of the implementation of the GMA, to constitute the best available science for
use by local governments planning under the GMA. *Testimony of O'Brien.*

18 This same requirement is included in The Manual. *Ex. Ecy 0004 (Phase I), Vol. 1, p. 2-26.*

19 The Fact Sheet's reference to 40 C.F.R. 122.26(b)(2) appears to be a typographical error. Ecology's pre-hearing brief properly cites
the applicable federal regulation for these program elements as 40 C.F.R. 122.26(d)(2). A portion of this federal rule, unrelated
to municipal stormwater, was recently invalidated in *Natural Resources Defense Council v. U.S. E.P.A.*, 526 F.3d 591 (9th Cir. 2008).

20 Issues C.I and C.3.

21 Issue F.3.

22 A portion of this federal rule, unrelated to municipal stormwater, was recently invalidated in *Natural Resources Defense Council v.*
U.S. E.P.A., 526 F.3d 591 (9th Cir. 2008).

23 It is also possible that parts of the Pierce and Clark County programs could be used to satisfy the targeted effectiveness component of
the S8 monitoring (S8.E). *Ex. Muni 0001, p. 45-46.* The Board encourages Ecology to work with Pierce and Clark Counties to find
ways to make parts of their current monitoring programs satisfy some of the requirements under S8.

24 The term “practicable” as used in a different section of the CWA, 33 USC § 1311(b)(1)(a), has been defined as meaning that
technology is required unless the costs are “wholly disproportionate” to pollution reduction benefits. *Rybachek v. U.S. EPA*, 904
F.2d 1276, 1289 (9th Cir. 1990).

25 We also note that, in another context, Ecology has recently adopted rules for the implementation of the Shoreline Management Act
which outline a comprehensive process for preparing or amending shoreline master programs that requires, among other things, local
governments to incorporate the most current, accurate, and complete scientific and technical information available that is applicable

to the issues of concern; prepare a characterization of shoreline ecological functions, including hydrologic functions; identify water quality and quantity issues relevant to master program provisions; identify important ecological functions that have been degraded through loss of vegetation; and identify measures to ensure that new development meets vegetation conservation objectives. WAC 173-26-201.

- 26 Although this decision was split on several issues, the holding on the GMA issue was unanimous. We note that even prior to the GMA, the Shoreline Management Act (SMA), Ch. 90.58 RCW, was enacted by initiative of the people in 1971 after recognizing the “ever increasing pressures of additional uses ... being placed on the shorelines necessitate[e] increased coordination in the management and development of the shorelines of the state.” RCW 90.58.020. The SMA includes a broad policy to protect the waters of the state and gives preference to uses that protect water quality and the natural environment. *Id.* The SMA establishes a balance of authority between local and state government, where cities and counties have the primary responsibility for initiating the planning required by the Act and administering the regulatory program, and Ecology is tasked with providing assistance to local governments in the development of their shoreline master programs and “insuring compliance with the policy and provisions of [the Act].” RCW 90.58.050.
- 27 Ecology's SMA rules recognize a similar responsibility to harmonize overlapping bodies of law and regulation, which now provide: “It is the responsibility of the local government to assure consistency between the master program and other elements of the comprehensive plan and development regulations.” WAC 173-26-191(e).
- 28 These modifications are ordered in the Board's Findings, Conclusions and Order on S4, issued on August 7, 2008.

2008 WL 5510413 (Wash.Pol.Control Bd.)

End of Document

© 2016 Thomson Reuters. No claim to original U.S. Government Works.

2010 WL 3420570 (Wash.Pol.Control Bd.)

Pollution Control Hearings Board

State of Washington

ROSEMERE NEIGHBORHOOD ASSOCIATION; COLUMBIA RIVERKEEPER;
AND NORTHWEST ENVIRONMENTAL DEFENSE CENTER, APPELLANTS

v.

WASHINGTON STATE DEPARTMENT OF ECOLOGY, AND CLARK COUNTY, RESPONDENTS
BUILDING INDUSTRY ASSOCIATION OF CLARK COUNTY, INTERVENOR-RESPONDENT

PCHB No. 10-013

August 26, 2010

ORDER DENYING SUMMARY JUDGMENT

*1 This matter comes before the Pollution Control Hearings Board (Board) on cross motions for partial summary judgment filed by Appellants Rosemere Neighborhood Association, *et al.* (“Appellants” or “Rosemere”) and Respondent Clark County. Attorneys Jan Hasselman and Janette K. Brimmer, Earthjustice, represented Appellants. Assistant Attorney General Ronald L. Lavigne, Senior Counsel, represented Respondent Department of Ecology (“Ecology”). Chief Civil Deputy E. Bronson Potter, represented Respondent Clark County on the briefs, and Christine M. Cook, Deputy Prosecuting Attorney, presented oral argument on behalf of Clark County. Intervenor-Respondent Building Industry Association of Clark County did not participate in the motions.

Board members Andrea McNamara Doyle, Presiding, and Kathleen D. Mix and William H. Lynch, Members, heard oral arguments on June 16, 2010, and reviewed and considered the pleadings and record pertinent to the motion in this case, including the following:

1. Appellants' Motion for Partial Summary Judgment, with attached Exhibits 1-7;
2. Respondent Department of Ecology's Response in Opposition to Appellants' Motion for Partial Summary Judgment;
3. Declaration of Gavin Schrieve, dated April 5, 2010;
4. Clark County's Response to Appellants' Motion for Partial Summary Judgment and Clark County's Cross-Motion for Summary Judgment, with attached Appendices A-F (and their attached exhibits);
5. Appellants' Opposition to Clark County's Cross Motion for Summary Judgment and Reply in Support of Motion for Partial Summary Judgment, with attached Exhibit 8;
6. Department of Ecology's Reply to Clark County's Response to Appellants' Motion for Partial Summary Judgment and Clark County's Cross-Motion for Summary Judgment.

BACKGROUND

This appeal challenges Agreed Order No. 7273, entered into by the Ecology and Clark County, related to achieving compliance with the National Pollution Discharge Elimination System Phase I Municipal Stormwater General Permit (“Phase I Permit”). The Phase I Permit requires all permittees, including Clark County, to adopt ordinances that apply an updated flow control

standard, and other elements of the 2005 Stormwater Management Manual ("2005 Manual"), for development projects over certain size thresholds. *Phase I Permit* at 10 (Condition S5.C.5.b.i). Under this updated flow control requirement, Phase I permittees are required to control stormwater flows from new development and redevelopment projects to levels that match historical pre-developed (forested) conditions.¹ The purpose of the flow control standard is to reduce negative impacts on water quality, fish, other aquatic life, and streams caused by increased runoff from new development and redevelopment and to reduce impacts from existing development. The Phase I Permit required these ordinances be adopted by August 19, 2008. *Shrieve Decl.* at ¶3.

*2 The flow control standard and other elements of the 2005 Manual represent a "default" standard under the Phase I Permit. The permit allows these requirements to be "tailored to local circumstances through the use of basin plans or other similar water quality and quantity planning efforts." *Phase I Permit* at 11 (Condition S.5.C.5.b.i). The permit requires that any such local alternative standards "shall provide equal or similar protection of receiving waters" relative to the default standard. *Id.*

As a result of challenges to the Phase I Permit, this Board concluded that Ecology's default flow control standard failed to comply with the requirements of the federal Clean Water Act and state law and directed Ecology to revise the Phase I Permit to require permittees to aggressively employ low impact development ("LID") techniques where feasible, in combination with the flow control standard, in order to meet the federal and state standards to reduce stormwater runoff to the maximum extent practicable ("MEP") and to apply all known, available and reasonable methods to control runoff and protect water quality (AKART). The process of revising the permit to comply with the Board's ruling is ongoing.

On January 13, 2009, Clark County adopted Ordinance No. 2009-01-01, with an effective date of 90 days later, or April 13, 2009 (Appendix B to Clark County's Response). Among other things, the ordinance requires the flow duration standard for high flows to be engineered to match the *existing* conditions on the site rather than historic, pre-development conditions. Clark Co. Code 40.385.020.C.2a. *Id.*

On March 17, 2009, Ecology issued a Notice of Violation to Clark County alleging that the county violated the terms of the permit by "[a]dopting a flow control policy that Ecology determined does not provide equal or similar protection of receiving waters and equal or similar levels of pollutant control, as compared to Appendix 1. (CCC § 40.385.020.C.2.a)." *Notice of Violation No. 6514* at 1. In addition to being late, Ecology determined that Clark County's ordinances and manual did not meet the standard flow control requirement, the 0.1 cubic feet per second flow threshold, and other requirements of Appendix 1 of the Phase I Permit. Ecology concluded that Clark County's lesser standards and thresholds for control of runoff from new development and redevelopment, unless otherwise mitigated, would not provide an equivalent amount of flow control as required by the Phase I Permit.

On January 6, 2010, Clark County and Ecology entered into Agreed Order No. 7273, the purpose of which was to "establish the actions necessary to bring the County into compliance with Special Condition S5" of the Phase I Permit. *Agreed Order* at 1. The Order requires Clark County to implement a flow control program for new development and redevelopment that Ecology believes will result in an equivalent level of protection as the flow control requirement for new development and redevelopment in the Phase I Permit. *Shrieve Decl.* at ¶4.

*3 Under the Agreed Order, Ecology approved Clark County's alternative flow control program on the condition that Clark County mitigate runoff from new development and redevelopment to the historic, pre-development condition through a capital flow control mitigation program undertaken at County expense. *Agreed Order* at 3-4. In other words, the Agreed Order would allow Clark County to apply the lesser flow control standard to new and redevelopment projects in its jurisdiction, utilizing existing rather than pre-development conditions as the standard, provided that Clark County makes up the difference in flow control protection that individual developments will not be required to achieve. The Agreed Order establishes an accounting system for the mitigation requirement and incorporates a 14-page attachment more specifically describing the County's Development and Redevelopment Flow Control Mitigation Program ("Mitigation Program"). The attachment details various aspects of the Mitigation Program such as its purpose, projects triggering the mitigation obligation, allowable capital

mitigation projects, calculating area mitigated by capital projects, prioritization of projects, geographic location of mitigation projects, mitigation project timing and tracking, reporting, funding, and limitations. *Agreed Order, Attachment A*.

Clark County's Mitigation Program applies to development and redevelopment projects that vested on or after April 13, 2009. *Id.* at 2. The Agreed Order similarly requires Clark County to account for its stormwater mitigation obligation based on acreage impacted by new development or redevelopment projects that start construction and are vested after April 13, 2009. *Agreed Order* at 4.

Appellants disagree that the Agreed Order provides an equivalent or similar level of protection for receiving waters as the Phase I Permit and timely appealed the Agreed Order to this Board. Rosemere has moved for partial summary judgment on legal issues 1(c) and 2(c), which are stated as follows in the Consolidated List of Legal Issues governing this appeal:

1. Does the mitigation requirement imposed by Section IV.1 of the Agreed Order reduce stormwater runoff to the maximum extent practicable ("MEP"), and apply all known, available and reasonable methods to control runoff and protect water quality ("AKART"), in light of the following: (c) Provisions in the Agreed Order that exempt from the mitigation obligation any new development or redevelopment that has applied for a permit on or prior to April 13, 2009?

2. Does the mitigation requirement imposed by Section IV.1 of the Agreed Order provide an equivalent level of protection for receiving waters as the requirements of the Phase 1 Permit, for the reasons discussed in Issue [1(c)] above?

Clark County cross moved for summary judgment in its favor on the legal issues it believes are premised on a challenge to applying the vested rights doctrine to the flow control standard, which the County identifies as Legal Issues 1(h), 5(a), and (5)(b), in addition to 1(c) listed above. These additional issues read as follows:

*4 1. Does the mitigation requirement imposed by Section IV.1 of the Agreed Order reduce stormwater runoff to the maximum extent practicable ("MEP"), and apply all known, available and reasonable methods to control runoff and protect water quality ("AKART"), in light of the following: (h) The failure of the Agreed Order to mitigate for development that occurred after August 17, 2008, when Clark County was initially required to adopt a compliant stormwater ordinance.

5. Does § IV.2 of the Agreed Order, which requires Clark County to make other changes to its development codes in order to comply with the permit, result in a stormwater standard for new development and redevelopment that fails to require MEP and apply AKART, or authorize stormwater discharges that unlawfully degrade water quality and/or causes or contributes to a violation of water quality standards by: (a) Allowing Clark County to continue issuing development permits that vest prior to December 9, 2009, and/or (b) Not requiring any mitigation for permits issued after August 8, 2008 that were inconsistent with the permit?

ANALYSIS

Summary judgment is a procedure available to avoid unnecessary trials on formal issues that cannot be factually supported and could not lead to, or result in, a favorable outcome to the opposing party. *Jacobsen v. State*, 89 Wn.2d 104, 569 Wn.2d 1152 (1977). The summary judgment procedure is designed to eliminate trial if only questions of law remain for resolution. Summary judgment is appropriate when the only controversy involves the meaning of statutes, and neither party contests the facts relevant to a legal determination. *Rainier Nat'l Bank v. Security State Bank*, 59 Wn. App. 161, 164, 796 P.2d 443 (1990), review denied, 117 Wn.2d 1004 (1991).

The party moving for summary judgment must show there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Magula v. Benton Franklin Title Co., Inc.*, 131 Wn.2d 171, 182, 930 P.2d 307 (1997). A material fact in a summary judgment proceeding is one that will affect the outcome under the governing law. *Eriks v. Denver*, 118 Wn.2d

451, 456, 824 P.2d 1207 (1992). In a summary judgment, all facts and reasonable inferences must be construed in favor of the nonmoving party. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002).

Through its motion, Rosemere requests the Board to declare that municipal permittees are not simply exempt from the duty to meet MEP and AKART where project proponents submitted applications before updated stormwater codes took effect. *Rosemere's Motion for Partial Summary Judgment* at 2. More specifically, Rosemere asks the Board to interpret the Phase I Permit in such a way as that the state's vested rights doctrine, found at RCW 58.17.033 (subdivision code) and RCW 19.27.095 (building permits), does not apply to the flow control requirements contained in Condition S5.C.5.b.i., which implements state and federal clean water laws. Rosemere argues that even if the doctrine did apply, that the vesting statutes explicitly provide permittees with substantial discretion to limit environmental impacts of vested development projects.

*5 Rosemere further asks the Board to set aside provisions in the Agreed Order exempting development projects vested before April 13, 2009, from the mitigation obligation imposed by that Order. *Rosemere's Motion* at 2. Appellants seek an order concluding that, because Clark County has exempted from the obligations of its Mitigation Program all new or re-development projects vested before April 13, 2009, the Agreed Order fails as a matter of law to provide an equivalent or similar level of protection as the Phase I Permit's default flow control standard.

Finally, Rosemere contends that the eight month delay between the April 13, 2009 effective date of Clark County's ordinance and the permit's August 19, 2008 deadline for permittees to adopt their ordinances is an additional reason why the Agreed Order is not, in fact, equivalent, but Appellants do not rely on this as a basis for summary judgment. Rather, they contend that factual evidence at hearing regarding the negative impacts of this gap will demonstrate the additional inadequacy of the Agreed Order.

Respondent Clark County contends that the imposition of the flow control standard is subject to Washington's vested rights doctrine and that Rosemere's motion is an untimely collateral attack on the Phase I Permit. Clark County asks the Board to conclude that the vested rights doctrine applies to stormwater regulations and to interpret the Phase I Permit as not requiring permittees to impose the new flow control standard on vested development. Clark County further seeks an order from the Board determining that Clark County's decision to exempt from its Mitigation Program development that vested before April 13, 2009, does not render the Agreed Order invalid as a matter of law.

Ecology agrees with Appellants that the state's vesting laws do not exempt municipal permittees from complying with MEP and AKART requirements. Ecology further agrees with Rosemere that the state can and should require municipal permittees to exercise their discretion to the fullest under vesting laws in order to meet the requirements of federal and state clean water laws. *Ecology's Response* at 3. However, Ecology parts company with Rosemere when it argues that although vesting laws do not require permittees to exempt vested new and redevelopment from the updated standard, Ecology's decision to allow Clark County to exempt projects vested after April 13, 2009, was a reasonable exercise of its enforcement discretion. Ecology further contends the same is true for the Phase I Permit generally: that while Ecology was not required by vesting laws to allow all municipalities to exempt all vested development from the permit's updated flow control requirements, Ecology was also not required by the MEP and AKART standards to include all such vested projects within the reach of Condition S5.C.5 of the Phase I Permit. Ecology argues that its interpretation of MEP and AKART, in which it determined to use vesting as something akin to a proxy for "practicability" or "reasonability," was not challenged as part of the appeal of the Phase I Permit so that any such challenge now amounts to an untimely collateral attack on the permit.

*6 Finally, Ecology contends that material facts preclude the Board from ruling on summary judgment whether Clark County's Mitigation Program provides a level of protection equivalent or similar to the protection afforded by the flow control program in the Phase I Permit, and whether Clark County's program meets MEP and AKART requirements. Vesting

We find that the Phase I Permit is ambiguous regarding the extent to which the flow control standard contained in Condition S5.C.5 applies to projects applied for prior to the August 2008 required effective date for permittees' ordinances. The Board never addressed the vesting issue in its review of the Phase I Permit, and the Phase I Permit itself is silent as to vested rights.

It is necessary for us to resolve this ambiguity before reaching a decision regarding Rosemere's challenge to Clark County's Mitigation Program.

We reject Clark County's position that imposition of the flow control standard on development is subject to Washington's vested rights doctrine and that Appellant's motion is an untimely collateral attack on the Phase I Permit itself. We also reject Clark County's argument that the vested rights doctrine precludes, as a matter of law, the application of the Phase I Permit's flow control requirements to new or redevelopment projects that vested for land use purposes prior to April 13, 2009. Rather, as explained later in this decision, this appeal requires us to interpret what constitutes MEP and AKART under the Phase I Permit in order to rule on Rosemere's challenge to the equivalency of Clark County's Mitigation Program as approved in the Agreed Order.

This Board has previously ruled that the requirements imposed by state stormwater permits are not "land use control" ordinances, and we re-affirm those rulings here. In our Phase II summary judgment decision, we rejected the permittees' argument that a state land use control statute, RCW 82.02.020, applied to stormwater permits:

[T]he purpose of the Permits is to ensure that the rate of stormwater discharge from property is maintained within a certain level, and this flow level has been determined by Ecology to be necessary to prevent harm to the environment. The flow control standard is aimed at achieving a particular environmental result, and the Permits provide considerable flexibility how this result is achieved. *The purpose of the Permits is to control discharge of pollutants and not to control land use ...* Ecology has determined that, collectively, these requirements, which include the flow control standard, are necessary to satisfy the federal MEP and state AKART standards. While developers ultimately may have to undertake actions consistent with the flow control standard of the Western Phase II Permit if they seek to discharge into an MS4, the requirements originate in state and federal law, and *the imposition of these requirements on municipalities derives from the delegated NPDES and state waste discharge programs, not local government-initiated regulation of development.*

*7 Phase II Order on Summary Judgment (September 29, 2008) at 6-7 (emphasis added).²

Under Washington law, proposed land divisions and building permits are to be considered under the "zoning or other land use control ordinances" in effect at the time a "fully completed application" has been filed. RCW 58.17.033 (subdivision code); RCW 19.27.095 (building permits). The purpose of this doctrine is to provide a measure of certainty to property owners and developers, and to protect their expectations against fluctuating land use policy. *Noble Manor Co. v. Pierce County*, 133 Wn.2d 269, 278 (1997) (citing *West Main Associates v. City of Bellevue*, 106 Wn.2d 47, 51 (1986)).

At the same time, the Washington Supreme Court has recognized that "[a] proposed development which does not conform to newly adopted laws is, by definition, inimical to the public interest embodied in those laws." *Abbey Road Group, LLC v. City of Bonney Lake*, 167 Wn.2d 242, 251 (2009) (quoting *Erickson & Associates, Inc. v. McLerran*, 123 Wn.2d 864, 873 (1994)). Vesting, therefore, necessarily creates conflict with competing public policies, and may undermine the public interest embodied in later-enacted laws. *Noble Manor*, 133 Wn.2d at 280 (If a vested right is too easily granted, the public interest is subverted).

In its efforts to balance these competing objectives, the courts have limited application of vested rights under various circumstances. For example, state vesting law does not apply to ordinances that impose additional fees or costs on development, so even where vested projects are allowed to build to outdated development standards, a jurisdiction is allowed to impose a fee that can be used to offset the environmental impacts of the project. *See e.g., New Castle Investments v. City of La Center*, 98 Wn. App. 224, 237-8 (1999) (transportation impact fees are not "land use control ordinances" and hence not subject to vesting laws); *Belleau Woods II, LLC v. City of Bellingham*, 150 Wn. App. 228, 238-39 (2009) (vested rights doctrine does not protect developer against the additional cost of impact fees, which are not "land use control ordinances" because they simply add to the cost of the project but do not affect physical aspects of a development).

Clark County argues that, unlike impact fees, stormwater regulations are land use ordinances that are subject to the vested rights doctrine. The County relies on *Westside Business Park* in support of this position. *Westside Business Park, LLC v. Pierce County*, 100 Wn. App. 599, 607 (2000). But *Westside Business Park* is not a water pollution control permit case; it involved a local government's storm drainage ordinance and a dispute about the completeness of the developer's application. In *Westside Business Park*, the "only issue" for resolution by the court was whether the vesting statute vests a developer's right to have the county apply the stormwater drainage ordinance in effect at the time of the developer's bare bones application for short plat approval, where the application failed to disclose the proposed use of the site but the County actually knew of the intended use from the predevelopment conference and accepted the application as complete. *Westside Business Park*, 100 Wn. App. at 602. The decision essentially involved a factual inquiry into the adequacy of the application and surrounding information in light of the County's requirements for a fully completed application. *Id.*, at 605. The *Westside Business Park* court also specifically declined to review the issues raised by the interplay between the state vested rights doctrine and the requirements of the federal Clean Water Act. *Id.*, at 608-9. For these reasons, we do not find the Court's statements characterizing stormwater drainage ordinances as "land use controls" controlling in this context.

*8 Rather, the better analysis for purposes of the vesting issue entails an examination of the source of authority for the requirement as well as its purpose, in addition to whether it may exert some restraining or directing influence over land use. In the case of the Phase I Permit, it is the application of the federal Clean Water Act and state water pollution control laws that require municipal permittees to adopt updated stormwater controls for the purpose of controlling water pollution and protecting water quality. To that end, the Phase I Permit is an environmental regulation which does not dictate particular uses of land but requires only that, however the land is used, damage to the environment is kept within prescribed limits. *See generally, California Coastal Com'n v. Granite Rock Co.*, 480 U.S. 572, 587, 107 S. Ct. 1419 (1987) (The line between environmental regulation and land use planning will not always be bright, but their core activities are undoubtedly different).

The Phase I Permit is distinct from those requirements derived from state and local government's land use planning authority, which in essence chooses particular uses for the land. Additionally, neither the Phase I Permit's flow control standard, nor the Agreed Order, directly exert "a restraining or directing influence" over land use because it is the municipal permittees that bear the burden of meeting the requirements, not developers. As we have previously recognized, the permit's flow control standard is a technological standard aimed at achieving a particular environmental result, and the permit provides considerable flexibility as to how that result is achieved. This includes options, such as allowing local government to construct necessary regional stormwater control facilities. *Phase II Summary Judgment Order* at 7. It also includes options to achieve flow control goals through best management practices ("BMPs") like water harvesting, green roofs, pervious materials, and other engineered onsite facilities, which are not "land use control" ordinances like zoning ordinances.

Even if the permit's flow control standard is characterized as a land use control, the Washington courts have rejected arguments that the vested rights doctrine should be expanded to all types of land use applications in order to harmonize its use with the common law vesting doctrine and provide more certainty to developers. *Abbey Road Group*, 167 Wn.2d at 260-61 (rejecting expansion of the vested rights doctrine to a site plan application for a multifamily condominium development); *Deer Creek Developers, LLC, v. Spokane County*, — Wn. App. —, 2010 WL 2882778 (May 27, 2010) (rejecting expansion of the vested rights doctrine to a subdivision application. The Deer Creek Developers Court, quoting *Abbey Road*, noted that "'such a rule would eviscerate the balance struck in the vesting statute. While some of Abbey Road's arguments could support a change in the law, instituting such broad reforms in land use law is a job better suited to the legislature,' not the judiciary.'" *Deer Creek Developers*, at ¶21 (quoting *Abbey Road*, 167 Wn.2d at 261). The Board finds no reason why the vested rights doctrine should be expanded to apply to an environmental regulation such as a pollution control permit that implements the federal Clean Water Act. The Board concludes that it is more appropriate for the legislature to enact any such expansion of the vested rights doctrine.³

*9 Equivalency

The Board denies the parties' cross motions for summary judgment on the basis that it is premature to reach a decision about whether the Agreed Order provides equal or similar protection of receiving waters as the Phase I Permit. In order to resolve this

issue, the Board believes the record needs to be more fully developed in a number of areas. Specifically, it is important for the Board to evaluate additional factual evidence related to how and why Ecology selected the August 17, 2008 effective date for the Phase I Permit's new flow control standard, and the criteria Ecology used to determine how the Agreed Order provides an equivalent or similar level of protection. Because of the ongoing impacts to water quality for development undertaken to a lesser discharge standard, the Board is interested in reviewing the mitigation proposed by Clark County and determining whether this mitigation is sufficient to offset any impacts that may be generated from development and redevelopment that the Agreed Order exempts from mitigation. Because the flow control standard is included within Ecology's definition of MEP, and MEP is a technological standard, the Board is interested in the feasibility of using the flow control standard at the sites which were exempted under the Agreed Order, and the potential mitigation costs for the County if it did provide mitigation for stormwater discharged under a lesser standard from these sites. This information is necessary for the Board to harmonize the MEP/AKART standards with Ecology's ability to exercise discretion, and to establish the Phase I Permit's baseline level of protection required by MEP and AKART against which the equivalency of Clark County's mitigation program is to be measured.

We also agree with Rosemere and Ecology that the Phase I Permit requires municipal permittees to exercise their discretionary authorities to the fullest under vesting laws (if and where they might be applicable), in order to meet the requirements of federal and state clean water laws. What remains unclear at this point, however, is how the exercise of that discretion impacts the level of protection afforded by Phase I Permit generally, and by Clark County's Agreed Order specifically. Without that information, it is premature for us to reach a judgment regarding the equivalency of Clark County's Mitigation Program.

In conclusion, in keeping with our previous decisions and the analysis above, we hold that the vested rights doctrine does not, as a matter of law, preclude municipal permittees from applying the Phase I Permit's flow control standard to new or redevelopment projects that vested prior to the effective date of their updated flow control requirements adopted to satisfy Condition S5.C5. To hold otherwise would contravene the purposes behind the NPDES and state waste discharge programs, which is not to control land use but to control the discharge of pollutants and to protect water quality. We also recognize that MEP and AKART do not foreclose Ecology's discretionary authority to allow municipal permittees to propose alternative flow control programs for new development and redevelopment that provide equal or similar protection of receiving waters. The Board agrees with Rosemere and Ecology that the state's vesting laws do not exempt municipal permittees from complying with MEP and AKART requirements. We leave open the factual question as to whether the Agreed Order properly allows Clark County to deny, condition, or mitigate otherwise vested projects based upon the baseline level of protection afforded by Phase I Permit.

*10 Summary judgment should therefore be denied, and the issues involving vested projects should proceed to hearing for further development (Legal Issues No. 1(c), 2(c), 1(h), and 5(a-b)). Issues 1(c), 2(c), 1(h), and 5(b) concern the relationship between the mitigation requirement and vested projects, and require further development at hearing as explained above. Issue 5(a) concerns the validity of the Agreed Order to the extent it allows Clark County to continue issuing development permits that vest prior to December 9, 2009.⁴ At hearing, Rosemere, as the appealing party, will continue to bear the burden of proof in challenging the Agreed Order, but Ecology will also bear the burden of establishing the baseline against which it determined the equivalency of Clark County's alternative.

ORDER

The parties' cross motions for summary judgment are each DENIED.

SO ORDERED this 26th day of August, 2010.

Andrea McNamara Doyle
Presiding
William H. Lynch

Member
Kathleen D. Mix
Member

Footnotes

- 1 The standard flow control requirement is to “match development discharge durations to pre-developed durations for the range of pre-developed discharge rates from 50% of the 2-year peak flow up to the full 50-year peak flow.” *Id.* at Appendix 1, p. 24.
- 2 In a decision involving applicability of the Construction Stormwater General Permit, we similarly held that the requirement to control stormwater imposed by state stormwater permits is not a land use control subject to vesting. *Cox v. Ecology*, PCHB No. 08-077 (Order Granting Summary Judgment, February 26, 2009).
- 3 In an earlier decision reviewing the applicability of a critical area ordinance to a development project for which the developer had earlier submitted a master use permit application, the Washington Supreme Court rejected the call to “modernize” the vested rights doctrine in light of the substantial increase in land use regulations. Citing the legislative findings in both SEPA and the Growth Management Act, the Court stated that “these findings reflect a legislative awareness that land is scarce, land use decisions are largely permanent, and, particularly in urban areas, land use decisions affect not only the individual property owner or developer, but entire communities.” *Erickson & Associates*, 123 Wn.2d at 875-76.
- 4 Clark County's brief fails to address this issue distinct from its arguments related to mitigation and vesting, and we conclude the County has not met its burden of demonstrating it is entitled to summary judgment on this issue.

2010 WL 3420570 (Wash.Pol.Control Bd.)

End of Document

© 2016 Thomson Reuters. No claim to original U.S. Government Works.

2011 WL 62921 (Wash.Pol.Control Bd.)

Pollution Control Hearings Board

State of Washington

ROSEMERE NEIGHBORHOOD ASSOCIATION; COLUMBIA RIVERKEEPER;
AND NORTHWEST ENVIRONMENTAL DEFENSE CENTER, APPELLANTS

v.

WASHINGTON STATE DEPARTMENT OF ECOLOGY, AND CLARK COUNTY, RESPONDENTS
BUILDING INDUSTRY ASSOCIATION OF CLARK COUNTY, INTERVENOR-RESPONDENT

PCHB No. 10-013

January 5, 2011

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

*1 Appellants Rosemere Neighborhood Association, Columbia Riverkeeper, and Northwest Environmental Defense Center (“Appellants” or “Rosemere”) challenge Agreed Order No. 7273, entered into by the Respondents Washington State Department of Ecology (Ecology) and Clark County, related to achieving compliance with the National Pollution Discharge Elimination System Phase I Municipal Stormwater General Permit (Phase I Permit).

The Pollution Control Hearings Board (PCHB or Board) conducted a hearing in this matter on September 28 - October 1, 2010, at the Board's offices in Tumwater. Attorneys Jan Hasselman and Janette K. Brimmer, Earthjustice, represented Appellants. Assistant Attorney General Ronald L. Lavigne, Senior Counsel, represented Respondent Department of Ecology (“Ecology”). Chief Civil Deputy E. Bronson Potter, and Christine M. Cook, Deputy Prosecuting Attorney, represented Clark County. Intervenor-Respondent Building Industry Association of Clark County (BIA Clark Co.) was represented by James D. Howsley, of Miller Nash LLP.

The Board hearing the case was comprised of Andrea McNamara Doyle, Presiding, and Kathleen D. Mix and William H. Lynch, Members. Court reporting services were provided by Kim Otis and Randi Hamilton of Olympia Court Reporters.

FINDINGS OF FACT

1.

This appeal challenges Agreed Order No. 7273, entered into by Ecology and Clark County, related to achieving compliance with one aspect of the National Pollution Discharge Elimination System (NPDES) Phase I Municipal Stormwater General Permit (Phase I Permit). The history and scope of the Phase I Permit are discussed at length in this Board's decision on review of that permit. *See Puget Soundkeeper Alliance v. Ecology*, PCHB Nos. 07-021, -026, -027, -028, -029, -030, -037 (2008) (hereinafter “Phase I Decision”). Ecology developed the Phase I Permit through an eight year long process. *Id.* at FOF 1. Several events delayed the issuance of the Phase I Permit, including the federal listing of Puget Sound Chinook Salmon in 1999, and Ecology's decision to revise the states' Stormwater Management Manuals. *Id.* at FOF 3. The Phase I Permit, a “programmatic permit,” requires municipal permittees to implement area-wide stormwater management programs, rather than regulating discharges from individual outfalls. *Id.* at FOF 6. The heart of the Phase I Permit requires that permittees implement a Stormwater Management Program (SWMP), which has ten component parts,¹ including requirements to map municipal systems, detect and eliminate illicit discharges, engage in structural retrofits, and require source controls at existing development. *Id.* at FOF 9. Of particular relevance to this case is the SWMP component that requires permittees, including Clark County, to implement a

program to prevent and control the impacts of runoff from new development, redevelopment, and construction sites. The Phase I Permit anticipates that the permittees will adopt ordinances that require implementation of many aspects of the SWMP, either by the municipality or by the regulated community which discharges to the municipal storm sewer system.

2.

*2 In the Phase I Permit, Ecology chose to regulate stormwater discharges from new development and redevelopment primarily through the imposition of a new flow control standard. Permit Condition S5.C.5.b.i. *Phase I Decision* at FOF 38. The flow control standard is set out in Ecology's 2005 Stormwater Management Manual (2005 Manual), and required for development projects over certain size thresholds. *Ex. J-16 (Phase I Permit)* at Condition S5.C.5.b.i.² Under this updated flow control requirement, Phase I permittees must require new development and redevelopment projects to control the rate at which stormwater is released from the site to match historical pre-developed (typically forested) conditions, rather than existing site condition runoff.³ The flow control standard, which is contained in the 2005 Manual, represents a "default" standard under the Phase I Permit. If certain criteria are met (discussed further in this opinion), a permittee can implement an alternative program to the flow control standard. Under the same section of the Phase I Permit addressing controlling runoff from new development, redevelopment, and construction sites, the permittee must also require use of non-structural preventive actions and source reduction approaches, including Low Impact Development (LID), to minimize the creation of impervious surfaces and the disturbance of soils and vegetation where feasible. *Ex. J-16* at Condition S5.C.5.b.iii. The Phase I Permit required the ordinances necessary to implement this section of the permit to be adopted no later than 18 months from the effective date of the permit, by August 16, 2008. *Id.* at Condition S.5.C.b.iv.

3.

On January 13, 2009, Clark County adopted Ordinance No. 2009-01-01, with an effective date of 90 days later, or April 13, 2009. Among other things, the ordinance requires the flow duration standard for high flows to be engineered to match the *existing* conditions on the site rather than historic, pre-development conditions, as required by the Phase I Permit. Clark Co. Code 40.385.020.C.2.a. Clark County did not offer their adopted ordinance to Ecology as an equivalent alternative program under the provision of the Phase I Permit that allows a variance from the default flow control standard. Instead, in adopting the January 2009 Ordinance, Clark County rejected the regulatory approach Ecology had implemented with the Phase I Permit, and determined it would impose a less stringent standard for stormwater control at new development and redevelopment sites.

4.

On March 17, 2009, Ecology issued a Notice of Violation to Clark County alleging that the county violated the terms of the permit by "[a]dopting a flow control policy that Ecology determined does not provide equal or similar protection of receiving waters and equal or similar levels of pollutant control, as compared to Appendix 1 [the 2005 Stormwater Management Manual]. (CCC § 40.385.020.C.2.a)." *Ex. J-2* at 1. In addition to being late, Ecology also determined that Clark County's ordinances and manual adopted an exemption for infill and redevelopment projects from the 0.1 cubic feet per second flow increase threshold, also set out at Appendix 1 of the Phase I Permit. *Id.* In the Notice of Violation, Ecology stated that the purpose of the flow control requirement is to "reduce harmful impacts on fish, other aquatic life and streams caused by runoff from development." *Id.* Ecology concluded that Clark County's lesser standards and thresholds for control of runoff from new development and redevelopment would not provide an equivalent amount of protection to receiving waters and pollutant control, as required by the Phase I Permit. The Notice of Violation gave the County thirty (30) days to inform Ecology what steps it had or would take to control pollution and comply with the Order. *Id.* at 2.

5.

*3 On January 6, 2010, Clark County and Ecology entered into Agreed Order No. 7273, the purpose of which was to "establish the actions necessary to bring the County into compliance with Special Condition S5" of the Phase I Permit. *Ex.*

J-1 at 1. The Order requires Clark County to implement a flow control program for new development and redevelopment that Ecology concluded will result in an equivalent level of protection as the flow control requirement for new development and redevelopment in the Phase I Permit. Ecology stated that the Agreed Order “will provide an equivalent level of flow control” to that required under the Phase I Permit. Ecology also noted that “[t]his approach is consistent with the Permit wherein Permittees are allowed the option of proposing alternative methods of achieving flow control standards.” *Ex. J-1* at 3. Rosemere timely filed this appeal challenging the Agreed Order.⁴

6.

Concept of Agreed Order: Under the Agreed Order, Ecology approved Clark County's alternative flow control program on the condition that Clark County mitigate runoff from new development and redevelopment to the historic, pre-development condition through a capital flow control mitigation program undertaken at alternative sites selected by the County, and at County expense. *Ex. J-1* at 3-4. In other words, the Agreed Order allows Clark County to apply the lesser flow control standard to new and redevelopment projects in its jurisdiction, utilizing *existing* rather than pre-development conditions as the basis for application of the flow control standard, provided that Clark County “mitigates,” or makes up the difference, at another site in the County. The Agreed Order allows the County to mitigate by building several types of flow control facilities as capital improvement projects. These include stormwater retention, infiltration and detention facilities, existing facility retrofits or reconstruction, including LID retrofits, and conversion of land cover to historical forest. *Ex. J-1* at Attachment A, pp. 4-7.

7.

Authority for Agreed Order: The Agreed Order entered into between Ecology and Clark County relies on that term of the Phase I Permit that allows there to be adjustment or variance of the flow control requirements, by use of “more stringent requirements,” and/or requirements that may be “tailored to local circumstances through the use of basin plans or other similar water quality and quantity planning efforts.” *Id.* at Condition S.5.C.5.b.i. The permit requires that any such local alternative standards “shall provide equal or similar protection of receiving waters and equal or similar levels of pollutant control” relative to the default standard. *Id.* Because this is the standard the Board must apply to evaluate the Agreed Order under appeal in this case, we first make findings related to whether the prerequisites under the Phase I Permit for allowing an adjustment or variance to the flow control standard have been met, then make findings related to the scope of the Agreed Order, followed by findings related to the requirements of the Phase I Permit, and the manner in which the County will implement the Agreed Order. These form the basis of our analysis and conclusions as to why the mitigation program of the Agreed Order fails to provide equal or similar protection to receiving waters and equal or similar levels of pollutant control to that required by the Phase I Permit.

8.

*4 *Metrics for calculating the mitigation obligation:* The Agreed Order establishes an accounting system for the mitigation requirement based upon the existing project land use cover acreage for each of three categories of land use cover: effective impervious area, pasture, and lawn/landscape. Conversion of forest land does not trigger a mitigation obligation because the County Code requires development projects to fully mitigate for the project's cleared forest. The County will review all new development or redevelopment projects subject to the Agreed Order to determine the extent to which they fall short of mitigating to historical land cover conditions. The Agreed Order does not require the County to track or account for either the soil type or the slope of the new or redevelopment project site triggering the mitigation obligation, and it does not require the mitigation sites to have the same soil type or slope as the site of the new or development project. *Ex. J-1* at Attachment A.

9.

Tracking and Accounting mitigation obligation: The County will track the projects and, once construction or land disturbing activity starts, will incur a mitigation obligation. The mitigation obligation associated with each new or redevelopment project is measured as the difference between the flow control provided by the project to existing land cover and the amount of

flow control required to meet minimum requirement # 7 of the Phase I Permit's Appendix 1. *Id.* The County must construct flow control projects that achieve the additional amount of flow control necessary to match historic conditions. The Agreed Order sets out the acceptable procedures for performing the necessary calculations related to the stormwater retention and detention facilities, which involve using the Western Washington Hydrology Model (WWHM) or the Clark County version of the WWHM. *Ex. J-1* at Attachment A, p. 5. Additional details regarding Clark County's tracking and accounting system for the mitigation requirement are specified in Attachment A of the Agreed Order. County's Development and Redevelopment Flow Control Mitigation Program ("Mitigation Program"). *Ex. J-1* at 4 & Attachment A.

10.

Location of Mitigation Projects: Mitigation projects to address the County's mitigation obligation must be built within the same Water Resource Inventory Area (WRIA), of which there are two in Clark County.⁵ The Agreed Order states that "[T]o the extent feasible, the locations of Mitigation Projects *should* support identified needs and recommendation in existing resource management plans, and *should* also align with the County's policies on environmental mitigation. Projects *should* be prioritized by watershed and then WRIA, in consideration of the distribution of the County's Mitigation Obligation." (emphasis added.) *Ex. J-1* at Attachment A, p. 8. Clark County will use its current Stormwater Needs Assessment Program (SNAP) and Stormwater Capital Improvement Program (SCIP) to scope, prioritize, and plan flow control mitigation projects. *Id.* The Agreed Order gives the County considerable leeway in how it ultimately selects mitigation projects, stating as follows with respect to development and prioritization of mitigation projects: "Within the group of projects deemed most suitable to watershed conditions, highest priority may be given to projects having the best cost/benefit ratios in terms of cost per unit of land cover, mitigated." *Id.* Ecology does not have a role in the review or approval of the prioritization process or the mitigation projects selected under the Agreed Order.

11.

**5 Timing of mitigation:* The County must meet its flow control mitigation obligation within two calendar years from the calendar year the development project being mitigated starts construction or land disturbing activity. *Ex. J-1* at Attachment A, p. 9. For example, a development project requiring mitigation that began construction anytime during calendar year 2009 must be mitigated by the end of calendar year 2011. *Id.* Since various types of subdivision and other construction approvals are valid for periods of two to seven years, and possibly longer with extensions, this will result in mitigation obligations extending well beyond the term of the current permit and into the future several years. *See e.g.*, RCW 58.17.170 and CCC 14.06.105.5.

12.

Use of Vesting, and Relevant Effective dates: Under the Agreed Order, the County incurs a potential mitigation obligation for any new or redevelopment project that meets threshold requirements for flow control facilities under the Phase I Permit and that "vested" under state vesting laws⁶ on or after April 13, 2009. *Ex. J-1* at Attachment A. Stated another way, the Agreed Order does not require mitigation for all projects as of August 16, 2008, the Phase I Permit's deadline for adoption of ordinances, but rather provides the County an additional eight month delay before applying the flow control standard to new applications for development or redevelopment. The Agreed Order also allows the County to receive mitigation credits for any qualifying flow control mitigation projects completed after April 13, 2009, irrespective of when they were designed, approved, or started construction. *Ex. J-1* at Attachment A. In practice, this has allowed the County to receive a large amount of mitigation credit for a project that was well underway before the Agreed Order was executed or before the County incurred any mitigation obligations.⁷ Numerous commercial and multifamily building permit applications, as well as numerous subdivision permit applications, vested for land use purposes between August 16, 2008, and April 13, 2009.⁸ *Exs. A-58, A-59.* One of these subdivisions is approved for 103 single-family lots. *Snell Testimony, Ex. A-67.* EPA expressed concern that the delayed effective date under the Agreed Order provides less cumulative flow control over its term than the Phase I Permit. *Shrieve Testimony, Ex. A-22.* NMFS likewise expressed concerns over the lag time between August 2008 and April 2009, and stated

that there is “no scientific justification” for this delay. *Shrieve Testimony, Ex. A-23*. Costs can be significant, however, if a project needs to be re-designed. *Killian Testimony*.

13.

Monitoring/Maintenance of mitigation projects: The Agreed Order does not include any requirements for the County to monitor or maintain the mitigation projects it constructs under the Mitigation Program. Clark County's Stormwater Facility Maintenance Manual, and its Stormwater Manual, set forth the requirements for monitoring, inspecting, and maintaining stormwater mitigation facilities. *Exs. R-29 & R-30*.

14.

*6 *Funding of Mitigation Program*: The Agreed Order requires the County to maintain funding sources adequate to comply with the Agreed Order. *Ex. J-1* at p. 4. Parties to the Agreed Order anticipated that the County's Clean Water Fund would be used to plan and construct mitigation projects, although the Agreed Order provides that the County may use any allowable funds to pay for mitigation projects. *Ex. J-1* at Attachment A, p. 11.

15.

Reports to Ecology: Clark County will report to Ecology annually on the status of its Flow Control Mitigation Program, as an attachment to the annual report required by the General Permit. The Agreed Order sets out the elements of the annual report, and also requires the County to include a narrative describing the funding status of the mitigation program, identifying any anticipated shortfalls. Beyond this reporting requirement, Ecology has no role in selection of mitigation projects, and no responsibility for review or approval in project selection or prioritization. There is no requirement in the narrative reporting for the County to compare results achieved through the mitigation program against any criteria related to stream or basin health or recovery, or to identify whether significant areas of salmon habitat are being mitigated to compensate for similar significant areas of salmon habitat where historic pre-development conditions are not being mitigated at the site of the new development or redevelopment. *Ex. J-1*, at Attachment A, p. 10.

16.

On September 1, 2010, Ecology modified the Phase I Permit to incorporate the substantive provisions of the Agreed Order into the permit. *Ex. J-23*. Rosemere timely filed an appeal of the Permit Modification.

17.

In coming to agreement with Clark County, Ecology evaluated the Agreed Order to determine if it was equivalent to Phase I Permit requirements under the terms of Condition S5.C.5.b. *O'Brien Testimony*. Ecology now contends that the Agreed Order does not change the default flow control standard, but rather provides a different administrative way to meet it, simply allowing it to be applied at a different site. *O'Brien Testimony*. The County and Ecology also attempt to recast the Agreed Order as something other than a “mitigation” program, by stating the County is meeting its obligation to match the Phase I Permit flow control standard, just at an alternative location. *Gray Testimony*. If Ecology (and the County) is correct in this latter interpretation, then Clark County was not required to conduct basin planning or a similar water quality and quantity planning effort prior to Ecology's approval of the alternative flow control program under Condition S5.C.5.b. The Board will first consider the purpose of basin planning and the purpose of the flow control standard, in developing its conclusions of law on this issue.

18.

Appendix 1 to the Phase I Permit and the Stormwater Management Manual for Western Washington provide further specificity on how basin plans, referenced in Condition S5.C. of the Phase I Permit as an alternative planning effort, are to be developed. Appendix 1 states that an alternative requirement for Western Washington may be established through application of *watershed-scale* hydrological modeling and supporting field observations. *Ex. J-17 at Appendix 1 (Minimum Technical Requirements for New Development and Redevelopment)*, pp. 25 & 28.⁹ Appendix 1 also requires that before a basin plan can modify the minimum requirements of the Phase I Permit: it must be formally adopted by all jurisdictions with responsibilities under the plan, all ordinances and regulations called for by the plan must be in effect, and the basin plan must be reviewed and approved by Ecology. *Id.* at p. 29.

19.

*7 It is un rebutted that Clark County did not prepare a basin plan using watershed-scale hydrological modeling and supporting field observations, it did not adopt a basin plan, and Ecology did not review and approve a basin plan for Clark County as an underlying basis for the alternative program set out in the Agreed Order. Instead, Clark County will use its Stormwater Needs Assessment Program (SNAP) and Stormwater Capital Improvement Program (SCIP) to scope, prioritize, and plan flow control mitigation projects. *Ex. J-1 at Attachment A*, p. 8. These planning documents relied upon by Clark County to justify its alternative flow regime, fall far short of what is contained in a basin plan. A basin plan includes several key components, including a discussion of zoning, projected build-out, an evaluation of every stream channel (each which has been walked), a hydrologic model, and water quality data that includes new sampling. Essential information such as hydrologic modeling is missing in many of the SNAP manuals. *Booth Testimony*. Rod Swanson, the NPDES Coordinator for Clark County, acknowledged the SNAP manuals are not basin plans. *Swanson Testimony*. Similarly, SCIP is a process whereby the County uses objective criteria to evaluate and prioritize the many possible stormwater capital improvement projects, allowing public input on the allocation of resources. *Ex. J-3*. It is not a basin plan in any sense of the word.

20.

The Phase I Permit requires that municipalities' Stormwater Management Programs (SWMP) must prevent and control the impacts of runoff from new and redevelopment activities. *Ex. J-16 at Condition S.5.C.5.a-b.ii*. In order to do so, the Phase I Permit required implementation of a new, more stringent default flow control standard, with the attendant thresholds and definitions contained in Ecology's 2005 Stormwater Management Manual. This new standard was developed over a long period of time, and replaced the previous "peak" flow standard. *Ex. J-16 at Condition S.5.C.5*. Under the Phase I Permit, municipal permittees are required to control stormwater flows from certain new and redevelopment projects to levels that match historical pre-developed (typically forested) conditions, under certain peak flow conditions.¹⁰ In other words, it requires facilities be engineered so that discharges are not predicted to exceed the predevelopment flow duration for a range of storm events. *O'Brien Testimony, Booth Testimony*. The Independent Science Panel, which reviewed Ecology's Stormwater Management Manual for Western Washington, determined the flow control standard and the requirement to match flows estimated for an historic land cover condition, was appropriate to use in all watersheds, regardless of a watershed's current level of development.¹¹ *Ex. R-77 at p. 11*.

21.

A primary goal of the new flow control standard of the Phase I permit is to make progress in reducing high flows of stormwater from all new development, redevelopment, and construction sites that contribute to accelerated erosion of stream channels. *O'Brien Testimony, Booth Testimony*. Ecology identified the purpose of the flow control requirement (Condition S.5.C.5.b.ii) as being "to reduce negative impacts on water quality, fish, other aquatic life, and streams caused by increased runoff from new development and redevelopment and to reduce impacts from existing development." *Ex. J-1*. Stated another way, the Phase I permit's flow control standard is intended to ensure flows from new and redevelopment do not make existing conditions worse and, where existing conditions/flows are different from historic flows, require that post-development flows restore flows to more natural conditions. While the flow control standard was not expected to restore aquatic habitat, or eliminate all erosion

from a development site, it represented a substantial advancement in the effort to reduce adverse impacts to stream hydrology and water quality associated with stormwater runoff, and associated high flows, from ongoing urbanization, offering significant protections for streams from erosion and other adverse consequences. *Booth Testimony, O'Brien Testimony*. In discussing the objective of the flow control requirement and flow control BMPs, the Stormwater Management Manual for Western Washington states that “[maintaining the naturally occurring erosion rates within streams is vital, though by itself insufficient, to protect fish habitat and production.” *Ex. J-19* at Vol. 1, § 2.5.7, pp. 2-34.

22.

*8 In the Phase I Decision, this Board discussed the need for the NPDES Phase I Permit to comply with the Clean Water Act requirement to reduce pollution to the maximum extent practicable (the “MEP” standard). The Board also concluded that state law had a similar requirement, wherein all waste discharge permits must incorporate permit conditions that require all known, available and reasonable methods of treatment to control discharges and protect water quality (the “AKART” standard) *Phase I Decision* at COL 12. The Board also found as follows with respect to the conditions of the Phase I Permit: “Ecology views these SWMP requirements, in the aggregate, to represent MEP standard; that is, permittees who implement all of the program requirements in combination with one another are considered by Ecology to be reducing pollutants to the maximum extent practicable” *Phase I Decision* at FOF 8. Ultimately, the Board concluded that the permit’s reliance on a flow control standard as the primary method to control stormwater runoff from MS4s failed to reduce pollutants to the federal MEP standard, and did not represent application of all known, available and reasonable methods of treatment under state law because it placed insufficient reliance on the application of low impact development (LID) techniques in combination with the flow control standard. These findings and conclusion are discussed further below. *Phase I Decision*.

23.

Ecology determined that in order to satisfy MEP and AKART, permittees must adopt their updated flow control requirements no later than 18 months after the effective date of the permit (August 16, 2008), and begin applying those requirements within a reasonable period of time after adoption (30-90 days). The Phase I Permit’s Appendix 1 does not specify a precise date by which the post-construction stormwater control facilities need to be operational relative to the start of construction or land-disturbing activity at development sites. As a practical matter, they are typically constructed as part of the site-development process, when the developer installs the infrastructure for the new or redevelopment. In a subdivision, for example, this means they are constructed when the roads and utilities are installed, prior to the construction of the individual residences within the subdivision. *O'Brien Testimony*.

24.

The Phase I Permit does not require either municipal permittees or developers to monitor the effectiveness of the stormwater control facilities constructed in compliance with the permit’s default flow control standard in Condition S.5.C.b.ii. The permit requires that municipal permittees’ stormwater management programs must use qualified personnel to perform post-construction inspections of all development sites that meet the thresholds of the default flow control standard, provide for the development of maintenance plans for permanent stormwater facilities, and assign responsibility for such maintenance. *Ex. J-16* at Condition S.5.C.b.vi.

25.

*9 The Board finds that the Agreed Order rests on no science as to the comparability of its mitigation metric in relation to the Phase I Permit’s flow control approach, and has no requirement on a going forward basis that calls for a comparison of the benefits gained at a mitigation site, compared to the detrimental effects at a new development site where a lesser control standard is utilized. As discussed earlier, the Agreed Order allows the County considerable leeway in how it ultimately selects and sites flow control mitigation projects. The only restriction is that mitigation projects to address the County’s flow control

mitigation obligation must be built within the same WRIA. While the mitigation obligation is measured and tracked by acres for each of three land-cover types, it does not require the County to track or account for either the soil type or the slope of the new or redevelopment project site triggering the mitigation obligation, and it does not require the mitigation sites to have the same soil type or slope as the site of the new or development project. As discussed below, the acreage metric set forth in the Agreed Order, and the siting of flow control mitigation projects without any requirement for Clark County to address equivalent impacts to the environment and beneficial uses, lack a scientific basis and is inconsistent with directives to protect beneficial uses.

26.

The majority of the Board finds that the acreage metric is fundamentally flawed. Ecology believes this acreage metric is useful because it is straight-forward and is less likely for a permittee to be able to “play games with.” *O'Brien Testimony*. While the acreage metric may be simpler and easier to implement, the majority finds it is critically flawed because it is based entirely upon a mathematical perspective and there are *no* data, studies, or scientific support to support its underlying assumption that harm caused to one stream can be mitigated through a project in a different subwatershed. Under this acreage metric, it is highly unlikely there will be any relationship between the harm and the benefit. *Winters Testimony*.

27.

The acreage metric also completely ignores the purpose of the flow control requirement in the first instance, which is to “reduce harmful impacts on fish, other aquatic life and streams caused by runoff from development.” *Ex. J-2* at p. 1. Multiple witnesses stressed how the acreage metric fails to consider and mitigate for actual impacts on the environment, for example eroded stream banks and scoured substrates. *Booth Pre-Filed Testimony* at ¶33. Salmon and steelhead populations are influenced by the importance of the habitat affected, and the areas to be used for mitigation do not need to account for any of these attributes. *Rhodes Pre-Filed Testimony* at ¶36.

28.

The weight of expert testimony recognizes that streams, once degraded, can continue to degrade. “[T]he high flow durations from even a partially developed site will be highly disruptive to streams.” *Booth Pre-Filed Testimony* at ¶24. “[D]amage to receiving waters from stormwater flow from developed areas is cumulative. Damage to a stream builds on itself each time it rains as the water flows faster, cuts stream banks and scours stream beds further, and the hydrograph becomes more extreme. In other words, a flow duration standard based on meeting only existing conditions (like Clark County's) [at new development sites] does not freeze the environmental conditions in place, but allows for ongoing cumulative degradation of the stream. Moreover, the status quo in Western Washington, including Clark County, is currently degraded ... with many streams unable to support beneficial uses and even basic ecological function due in large part to stormwater runoff from developed areas.” *Booth Pre-Filed Testimony* at ¶26. Doug Beyerlein, Clark County's expert witness on hydrology, did not disagree with Dr. Booth's research and agreed that Clark County streams are not stabilized. *Beyerlein Testimony*. Ecology's expert, Ed O'Brien, also acknowledged that streams are still degrading, that there is nothing unique about Clark County that precludes use of Ecology's default flow control standard, and that no part of Clark County qualifies as a highly urbanized area for purposes of applying a lesser standard. *O'Brien Testimony*. The Board finds that the streams in Clark County are subject to further degradation.

29.

*10 Ecology recognizes that the flow control standard is a water-quality based standard and not just a technical standard. The flow control standard, therefore, goes beyond the state's requirement to implement AKART. Ecology also states that the flow control standard tries to address past harms to streams, but was not intended to address all biological factors. *O'Brien Testimony*. Simply because all biological factors are not meant to be addressed by the flow control standard, however, does not mean all biological factors on the ground can be ignored, especially given the purpose of the flow control standard to protect beneficial uses in the stream. Ecology has, in connection with this case, recognized the importance of preserving beneficial uses when

evaluating flow control regimes. The Department stated that “[to] relieve any developed area of a retrofit obligation for flow control, the County has to prove that a stretch of stream channel has not been altered by flows from existing development; or that the altered stream channel is still compatible with preserving the necessary beneficial uses.” *Ex. A-50* (emphasis added.)

30.

The experts all agree that factors such as soil type, slope, and other conditions are highly variable from site to site, and those variables have consequences for how alteration to the site impacts the stream. “[V]ariables such as stream size, soils in stream beds and banks, slope and characteristics of stream banks, grade, vegetation in-stream and near-stream as well as previous damage can all result in different reactions by a stream to stormwater and attempts to address it. An amount or type of development that causes minimal damage in one stream may dramatically alter the morphology of another. *Booth Pre-Filed Testimony* at ¶18. “Development on a highly infiltrative soil will likely result in particularly large increases in runoff Mitigation on a less-infiltrative soil somewhere else can never recover the loss of recharge or commensurately reduce the increase in stream discharge.” *Booth Pre-Filed Testimony* at ¶34.

31.

In the Lower Columbia basin, several salmon and steelhead populations are listed as threatened or endangered under the federal Endangered Species Act. *Rhodes Pre-Filed Testimony* at ¶8. Clark County is one of the fastest growing counties within the state. *Ex. A-49* at p. 1. The evidence indicates that potential impacts to fish and other aquatic organisms from stormwater can be significant, and is essentially un rebutted. In 1999, the state of Washington identified stormwater runoff as a major factor in the degradation of salmon streams in developed areas in the “Statewide Strategy to Recover Salmon: Extinction is Not an Option” (Statewide Strategy). The Statewide Strategy recommended that Ecology update the 1992 Stormwater Management Manual to provide guidance for applying the most recent stormwater management science and technology to new development and redevelopment to comply with water quality standards and contribute to the protection of beneficial uses of the receiving waters. *Ex. R-77* at p. 1. The testimony of the experts echoes the relationship between stormwater and negative impacts to fish. “[C]ombined effects significantly reduce the survival and production of salmon and steelhead and can cause long-term degradation of what was once good spawning and rearing habitat to a degree that renders it unusable or unproductive.” *Rhodes Pre-Filed Testimony* at ¶16.

32.

*11 The majority of the Board finds that the terms of the Agreed Order are insufficient to protect beneficial uses. Under the terms of the Agreed Order, Clark County can allow an important spawning reach to be impacted by application of the old flow control standard, and then, a few years later, mitigate the same number of acres in a watershed area that may not be occupied by fish or that does not have as important spawning or rearing habitat. *Rhodes Pre-filed Testimony* at ¶32. The evidence before the Board supports this conclusion by stating as follows: “The Clark County standard is plainly insufficient to protect beneficial uses like salmon and other aquatic life, and healthy aquatic conditions generally.” *Booth Pre-Filed Testimony* at ¶25. Clark County contends that its approach of targeting streams and watersheds for improvements where the greatest problems exist is the best approach for successful mitigation rather than mitigating all development at the development site. *Gray Testimony*. While the Board does not disagree with this statement, the majority finds that the Agreed Order does not require such targeting.

33.

Ecology acknowledges that the location of where flow enters a stream can impact the system. If the flow enters a higher portion of a stream, then generally there is a greater impact on the stream channel because there is an impact throughout the system. *O'Brien Testimony*. As noted by one of the Petitioners' experts, “There is nothing in the Agreed Order approach that would prevent the harm from occurring in the most ecologically valuable subwatersheds (for example, headwaters, riparian buffers, salmon habitat, etc.) in exchange for mitigation that is in the least ecologically important areas (degraded, highly developed,

far downstream, etc.), but that happens to meet the acreage requirement in the same WRIA.” *Booth Pre-Filed Testimony* at ¶36. Viewed in a different context, if development occurred near a stream that ultimately discharged to an area of shellfish production that was in danger of being closed because of stormwater contaminants, allowing the mitigation of the historical damage to occur in an entirely different stream that discharged near an industrial area would easily be recognized as not being equivalent in its impact on beneficial uses.

34.

The United States Environmental Protection Agency (EPA) expressed multiple concerns over Clark County's proposed flow control program in a letter to Ecology. EPA emphasized that stormwater impacts to salmon bearing streams constitutes a significant limiting factor to the recovery of ESA listed salmon in Western Washington. EPA stated its belief that mitigating urban and urbanizing stormwater impacts will require a three prong approach: 1) state of the art methods to minimize the impacts from new development, 2) enhanced gradual improvement of baseline conditions as redevelopment occurs, and 3) enhanced investment in retrofit projects to reduce stormwater impact from developed land. *Ex. A-22*. The Agreed Order does not necessarily allow for gradual improvement of baseline conditions in areas that are significant to salmon. Furthermore, by subsidizing mitigation, Clark County's is not making the enhanced investment in retrofit projects called for by EPA (discussed further in this opinion).

35.

*12 The National Marine Fisheries Service (NMFS) also sent a letter to Ecology expressing concerns over Clark County's proposed flow control program. NMFS emphasized the science that went into the development of the default flow control standard: “In Ecology's 2002 review material provided to the Independent Science Panel, Ecology stated that the use of the pre-developed, forested conditions standard was ‘... the most appropriate assumption necessary to help achieve the federal and state water pollution statutory and regulatory requirements to maintain beneficial uses.’” NMFS also noted that in the Notice of Violation Ecology issued to Clark County, Ecology stated that “*a flow control target is not defensible unless analyses of basin flows and stream geomorphology indicate it will produce a flow regime compatible with sustaining and restoring beneficial uses.*” *Ex. A-23* at p. 2. NMFS also commented that while the Clark County program appeared to be aiming to provide equivalent effects to receiving water bodies, effects on specific river systems may not be equivalent, and expressed concern about the lack of guidelines in the mitigation program to address effects to listed salmon and steelhead as important factors to be considered in selecting mitigation sites. *Ex. J-18*. NMFS also described the adverse effects certain pollutants in stormwater discharge have upon salmon, and that reducing the volume of stormwater can help salmon avoid these detrimental effects. NMFS further concluded that “The expectation that mitigation based solely on acreage and land use type will be effective to adequately reduce flow control effects is not supported by best available science.” *Ex. A-23* at p. 3.

36.

The Fact Sheet for the Phase I Permit discusses the wide range of impacts stormwater can have upon fish, invertebrates, and water quality. The Fact Sheet also recognizes that impacts from stormwater are highly site-specific and vary geographically due to differences in local land use conditions, hydrologic conditions, and the type of receiving water. *Ex. J-15* at p. 8. In addition, the Fact Sheet recognizes the link between permit requirements and the protection of beneficial uses by citing to RCW 90.48.010. This statute declares as the public policy of the state to maintain the highest possible standards to insure, among other ends, the propagation and protection of wild life, birds, game, fish, and other aquatic life. *Ex. J-15* at p. 16.

37.

Ecology's uncertainty regarding whether Clark County will undertake mitigation in areas that are ecologically valuable to salmon and other aquatic life, or which is otherwise important to water quality, is evident in Ecology's response to interrogatories. When asked whether the habitat/stream classification or status of water quality had any bearing in the mitigation provisions

of the Agreed Order, Ecology responded: “The Agreed Order does not require habitat/stream classification or status of water quality, but Ecology *expects* the County will *consider* these factors in prioritizing mitigation projects.” (emphasis added.) *Ex. A-4* at p. 16 (Interrogatory No. 21).

38.

*13 In contrast to the lack of evaluation required in the Agreed Order for mitigation to be based on environmental impact, the Department of Ecology devotes five pages in its guidance on wetland mitigation to the types of analyses that must be conducted to justify mitigation in that context. *Booth Pre-Filed Testimony* at ¶36. (citing *Wetland Mitigation in Washington State — Part I: Agency Policies and Guidance (Version 1), 2006*, pp. 55-59).

39.

In December 2008, Ecology issued “Making Mitigation Work”¹² as a shared vision by the Mitigation That Works Forum (Forum) for successful mitigation and to identify practical actions that could be taken to make all aspects of environmental mitigation work better and to improve outcomes. *Ex. A-25* at p. 2. The Forum found that many mitigation projects continue to be poorly sited, poorly designed and implemented, and poorly maintained, without sufficient attention being devoted to monitoring and adaptive management. Therefore, ecological values and functions continue to be lost, watershed conditions increasingly degrade, especially in developing areas. *Id.* at p. 3. One of the Forum's recommendations was the use of a compliance monitoring and inspection checklist for mitigation projects. The Forum recommends that when compliance monitoring shows that a mitigation project is not working, prompt efforts should be undertaken to correct the problems so that the mitigation project can provide environmental functions and values. *Id.* at p. 24. As discussed earlier, the Agreed Order fails to include any monitoring for its flow control mitigation projects. Monitoring of Clark County's mitigation projects under the Agreed Order has been described as “vital” by a hydrologist. *Rhodes Testimony*.

40.

In addition to establishing the new flow control standard, the same section of the Phase I Permit applicable to new development, redevelopment, and construction sites also requires that the permittees' stormwater management program “must require non-structural preventive actions and source reduction approaches including Low Impact Development techniques (LID) to minimize the creation of impervious surfaces, and measures to minimize the disturbance of soils and vegetation where feasible.” *Ex. J-16* at Condition S5.C.5.b.iii. The Phase I Permit's modified conditions related to LID were the result of this Board's decision in the Phase I case. In that decision the Board made lengthy and specific findings that LID was a well-established concept, and the basic BMPs that constituted LID well-defined. The Board found that utilization of LID techniques “may be useful (or even in some cases necessary) to meet the flow control standard on a particular site.” *Phase I Decision* at FOF 38. The Board's extensive, and unchallenged, findings of fact related to LID stated, among other findings that “[r]equiring municipalities to impose parcel and subdivision-level LID best management practices represents a cost effective, practical advancement in stormwater management.” *Id.* at FOF 60. The Board concluded that LID methods are known and available method to address stormwater runoff at the site, parcel, and subdivision level, and ordered the Phase I permit modified to required LID, where feasible, in the SWMP of each municipal permittee. *Phase I Decision* at FOF 66.

41.

*14 Ecology's Notice of Violation to Clark County originally identified a second problem with the County's compliance with the Phase I Permit's condition S5.C.5 requirements, in addition to the “existing” versus “pre-development” conditions problem. Specifically, Ecology cited the County for adopting an exemption for certain development projects from one of the thresholds that triggers the duty to control high flow durations. *Ex. J-2*. The new stormwater ordinances adopted by the County in response to the Phase I Permit on January 13, 2009, included an exemption for infill and redevelopment projects from the one tenth (0.1) cubic feet per second (cfs) flow increase threshold identified in Minimum Requirement No. 7 of Appendix 1. As part of

the Agreed Order, the County agreed to change its codes and manual during the County's fall 2009 Biannual Code Review to remove the exemption of infill and redevelopment projects from the 0.1 cfs flow increase threshold contained in Minimum Requirement 7, which would become effective no later than December 8, 2009. *Ex. J-1* at 4. However, during the window between the adoption of the non-compliant code and the subsequent removal of the exemption, many commercial projects and subdivisions vested under Clark County's land use regulations. *Exs. A-58, A-59.*

42.

In addition to establishing a flow control standard at new development sites and requiring implementation of LID where feasible, the Phase I Permit also required local governments to include a structural stormwater control program in their stormwater management program to prevent or reduce impacts to waters caused by discharges from the MS4. *Ex. J-16* at Condition S5.C.6. Sometimes referred to as the "structural retrofit" program, this permit term required Phase I municipalities to consider impacts of stormwater discharges from existing development, and areas of new development. The program was to address impacts "not adequately controlled by the other required actions of the SWMP," and required proposed projects and an implementation schedule. The permit offered a number of examples of programs that could meet this requirement, such as regional flow control facilities, water quality treatment facilities, retrofits of existing facilities, and property acquisitions, among others. *Id.*

43.

As part of the minimum performance measures for the structural stormwater control program, each permittee must include the goals that are intended to be achieved; the planning process used to develop the program, including, among other factors, the type of characterization information considered and the amount budgeted for implementation; and a description of the prioritization process, procedures, and criteria used to select the structural stormwater control projects. For planned individual projects, and programs of small projects, the following detailed information must be provided: the estimated pollutant load reduction that will result from each project designed to provide stormwater treatment; the expected outcome of each project designed to provide flow control; any other expected environmental benefits; and if planned, the monitoring or evaluation of the project and the monitoring or evaluation results. *Ex. J-16* at Condition S5.C.6. Recognizing that mitigation projects under the Agreed Order are not structural control projects responsive to this Phase I Permit requirement, but to depict the contrast, Clark County is not required to even state what the expected outcomes will be for its flow mitigation projects under the Agreed Order.

44.

*15 The Fact Sheet for the Phase I Permit states that the permit language pertaining to structural stormwater controls is drawn directly from EPA rules.¹³ Although Ecology recognizes that it is not feasible to provide structural controls to mitigate for the impacts of all existing development, "[p]ermittees will set priorities and address the highest-ranked problems subject to the limitations of available resources." (emphasis added.) *Ex. J-15* at p. 35.

45.

In recommending the Agreed Order, Ecology expected that Clark County would commit extra funding to the mitigation program of the Agreed Order, above and beyond that already dedicated to the structural stormwater control "retrofit" program as required by the Phase I permit. Ecology further understood from Clark County that the County would maintain at least the same level of effort for its existing structural retrofit program. Ecology expected that implementation of the Agreed Order would necessitate new projects, not simply a shifting or "counting" of projects that had already been planned by the County under existing capital plans. In short, Ecology expected that with the implementation of the mitigation program, Clark County would have an increased level of effort, above and beyond that already in place under the structural stormwater control program. *Moore Testimony, O'Brien Testimony.* Nevertheless, the Agreed Order contains no term that requires the County to provide additional funding above that historically spent and dedicated to the structural stormwater control program, nor does it limit the County's ability to reduce its level of effort on structural stormwater control. *Moore Testimony.* The County is merely required to "maintain

funding sources adequate to comply” with the requirements of the Agreed Order. Ecology concedes that redirection of funds from the already required structural program to the mitigation obligation of the Administrative Order could result in an overall reduced level of effort in addressing urban stormwater management, as required by the Phase I Permit. *O'Brien Testimony, Exs. A-48 & A-55.*

46.

Both EPA and the National Marine Fisheries Service commented on this aspect of the proposed modification to the Phase I permit to incorporate Clark County's Agreed Order terms, in addition to their comments related to science-based concerns. NMFS stated its main concern with the structural stormwater control program to be a “possible reduction in projects, potentially providing less mitigation to listed salmon designated as primary populations in the LCR (Lower Columbia River) Recovery Plan.” *Ex. J-18* at 2. Among other concerns, NMFS commented that “[I]f Clark County moves projects from the structural control program to the flow control mitigation program such that structural control projects are substantially reduced, it could result in a net reduction in mitigation overall.” Thus, NMFS concludes that there is a need for careful implementation of both programs. *Ex. J-18.*

47.

*16 EPA expressed similar concerns to those of NMFS in its comments on the amended Permit, but chose not to file a formal objection to the Phase I permit modification. EPA was concerned that without additional conditions, Clark County's flow control mitigation program would result in less overall stormwater flow control. EPA noted that Clark County had a well-established stormwater capital improvement program to meet the Phase I structural stormwater control/retrofit program requirement of the permit, and went on to express concern that Clark County would reduce the level of investment directed to that program in order fund mitigation projects. Noting that the Phase I permit did not mandate a minimum investment level or amount of retrofits for the structural stormwater control program, EPA stated that “the lack of such specificity should not be used to significantly reduce long standing investment toward the structural stormwater control requirement in order to establish a mitigation program” to meet other permit requirements applicable to new development. *Ex. A-22* at pp. 1-2. Ecology responded to EPA comments by stating that the comments went to issues that were not the subject of the permit modification (i.e. the structural stormwater requirements), and that Ecology was only looking to determine if Clark County was providing an equivalent program of flow control for new development and redevelopment. *Ex. J-21, Moore Testimony.* Thus, Ecology viewed the alternative flow control program in isolation from other permit requirements.

48.

The parties provided much evidence in an attempt to explain the County's planned funding of mitigation projects and structural stormwater improvement projects. The County's Stormwater Capital Improvement Program (SCIP) and Stormwater Needs Assessment Programs (SNAP) set out the County's budget and expenditure planning on stormwater projects. However, it is challenging, if not impossible, to make direct comparisons between the County's budget and expenditures on stormwater retrofit projects, and Agreed Order mitigation obligations, due to the variety of ways in which the information is tracked and reported, and because the County's efforts are in a continuing state of flux. Differing amounts of money, and different prioritization of projects appears throughout the County's capital budget planning documents. This makes comparisons difficult both in terms of the County's historic budgets and expenditures toward either or both types of infrastructure over time and its relative budgets and expenditures between the two different of kinds of projects. *Gray Testimony, Swanson Testimony, Exs. A-43, A-74, A-75,*

49.

The County has only one budget for the combined structural stormwater/retrofit program and the flow control mitigation program, the Stormwater Capital Improvement Budget.¹⁴ *Ex. A-43(Clark County's Supplemental Responses to Interrogatories).* Although County witnesses initially stated that they received “supplemental appropriations” from the Board

of County Commissioners for the Phase I permit requirements related to implementing the structural stormwater control program and the Agreed Order mitigation obligation, testimony clarified that there were not additional funds dedicated to the Agreed Order's flow mitigation program. Stormwater managers within the County received an increase in budget authority, or permission to spend more money from the fund balance in the Clean Water fund. New monies were not made available to fund an increased level of effort for mitigation projects. *Wierenga Testimony*.

50.

*17 The County's current Clean Water Fund balance is approximately \$7-8 million. That fund balance is available for the total of all stormwater management in the County, not just capital programs. The balance has accumulated over the past decade as a result of spending less on the County's overall Clean Water Programs than the County has collected in fees. Historically, the County has spent on average approximately \$800,000 per year on structural retrofit programs. *Gray Testimony, Wierenga Testimony*. The County has projected that it will cost approximately \$360,000 during the remainder of this permit term to pay for the mitigation obligations incurred under the Agreed Order. *Gray Testimony, Swanson Testimony*. For this reason, the County projects that ongoing funding for the mitigation obligations taken on by the County under the Agreed Order is adequate. *Gray Testimony*. However, the Board finds that this projection is based on several assumptions: (1) that projects vested before August 2009 are not subject to the mitigation requirement, (2) that the County does not look beyond the terms of this permit, even though its mitigation obligation extends well into the future, and (3) that the projected rate of recessionary development which has resulted in a significant downturn in development in Clark County, continues. For example, Clark County issued approximately 550 single-family building permits in 2009, down from approximately 4,000 in 2007. *Snell Testimony*.

51.

The County will undertake more flow control mitigation projects relative to structural stormwater control projects under the Agreed Order, conceding that some existing "retrofit" projects will be shifted from the structural stormwater control program to the mitigation obligation. *Wierenga Testimony*. Three projects that had been on the structural stormwater control/retrofit program for some time were shifted to the mitigation obligation, including the 152nd Street/20th Avenue retrofit, the Teal Point retrofit, and the New Valley retrofit. *Wierenga Testimony, Gray Testimony*. It appears Clark County has identified only one structural stormwater control project for 2012. ¹⁵ *Ex. A-74, p. 2*.

52.

In meetings between Ecology and the County leading up to the Agreed Order, the parties discussed the question of whether the County could sustain the both the structural stormwater retrofit program and the mitigation obligation within existing funding. Ecology maintained that in order to meet the concept of "equivalency," Clark County should continue its current program. The County's position was that the current structural control program was "designed to spend down the capital reserve" and "was not sustainable under current funding and does not account for the flow control debt." At that point the County indicated that some part of a deficit, apparently referring to the flow control mitigation obligation, could be made up from projects in the structural control program *Ex. A-33*.

53.

*18 The Board finds that the Agreed Order allows a reduced level of effort in meeting the stormwater management goals of the Phase I Permit. The lack of any requirement to maintain a level of effort in the structural retrofit efforts, the ability to shift retrofit projects to the mitigation obligation, and the total discretion afforded the County in the implementation of the Agreed Order allow such an outcome.

54.

Implementation of LID under Agreed Order: It is unclear whether the Agreed Order is a substitute or alternative to all the requirements contained in Condition S5.C.5. of the Phase I permit, or only the flow control requirement contained in S5.C.5.b.i. Whether the LID requirements of that permit condition related to new development and redevelopment, are affected by the terms of the Agreed Order is unclear. County witnesses suggest LID requirements of the permit are met by possible implementation of LID at the mitigation sites. *Wierenga Testimony.* The Agreed Order mentions use of LID in relation to retrofit projects that will be undertaken as mitigation under the Order, describing how LID facilities may be used, and that LID best management practices may be used to achieve the flow control requirement of the permit, or to reduce the size of downstream flow control facilities. *Ex. J-1* at Attachment A, pp. 5 & 7. The Agreed Order does not clarify the extent to which LID will be required at new development or redevelopment sites. The record before the Board is simply unclear how, where, and to what extent LID will be implemented, prioritized, or required by the County in relation to the Agreed Order and how the Agreed Order changes the requirements of the Phase I Permit as it applies to new development sites. In the Response to Comments on the Phase I Permit Modification for Clark County, Ecology addressed concerns that Clark County was no longer under a requirement to include LID practices. Ecology responded to comments by stating that the Board found the flow control standard to be adequate so long as low impact development was required where feasible. Ecology had concluded, however, that the County's alternative flow control method was equivalent, and the Board's ruling did not prohibit the use of equivalent flow control approaches. It becomes clear in Ecology's response to comments, that Ecology does not find it necessary for Clark County to use LID techniques under the terms of the Agreed Order. *Ex. J-21* at p. 8.

55.

Despite having concerns about whether the Agreed Order might result in less overall improvement in pollution control than if the default standard were met at development sites, and whether there would be a continued level of effort in the structural retrofit program, Ecology ultimately determined that the Agreed Order offered a local alternative that provides equivalent protection to receiving waters, as required by the Phase I Permit. *Schriever Testimony, O'Brien Testimony, Moore Testimony, Exs. A-48, A-55.* Ecology approved the Agreed Order, allowing Clark County to exclude projects that had "vested" prior to April 13, 2009, from the mitigation obligation, and did not require the County to establish a new funding mechanism to raise new sources of revenue for mitigation projects or to maintain its previous level of effort for the structural retrofit program. *Moore Testimony.*

*19 Any conclusion of law deemed to be a finding of fact is hereby adopted as such.

CONCLUSIONS OF LAW

1.

The Board has jurisdiction over the parties and the subject matter of this case pursuant to RCW 43.21B.300. The Board reviews the matter *de novo*, giving deference to Ecology's expertise in administering water quality laws and on technical judgments involving complex scientific issues. WAC 371-08-485(1), *Port of Seattle v. Pollution Control Hearings Board*, 151 Wn.2d 568, 593, 90 P.3d 659 (2004).

2.

As we have said in other decisions, the Clean Water Act requires Ecology to impose increasingly stringent requirements on the Phase I and Phase II jurisdictions under the NPDES general permit process. *Puget Soundkeeper Alliance v. Ecology*, PCHB Nos. 07-022, 07-023 (2009) (Phase II Decision) at FOF 29; *Cox v. Ecology*, PCHB No. 08-077 (Order Granting Summary Judgment, February 26, 2009). In the municipal stormwater context, stormwater discharges from municipal systems must reduce pollution to the maximum extent practicable (the MEP standard). *Phase I Decision* at COL 12-13. In prior decisions, this Board has recognized the uniqueness of this standard, and that it reflects both the difficulty of addressing stormwater on a system wide basis and the focus of regulation on prevention and control of municipal stormwater discharges. *Phase I Decision* at COL 13, citing *Save Lake Sammamish v. Ecology*, PCHB Nos. 95-78 & 121 (Order Granting Summary Judgment, December 12,

1995). The Board has noted that the MEP approach, by its nature, requires extensive planning and prioritization to achieve the underlying goal of meeting water quality standards. *Id.* Similarly, the Board has held that the AKART standard of state law is, as defined by rule, “the most current methodology that can be reasonably required for preventing, controlling, or abating the pollutants associated with a discharge,” and involves both technological and economic feasibility. WAC 173-201A-020. *Phase I Decision* at COL 14.

3.

The Phase I Permit represents a suite of requirements for municipalities that are practicable, feasible, available, and reasonable to prevent and control pollution from stormwater runoff in municipal stormwater systems. Ecology defines these requirements, including the flow control standard, as those necessary to meet the federal MEP standard, and the state AKART standard. *See Phase I Decision* at p. 10; *Puget Soundkeeper Alliance v. Ecology*, PCHB Nos. 07-022 & -023 (*Order on Summary Judgment, Phase II Municipal Stormwater General Permit, September 29, 2008*) at p. 12. In order to provide equal or similar protection of receiving waters and pollutant control, as set out in the Phase I Permit Condition S5.C.5., the Clark County Agreed Order must meet the federal MEP standard and apply AKART. The question before us is whether Clark County's alternative flow control mitigation program meets those legal standards by providing an equal or similar level of protection to receiving waters and equal or similar levels of pollution control, as required by the Phase I Permit.

4.

*20 The Board concludes that the Agreed Order, as currently stated, does not provide equal or similar protection of receiving waters or equal or similar levels of pollutant control. Because it does not do so, it also fails to meet the requirement for a municipality to ensure that the MS4 reduces pollutants to the federal MEP standard, and does not represent AKART under state law. A majority of the Board concludes it fails to do so for the following reasons. First, Ecology authorized an alternative to the flow control standard without following the requirements of the Phase I Permit. Section S5.C.5.b.i. requires a rigorous basin planning process, or similar planning effort, that combines the use of computer models and field work to support the models *before* Ecology can approve an alternative flow control standard or other program tailored to local circumstances. It is un rebutted that the required basin planning process or similar planning effort is absent in this case. Second, not only is the acreage metric used in the Agreed Order without a scientific basis, but the Agreed Order also fails to recognize potential impacts to beneficial uses, which is the stated purpose of the flow control standard. Third, by relying on the doctrine of vesting, and using a later date than specified in the Phase I Permit, the Agreed Order arbitrarily excludes a large number of projects from the mitigation requirement, and does not result in reduction of pollutants to the MEP standard, nor require application of AKART to many projects, in derogation of the terms of the permit. Fourth, as structured in the Agreed Order, the County can and has engaged in an impermissible reduction in the level of effort required under the structural retrofit program, by splitting and shifting available funds to the new mitigation requirements of the Order. Even if we could conclude that there was not reduction in the level of effort resulting from implementation of the Agreed Order, we conclude it suffers from another flaw, in that it gives Clark County sole discretion over how and where to apply the mitigation effort, and is consequently, impermissible self-regulation. Finally, by not clearly requiring LID at either areas of new development, redevelopment, or construction sites, nor specifying that LID will be required or the manner in which it will be implemented at mitigation sites, the Order falls short of the requirements set out in this Board's Phase I decision and necessary to meet the MEP standard and apply AKART.

5.

Clark County, and to a lesser extent, Ecology would have the Board review the flow control obligations of the Agreed Order in the narrowest possible mathematical fashion in relation to the Phase I Permit, looking only to the technological aspects of flow control, and comparing flow control as set out in the Agreed Order to flow control set out in the Phase I Permit. These parties would have the Board exclude the relationship of the Agreed Order requirements to other aspects of the Phase I Permit, and from the very purpose of the flow control standard. The Board cannot read the alternative program of the Agreed Order in such isolation for several reasons. First, while the Phase I Permit clearly allows for alternative local programs if certain standards are

met, the terms of the Agreed Order disconnect the flow control standard from the purposes which are implicit in its application to new development and redevelopment—to protect streams from degradation in an effort to protect beneficial uses. Second, the Agreed Order directly implicates the County's obligations under other terms or the Phase I Permit, particularly the structural stormwater retrofit program, and the County's obligations to implement Low Impact Development at new development sites. Additionally, the Board notes that the ramifications of the Clark County program go well beyond the borders of Clark County, and establish precedent for other municipal permittees. *See Ex. A-55*. Ecology has amended the Phase I Permit to add the Clark County Agreed Order as “functionally equivalent” to Appendix I of the Permit, thereby determining not only that Clark County's program is equivalent to the Phase I Permit, but also making the program available to other NPDES permittees as an equivalent level of pollution prevention for runoff from new development or redevelopment in other settings.¹⁶ *See Appendix 10 to Phase I Permit*. Thus, the Board will examine the Agreed Order in relation to other permit terms implicated by the Clark County program, and understanding that the terms of the Phase I Permit, as amended with the Clark County program, also become the baseline for the next iteration or round of municipal permits.

6.

*21 The Phase I Permit allows municipalities to develop different performance measures and programs to control stormwater runoff from new development, redevelopment and construction sites. If they do so, the alternative program must meet the standard set forth in that section of the permit, as follows:

More stringent requirements may be used, and/or certain requirements may be tailored to local circumstances *through the use of basin plans or other similar water quality and quantity planning efforts*. Such local requirements and thresholds shall provide *equal or similar protection of receiving waters and equal or similar levels of pollutant control* as compared to Appendix 1. (the SWMM) (emphasis added).

Ex. J-16 at Condition S5.C.5.b.i. Thus, an alternative program, such as is embodied in the Agreed Order between Ecology and Clark County, is authorized by the Phase I Permit, provided that it meets the criteria set out for such a variance from the Permit's flow control standard. The Board must first determine whether Clark County was an alternative program, such that it was required to complete a basin planning process, or similar planning effort, prior to Ecology's approval of its alternative flow control program, and if so, whether the County engaged in such an effort as part of the alternative program approved in the Agreed Order.

7.

In analyzing whether the Agreed Order is properly authorized as an adjustment or variance to the flow control standard under Condition S.5.C.5.b.i. the Phase I Permit, it is important to understand the flow control standard in the context of how Ecology developed the Stormwater Management Program (SWMP) of the Phase I Permit for permittees. Ecology decided not to follow EPA's permitting strategy where each permittee proposes a SWMP for the permit term, but instead, prescribed the SWMP requirements in the Phase I Permit. Ecology determined that the development, implementation, and enforcement of SWMPs pursuant to the permit terms constituted what was necessary to reduce pollutant discharges to the maximum extent practicable (MEP), meet AKART, and protect water quality. *Ex. J-17* at Condition S5.B., *Ex. J-15* at p. 28.

8.

Ecology determined that the Phase I Permit was an effective way to be consistent with federal rule requirements to minimize the impacts of stormwater discharges from areas of new development and redevelopment by “using techniques that:

- 1) minimize the generation of stormwater runoff (low impact development);
- 2) reduce exposure of pollutants to precipitation and stormwater runoff (source control BMPS's);

- 3) remove pollutants in stormwater runoff (treatment BMP's); and
- 4) control either the volumetric flow rate of stormwater discharged (for discharges to streams), or control the volume of water discharged (if discharging to a wetland)."

Ex. J-15 at p. 32. Thus, implementation of the flow control standard at new development and redevelopment sites was integral to the suite of requirements that constituted MEP under the Phase I Permit.

9.

*22 The Fact Sheet for the Phase I Permit also states that the Eastern and Western Stormwater Manuals are the latest technical guidance from Ecology for controlling the quantity and quality of stormwater runoff from new development and redevelopment, and that these manuals create a generic presumptive approach to meeting federal and state water quality requirements. *Ex. J-15* at p. 33. Although a permittee may adopt alternative minimum requirements if they have been approved by Ecology as equivalent, the "*permittee is obligated to demonstrate to Ecology's satisfaction that their alternative approaches will protect water quality, meet the "maximum extent practicable" requirement of federal statutes, and meet the all known, available and reasonable methods of prevention, control, and treatment requirements of the state's Water Pollution Control Act.*" (emphasis added.) *Ex. J-15* at pp. 33-34, *Ex. J-17* at Condition S.5.C.5.b.ii.

10.

Although the Ecology and County witnesses may have attempted to characterize Clark County's alternative flow control standard as the same as the default standard, only administered differently, we conclude that the language in the Agreed Order, the fact that Ecology reviewed it for needed equivalency from the outset, as well as the rest of the record, demonstrate that it is a different, and alternative standard, requiring a showing of equivalency, and consideration of impacts on beneficial uses. Because the Phase I Permit requires a permittee to demonstrate that using an alternative standard to the generic presumptive approach established in the Phase I Permit will meet federal and state water quality requirements, the permittee may only meet this requirement through a rigorous process. Condition S.5.C.5.b.i. requires the use of basin plans or other similar water quality and quantity planning efforts in order to use an alternative standard. The Board concludes that the plain language of the Phase I Permit condition that requires use of the flow control standard at new development or redevelopment sites, and the reasons behind that term, require any alternative program to be based on basin planning or a similar rigorous, science-based planning effort. Based on our Findings of Fact, above, we conclude that Clark County's budget planning and capital planning documents (SNAP and SCIP), do not meet the Phase I Permit's required basin planning or other similar planning effort. The Agreed Order does not rest on such a planning effort, and therefore violates the terms of the Phase I Permit.

11.

The second question before the Board becomes whether the County's implementation of the flow control standard at alternative sites, not connected to new development or redevelopment in the County, is equivalent to the requirements of the Phase I Permit in any event. Again, the Board concludes that the failure of the Agreed Order to consider the underlying purposes of the flow control standard, and the failure to consider the connection between the updated flow control standard and beneficial uses, results in the invalidity of the Order. The history of the development of the flow control standard and a review of other documents leaves no doubt that the flow control standard was developed and reviewed through rigorous science, and that it may only be altered through a rigorous scientific process that focuses on the potential impact to beneficial uses. The Stormwater Management Manual for Western Washington states the primary objectives for basin/watershed planning are "to reduce pollutant loads and hydrologic impacts to surface and ground waters *to protect beneficial uses.*" (emphasis added.) Vol. 1, § 2.5.9, pp. 2-38. This section further states that "[b]asin planning provides a mechanism by which the minimum requirements and implementing BMPs can be evaluated and refined *based on an analysis of an entire watershed.*" (emphasis added.) *Id.* The Independent Science Panel

discussed the flow control standard in its review of the Stormwater Manual, and noted that the Stormwater Manual recognizes the need to control flows from many small sites because the cumulative effect of uncontrolled flows from many small sites can be as damaging as those from a single large site. The Independent Science Panel then concluded that “[w]atershed-scale assessment and planning allows planners to identify where this may not be the case, by considering the size and location of proposed developments throughout a watershed and fully evaluating potential impacts.” (emphasis added.) *Ex. R-77* at p. 7.

12.

*23 Thus, implicit in the flow control standard is the concept that it will be applied at the site of new development or redevelopment where high flows of stormwater can be controlled, avoiding accelerated stream channel erosion, and resulting harm to beneficial uses. *Booth Testimony, O'Brien Testimony*. However, with approval of the Agreed Order, Ecology allowed the new flow duration standard to be applied at any site the County chooses, without consideration of the impact on such beneficial uses, and with the likelihood that the intended outcome will be different than if the new flow control standard were applied at a sites called for in the Phase I Permit.

13.

Ecology stated in the Agreed Order that it “will provide an equivalent level of flow control” to that required under the Phase I Permit, and that “[t]his approach is consistent with the Permit wherein Permittees are allowed the option of proposing alternative methods of achieving flow control standards.” *Ex. J-1* at 3. However, in the Notice of Violation issued by Ecology to Clark County, Ecology clearly states that the purpose of the flow control requirement is to “reduce harmful impacts on fish, other aquatic life and streams caused by runoff from development.” *Ex. J-2* at 1. A majority of the Board concludes that Ecology’s approval of the Agreed Order not only ignores the clear terms of Condition S5.C.5.b. which allows such an alternative only when tailored to local circumstances through the use of basin planning, or a similar planning effort, but also fails to consider the underlying purposes of the flow control standard in the first instance—to protect beneficial uses through the rigor of the flow control requirement, or through use of an equally rigorous alternative.

14.

Clark County would have the Board conclude that they are, in fact, implementing the same flow control standard in a fashion equivalent to the Phase I Permit, simply at another location selected through the County’s capital budget planning efforts. They argue that their strategic choice of a location to implement flow control is superior to the Phase I method of requiring it at all new development, which is a more random placement of flow control. Thus the County concludes their alternative program represents AKART and MEP. The problem with this is that there are neither criteria applied at the front end, nor evaluation and monitoring results that can be reviewed at the back end, that require, or will demonstrate that the flow control implemented by the county will achieve the same level of protection of beneficial uses that flow control at new development or redevelopment sites will achieve. A flow control project implemented by the County at a retrofit project low in a watershed will not have the same effect as flow control placed in a sensitive, salmon-bearing stream higher in the watershed where there has been relatively little development.

15.

The Board concludes that the alternative approach of the Agreed Order will not provide similar or equal protection to receiving waters. Significant amounts of un rebutted expert testimony are in the record that the ecological impacts of Clark County’s alternative flow control mitigation program are not only ignored, but that the potential impacts can be substantial. Clark County’s fisheries expert opined that targeted mitigation actions in areas that can provide the most environmental benefit is the best method for undertaking mitigation. Unfortunately, there is no requirement in the Agreed Order that Clark County do so. The Agreed Order does not require Clark County to detail the expected outcome of its proposed flow control mitigation projects or to monitor to see if these results are being achieved. An expert referred to monitoring of these projects as “vital.” Under

the acreage metric, Clark County is not even required to identify and track significant areas of salmon habitat for potential mitigation. The Phase I Permit clearly required basin planning as a basis for and alternative program such as Clark County's, because as stated by the Independent Science Panel, a watershed scale assessment and planning allows planners to identify and fully evaluate potential impacts. While Ecology may be concerned that developing a proper tracking metric may prove difficult, Condition S.5.C.5.b.ii. makes it the obligation of the permittee to demonstrate to Ecology's satisfaction that their alternative approaches will protect water quality, meet the maximum extent practicable requirement of federal statutes, and meet the all known, available and reasonable methods of prevention, control, and treatment requirements of the state's Water Pollution Control Act. Ecology did not require Clark County to do so before approving the Agreed Order in this case.

16.

*24 The Board understands that it must give deference to the technical expertise of Ecology. *Port of Seattle v. Pollution Control Hearings Board*, 151 Wn.2d 568, 90 P.3d 659 (2004). However, the Board concludes that Ecology is not entitled to deference in its characterization and agreement to Clark County's alternative flow control model as equivalent under the Phase I Permit because Ecology failed to follow the clear and unambiguous terms of the permit, and because Ecology's approval of the alternative program is unsupported by, and contrary to its own technical or science-based discussions and assessments of the flow control standard. *See Postema v. Pollution Control Hearings Board*, 142 Wn.2d 68, 77, 11 P.3d 726 (2000) (stating the principle that an agency's interpretation is accorded great weight only if there is ambiguity). Unambiguous terms of the Phase I Permit were violated when Clark County did not undergo the prerequisite basin planning or similar planning necessary to develop an alternative flow control requirement. Then, by simply allowing the flow control standard to be implemented at alternative sites, Clark County's acreage-based mitigation divorces the flow control standard from its impact upon beneficial uses, in contravention to Ecology's stated purpose for the flow control standard in the first instance. We recognize that the mitigation projects selected by Clark County could potentially adequately mitigate for historic flow control impacts and provide equal or better environmental protection for beneficial uses than the default standard in some instances. There is, however, neither a requirement in the Agreed Order, nor a guarantee this will occur, and Ecology does not have the information that this will occur. The flow control standard and other permit terms were developed after many years of scientific effort. The majority of the Board's focus on the absence of information regarding habitat values at the points of development and mitigation, and the absence of information regarding what the mitigation projects are expected to achieve, is not holding Clark County's program to a higher standard. Instead, it is to determine whether the alternative approach under the Agreed Order is equivalent to the Phase I Permit. In *Friends of Grays Harbor v. City of Westport*, after first recognizing the Board provides deference to Ecology's technical expertise, the Environmental and Land Use Hearings Board refused to find that Ecology had reasonable assurance that water quality standards would be met under the proposed project because it lacked critical information regarding groundwater levels. Without this information, the Board concluded Ecology had insufficient data to make a reasoned decision. *Friends of Grays Harbor v. City of Westport*, ELUHB No. 03-001 (*De Novo*) (*Findings of Fact, Conclusions of Law and Order*) (2005) at pp. 34-35, 40. The Board concludes that the alternative flow control standard in the Agreed Order does not provide an equal or other similar protection of receiving waters and equal or similar levels of pollutant control as compared to the default standard. The alternative flow control standard and the mitigation program also significantly impact Clark County's efforts under the structural control program. Ecology is not entitled to any deference regarding this aspect of the Agreed Order because Ecology's own witnesses did not foresee a reduced level of effort in the structural control program. The Board also concludes that the alternative flow control standard in the Agreed Order does not constitute MEP, since it constitutes a lesser standard than what other permittees are expected to achieve.

17.

*25 As stated in the Board's Order Denying Summary Judgment in this case, the Board never addressed the vesting issue in the Phase I case, and the Phase I Permit itself is silent as to vested rights. PCHB No. 10-013 (Order Denying Summary Judgment, August 26, 2010) p. 10. Ecology relied on the concept of "vesting" as a cut-off point for application of the new flow control standard on a going-forward basis.¹⁷ The Board rejected Clark County's argument that the vested rights doctrine precluded the application of the new flow control standard to projects that vested for land use purposes prior to April 13, 2009. The Board

stated that: For purposes of review of whether the Agreed Order is equivalent to the Phase I Permit, the Board must determine what constitutes MEP and AKART under the Phase I Permit. The Board reserved for hearing how and why Ecology selected the August 17, 2008 effective date for the new flow control standard, and the feasibility of using the new flow control standard at the sites exempted from providing mitigation under the Agreed Order. *Id.* at pp. 10, 16. We therefore analyze the Agreed Order in relation to that baseline of August 17, 2008.

18.

As we have found, Ecology established August 16, 2008, 18 months after the effective date of the permit, as the date by which permittees must adopt their updated flow control requirements. By that date, or within a reasonable period of time thereafter (30-90 days), Ecology expected municipalities to begin applying the flow control standard at new development, redevelopment, and construction sites. The Agreed Order allows Clark County to wait to apply the flow control standard, including the mitigation at alternative sites, until a date approximately eight months later than that defined in the Phase I Permit (April 13, 2009). Similarly, the Agreed Order also allows Clark County to wait to begin applying the "0.1 cfs increase" threshold until several months after it was supposed to have implemented the new threshold, after it revised its ordinances to remove the unlawful exemption. A substantial number of proposed development projects were exempted from the mitigation requirement under the Agreed Order. There is no scientific basis to justify the delayed effective date for Clark County for either the flow control standard or the 0.1 cfs increase threshold, nor was there any evidence introduced to establish that either of these requirements could not be met at particular sites. On this basis, we conclude that the Agreed Order, on its face, fails to reduce the discharge of pollutants to the maximum extent practicable as represented by the Phase I Permit's default flow control standard because it fails to begin applying the more stringent flow control requirements until much later than demanded by the Phase I Permit. To satisfy the equivalency requirement, Clark County's mitigation obligation must begin no later than 30-90 days after the County was required to adopt its updated flow control requirements (*i.e.*, November 16, 2008).¹⁸ The County's several month gap during which time it unlawfully exempted infill and redevelopment projects that increase flow beyond the 0.1 cfs threshold from applying the updated flow control requirements (or its mitigation obligations) is an additional basis for concluding that the Agreed Order is not equivalent to the Phase I Permit.

19.

*26 Rosemere maintains that in addition to the project applications filed between August 16, 2008, and April 13, 2009 that were improperly excluded from meeting the mitigation requirement under the Agreed Order, other uncompleted projects should be reviewed on a case by case basis to determine whether any of these projects should meet the new flow control standard. The Board declines to extend the application of the new flow control standard beyond what Ecology established in the Phase I Permit. Although Ecology improperly used vesting as part of the basis for establishing what was required for permittees under the Phase I Permit, the Phase I Permit also represented Ecology's best judgment regarding what was reasonable for a group of permittees with differing problems and resources to accomplish. Ecology considered the expected implementation date of the Phase I Permit to be MEP and AKART, and the Board defers to Ecology's expertise on what permittees could reasonably accomplish within their resources. The Board concludes that using the expected implementation date of the Phase I Permit for the baseline to apply to projects is MEP and AKART.

20.

The lack of any term in the Agreed Order to require a sustained level of effort in the structural retrofit program as the County implements the Agreed Order, leads the Board to conclude that the Agreed Order fails to require an ongoing effort by the County to meet the MEP standard set out in the Phase I Permit. In discussing Condition S5.B. of the Phase I Permit, the Fact Sheet provides that state and federal law requires a SWMP reduce the discharge of pollutants to the MEP and meet state AKART requirements. It also states: "Where appropriate, Permittees should 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." *Ex. J-15* at p. 29 The Fact Sheet, therefore, recognizes that although a permit term may

not specify a particular level of effort, Permittees should continue their activity under that permit term in a meaningful and sustained manner where necessary to meet MEP requirements. Clark County's ability to shift funds to the mitigation program, without maintaining continuing effort in the structural retrofit program, is a serious flaw in the County's required Stormwater Management Program, and results in an impermissible reduction in the level of effort to control runoff in urban and urbanizing areas of Clark County, as required by the Phase I Permit. This reduction in the level of effort results in a failure to meet the MEP standard, and thus the Agreed Order is invalid in this respect. *See* WAC 371-08-540(2) (Board will review terms of a General Permit to determine if it is "invalid in any respect.") To the extent the County defends the entire mitigation program as financially feasible based on the current level of recessionary development, it is difficult, if not impossible, to see how the mitigation program is sustainable as a going forward standard for the Phase I Permit program, other than at the complete expense of the existing level of effort for structural stormwater retrofits required under the Permit's other terms. EPA and the NMFS correctly assessed this deficiency in their comments on the amendments to the Phase I Permit.

21.

*27 Clark County argues that the Board need only look to the remainder of the current permit term to determine whether there is adequate funding, sufficient to implement a program that is equivalent to the Phase I Permit. We disagree, for several reasons. First, the mitigation obligations of the Agreed Order do not end in February 2012, with the expiration date of this iteration of the Phase I Permit. Rather, the mitigation obligations incurred by Clark County during this term of the municipal permit, will stretch well into the next permit cycle. We have also found that the assumptions Clark County relies on to argue it has more than adequate funding for the Agreed Order are not well-founded, and based on either changeable conditions, or terms the Board has invalidated in this Order (reliance on a later effective date). Moreover, having been incorporated into the Phase I Permit as a functionally equivalent program for runoff control at new or redevelopment and construction site, the terms of the Agreed Order will become the baseline for the next round or iteration of general permit renewals, not just for Clark County, but for other municipal permittees. For these reasons, the Board concludes that the Agreed Order allows for an impermissible, overall reduction in the level of effort in those requirements that Ecology has said constitute MEP under the Phase I Permit.

22.

On several occasions this Board has concluded that a particular term or approach of a General Permit amounted to impermissible self-regulation, essentially leaving the choice of the pollution control program entirely to the discretion of the regulated entity, with no regulatory oversight to ensure the permittee in fact reduces pollutants as required by law, and acts reasonably and in good faith. *Phase I Decision at COL 29, PSA v. Ecology, PCHB Nos. 02-162 through 164, (Industrial Stormwater General Permit, Order Granting Partial Summary Judgment, June 6, 2003)* at XVI. In reaching these decisions the Board has relied on at least one relevant decision in the municipal stormwater context. In review of the Phase II municipal stormwater rules, the Ninth Circuit Court of Appeals concluded that while it is laudable to involve regulated parties in the development of individualized stormwater pollution control programs, regulators are still required to ensure that, in every instance, the program is subject to meaningful review to ensure that the program reduces the discharge of pollutants to the maximum extent practicable. *Environmental Defense Center, Inc. v. U.S. E.P.A.*, 344 F.3d 832, 856 (9th Cir. 2003) In another context, the rules governing concentrated animal feeding operations (CAFOs), also to be implemented through a general permit, the Second Circuit Court of Appeals held that the failure of the rule to require regulatory oversight to ensure that each large CAFO, in fact, developed a nutrient management plan, was arbitrary and capricious. *Waterkeeper Alliance v. E.P.A.*, 399 F.3d 486 (2d. Circuit 2005).

23.

*28 In its Phase I decision, this Board criticized the structural stormwater control program requirements of the Permit as impermissible self-regulation, stating that the "program is left entirely to the discretion of the municipalities, not only with respect to which projects they initially select, but also in the timing and manner in which they implement the selected projects." *Phase I, COL 29*. The Board concluded that the permit failed "to require a minimum level of effort for the permittees in the selection and prioritization of structural stormwater projects, and provides no review and approval role for Ecology." *Id.* While

neither the Permit, nor this Board, demanded a particular level of funding for the program, in order to ensure that MEP and AKART standards were met, the Board required a minimum level of effort in the selection and prioritization of the planned projects, a schedule for implementation, a role for Ecology in determining if the pollution reduction goals of the Phase I Permit were met by the efforts of a particular Phase I permittee and documented progress in meeting the goals of the program. These steps were necessary to ensure that the federal MEP standard was met by each municipality. *Phase I Decision*. Furthermore, in implementing structural stormwater controls, the Fact Sheet for the Phase I Permit directs Permittees to “set priorities and address the highest-ranked problems subject to the limitations of available resources.” (emphasis added.) *Ex. J-15* at p. 35.

24.

The mitigation program of the Agreed Order suffers from the same problems the Board recognized in the Phase I decision related to the structural stormwater control condition of the that permit. The Clark County programs leaves it to Clark County to decide which mitigation projects will suffice to meet the demands of the Agreed Order, and complete discretion in deciding whether to move projects from the required structural retrofit program into the mitigation program. In implementing the structural control program, Permittees set priorities and address the highest-ranked problems subject to the limitations of available resources. There is no similar requirement for mitigation projects under the Agreed Order. The Agreed Order allows Clark County to provide highest priority to projects that provide the best cost/benefit ratio in terms of cost per unit of land cover mitigated, within the entire group of projects deemed most suitable for mitigation. If Clark County develops a list of 50 proposed projects, nothing prevents Clark County from funding projects listed 45 through 50 in terms of suitability for mitigation because those projects are less expensive. Ecology plays no role in ensuring that mitigation projects actually achieve the goal of the Phase I flow control standard, and no role in ensuring that mitigation sites are selected in a reasoned manner, free of political or bad faith influences. There is no oversight to ensure that the County sustains an overall level of effort as between the structural retrofit program and the mitigation program.

25.

*29 We disagree with the County and Ecology to the extent they argue that the flow control standard, as required by the Phase I permit, also requires no level of oversight by Ecology, and has not been found to suffer from the self-regulatory problems discussed above. By its terms, the Agreed Order sets out a “mitigation” or alternative program, untested and with significant questions as to whether or not the selected mitigation sites will actually offset the environmental harm allowed at the site of new development. In the context of another type of mitigation, wetland mitigation, Ecology has concluded that there is a need to closely monitor mitigation sites, as many fail to achieve the intended goals because of lack of understanding of ecosystem processes and watershed processes. *Ex. A-25*. Given these considerations, and the lack of criteria to guide how mitigation projects will be selected, there is no effective review to determine if the goals of the Phase I Permit are met, and progress in protection of streams against the detrimental effects of increased urbanization accomplished. The Agreed Order fails as an impermissible self-regulatory program.

26.

Furthermore, the Agreed Order raises concerns whether historic impacts will ever be addressed in a meaningful way in Clark County. The Agreed Order negatively impacts two of the three prongs EPA stated as necessary to mitigate for historic urban and urbanizing stormwater impacts: enhanced gradual improvement of baseline conditions as redevelopment occurs, and enhanced investment in retrofit projects to reduce stormwater impact from developed land. *Ex. A-22*. In considering whether MEP has been met, the Board considers the programmatic nature of the Phase I Permit and how the SWMP provisions are intended to operate as an aggregate level of effort. The Agreed Order's failure to address historic impacts in a meaningful and sustained manner for multiple components that are key to the programmatic Phase I Permit requires the Board to remand the Agreed Order. The Board recognizes that municipalities should have some flexibility in meeting the terms of the permit, and that more flexibility should be provided in an urbanized setting because there are more constraints. Alternative mechanisms, however,

must be based in science and have some assurances that beneficial uses will have at least the same level of protection as provided by the permit terms.

27.

In the Phase I decision, this Board held that the permit's reliance on a flow control standard as the primary method to control stormwater runoff from MS4s fails to reduce pollutants to the federal MEP standard, and without greater reliance on LID, does not represent AKART under state law. The Board concluded that indisputable evidence lead to the conclusion that application of LID techniques, at the parcel and subdivision level, is a currently known and existing methodology that is reasonable both technologically and economically to control discharges entering into MS4s covered by the Phase I Permit. The Board held that the Phase I permit "must require greater application of LID techniques, where feasible, in combination with the flow control standard, to meet the AKART standard." *Phase I Decision*, at COL 16. Underlying the Board's legal conclusion were factual findings, referenced above, to the effect that LID was a well-defined concept, and that the basic BMPs that constitute LID well-defined. The Board noted that utilization of LID techniques may be useful, or even in some cases necessary, to meet the flow control standard on a particular site. *Phase I Decision* at FOFs 38, 42.

28.

*30 As we have found, the LID requirements of the Phase I Permit are found in the section of the permit applicable to "Controlling Runoff from New Development, Redevelopment and Construction Sites," Section S5.C.5.—the same section that contains the flow control standard. That section of the Phase I Permit is the section that takes municipal permittees to a new standard for prevention and control of stormwater runoff from new development, redevelopment, or construction sites. Meeting the advanced flow control standard *and* implementing LID at the time of new development, redevelopment, or at construction sites are both necessary to meet the MEP and AKART standards. *See Phase I Decision*. The Agreed Order fails to meet the MEP and AKART standards, or establish an equivalent program for new development, redevelopment, or construction sites because it fails to adequately address compliance with the LID provisions of Phase I Permit. First, the Agreed Order it is silent on the County's obligation to require implementation LID at the site of the new development, even if the Permit's flow control standard is not met at those sites, but at alternative mitigation sites. Second, while the Agreed Order speaks to LID in relation to the flow control mitigation projects that the County will undertake, it does so only in the most permissive terms. Thus, it fails to impose a requirement comparable or equivalent to the Phase I Permit when it comes to LID. We also note that to the extent the Agreed Order allows new development to meet a more relaxed flow control standard, it fails to place an incentive on development to use LID, and therefore fails to require AKART and MEP.

29.

Any finding of fact deemed to be a conclusion of law is hereby adopted as such.

ORDER

The Agreed Order is reversed and remanded to Ecology for further actions consistent with this opinion.

SO ORDERED this 5th day of January, 2011.

see concurrence and dissent

Andrea McNamara Doyle
Presiding
William H. Lynch

Member
Kathleen D. Mix
Member

Footnotes

- 1 Listed in Condition S5.
- 2 Ex. J-16 is the version of the Phase I Permit issued on January 17, 2007, and modified on June 17, 2009. The most recent version of the Phase I Permit, Ex. J-23, was modified on September 1, 2010, to incorporate, among other things, the Agreed Order that is the subject of this appeal.
- 3 The standard flow control requirement is to “match development discharge durations to pre-developed durations for the range of pre-developed discharge rates from 50% of the 2-year peak flow up to the full 50-year peak flow.” *Id.* at Appendix 1, p. 24.
- 4 The parties filed cross motions for summary judgment on several of the legal issues in this appeal, all of which the Board denied. In denying summary judgment, the Board determined that it needed a better record in order to reach a decision about whether the Agreed Order provides equal or similar protection of receiving waters as the Phase I Permit. The Board concluded that Rosemere, as the appealing party, would continue to bear the burden of proof in challenging the Agreed Order but that Ecology also bore the burden of establishing the baseline against which it determined the equivalency of Clark County's alternative. *Order Denying Summary Judgment*, at 16-18.
- 5 WRIA 27, which drains the northern portion of the County to the Lewis River and its tributaries, and WRIA 28, which drains the southern portion of the County to the Columbia River and its tributaries. *Beyerlein Testimony*.
- 6 RCW 58.17.033 (subdivision code) and RCW 19.27.095 (building permits).
- 7 The County has reported mitigation credit for 11 acres of Effective Impervious Area, 15 acres of Lawn/Landscape, and 2 acres of Pasture in connection with its completion in 2009 and 2010 of the 152nd St. project (aka “Encore North Phase I”), a project that has been on the County's capital projects list for several years. *Ex. J-20*.
- 8 A subdivision will discharge into a municipal separate storm sewer system (MS4) approximately 80 to 90 percent of the time. *Gray Testimony*.
- 9 This is the same requirement as set forth as a minimum requirement for flow control in the Stormwater Management Manual for Western Washington. *Ex. J-19* at Vol. 1, § 2.5.7, p. 2-33.
- 10 The standard flow control requirement is to “match development discharge durations to pre-developed durations for the range of pre-developed discharge rates from 50% of the 2-year peak flow up to the full 50-year peak flow.” It applies to projects of a specified size or generating a specified amount of stormwater discharge. *Id.* at Appendix 1, p. 24.
- 11 The Independent Science Panel was created by the Legislature in 1998 to provide scientific oversight and review of the State's salmon recovery efforts. *Ex. R-77, p. 1*.
- 12 Although Respondent Clark County tried to establish that this document was limited to wetland mitigation, a review of the document clearly shows this is not the case. See for example, Section 2.4, where mitigation for wetland, stream, shoreline and nearshore impacts is discussed. *Ex. A-25, p. 13-14*.
- 13 Citing 40 C.F.R. § 122.26(b)(2).
- 14 Clark County's Stormwater Management Program is funded primarily through its local Clean Water Fee, which raises about \$4.5 million per year. Of that amount, approximately \$1.5 million is budgeted for capital programs, including the structural stormwater retrofit program required by the Phase I Permit, while the remainder of the budget supports other stormwater-related activities. The fee is paid by residential, commercial, industrial, and governmental property owners in the County according to a tiered rate structure. Clark County's fee is approximately \$30 per parcel, and the fees have not changed since 2000, although the County is proposing a cost of service study to evaluate the need for a fee increase. Other sources of funding are also used to support the County's Stormwater Management Program, but to a lesser degree. *Gray Testimony, Swanson Testimony, Ex. A-82*.
- 15 Capital budgets fluctuate more than operating budgets. *Gray Testimony*.
- 16 We note that Condition S3.A.3. (p. 13) of the recently reissued Industrial Stormwater General Permit (effective through January 2015) allows permittees covered by that permit to select best management practices (BMPs) consistent with documents listed in Appendix 10 of the Phase I Municipal Stormwater Permit, and those documents are incorporated into the Industrial Permit.
- 17 *Ex. J-15, p. 27; Ex. A-39, p. 143*. The Board also relies on the testimony of Bill Moore, who has stated that Ecology relied on vesting as a “cut-off” point, and informed regulated municipalities that vesting would be the trigger for obligations going forward under this part of the permit.
- 18 We do not find it relevant to consider that other municipalities may have had delays or negotiated other deadlines with Ecology for implementing flow control ordinances. To measure equivalency, we must look to the plain terms of the Phase I permit.

2011 WL 62921 (Wash.Pol.Control Bd.)

End of Document

© 2016 Thomson Reuters. No claim to original U.S. Government Works.