

COPY

DEPARTMENT OF ECOLOGY
FEB 16 2007
WATER QUALITY PROGRAM

STATE OF WASHINGTON
POLLUTION CONTROL HEARINGS BOARD

In the Matter of:

CLARK COUNTY, WASHINGTON,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT
OF ECOLOGY, CITY OF TACOMA, CITY
OF SEATTLE, KING COUNTY, PIERCE
COUNTY, and SNOHOMISH COUNTY,

Respondents.

PCHB NO.

CLARK COUNTY'S NOTICE OF
APPEAL OF THE PHASE I
MUNICIPAL STORM WATER
PERMIT

I. DECISION BEING APPEALED

Clark County, Washington appeals the Phase I National Pollution Discharge Elimination System and State Waste Discharge General Permit for Discharges from Large and Medium Municipal Separate Storm Sewer Systems issued by the Washington State Department of Ecology ("Ecology") on January 17, 2007 ("MS4 Permit"). A copy of the MS4 Permit is attached

Clark County's contact information is:

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CLARK COUNTY'S NOTICE OF APPEAL OF THE PHASE I
MUNICIPAL STORM WATER PERMIT - I

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9 Tacoma, Seattle, King County, Snohomish County and Pierce County are named as
10 respondents because the MS4 Permit is also directed to them. See WAC 371-08-340.

11 II. STATEMENT OF FACTS AND GROUNDS FOR APPEAL

12 Clark County is covered by the current Phase 1 MS4 Permit issued by Ecology which
13 will expire on February 15, 2007. On January 17, 2007, Ecology issued the attached MS4
14 Permit which will become effective on February 16, 2007. Clark County operates a municipal
15 separate storm sewer system ("MS4") into which stormwater runoff flows at times, in amounts,
16 and from many areas that all are beyond Clark County's control. For the reasons stated below,
17 the MS4 Permit is legally flawed and should be remanded to Ecology for modification.

18 (1) Conditions S4 A and S4.B are inconsistent with applicable laws and regulations,
19 are vague, unreasonable, impracticable and/or inappropriate for MS4 systems. Conditions
20 S4.A and S4 B, as drafted, may be interpreted in such a manner as to require discharges of
21 stormwater to comply with "any water quality standard". The Permit is unclear as to what
22 specific standards apply and where, how or when discharges are to be measured to determine
23 compliance with these conditions.

24 (2) Condition S4.E is inconsistent with other conditions of the Permit and misconstrues
25 the requirements of the Permit and the Clean water Act. Condition S4 E states that compliance
with all requirements of the Permit as defined in condition S3 is necessary to meet the goals of
the Clean water Act. Condition S3 requires compliance with all conditions of the permit
(except condition S6 *Stormwater Management program for Co-Permitees and Secondary*

1 *Permittees*). The statement in S4 E that compliance with all permit conditions is necessary to
2 meet the goals of the Clean Water Act is inconsistent with the language of condition S4.A that
3 states that it is imposed pursuant to state law, RCW 90.48.520. It is also inconsistent with
4 Ecology's response to comments on conditions S4.A and S4.B that state that "conditions S4 A,
5 S4.B and S4.F are based on state law" and "Ecology believes compliance [with conditions
6 S4.A and S4.B] may go beyond the federal MEP requirement." The Permit should be revised
7 to clarify that conditions S4.A and S4 B are based upon state law and are not imposed pursuant
8 to the authority of the Clean Water Act.

9 (3) The Permit should be revised to clarify that compliance with condition S4 F
10 constitutes compliance with not only conditions S4 A and S4.B, but also the underlying state
11 and federal laws. The Permit should also be revised to acknowledge that a determination of
12 whether a specific stormwater discharge may cause or contribute to a receiving water quality
13 action level requires consideration of many factors, of which in-system monitoring data is only
14 one factor, and that in-system monitoring data, by itself, is insufficient to establish a water
15 quality violation in the receiving water. This condition further imposes state law requirements
16 intended for discharges of pollutants regulated outside the scope of 33 U.S.C. § 1342(p).

17 (4) Condition S7 of the MS4 Permit imposes requirements that are inconsistent with
18 applicable laws and regulations, and that are vague, unreasonable, impracticable and/or
19 inappropriate for municipal stormwater. Clark County generally supports Ecology's approach
20 to creating permit requirements in response to TMDLs insofar as the Permit requires the BMPs
21 that Ecology has determined are appropriate for municipal stormwater management. However,
22 the last sentence in the first paragraph of condition S7 requires that "[a]ll Permittees shall be in
23 compliance with the requirements of applicable TMDLs." This requirement, as written, is
24 ambiguous and creates uncertainty regarding Permit compliance. Further, this provision does
25 not acknowledge that a wide variety of TMDL documents do not impose "requirements," but

1 instead are intended to be used as analytical tools for planning purposes. This sentence should
2 be removed in order to resolve the ambiguity and to clarify the requirements for Permit
3 compliance.

4 (5) Condition S8 contains provisions that are inconsistent with applicable laws,
5 unreasonable, impracticable, unjust and/or inappropriate for municipal stormwater. For
6 example, condition S8 of MS4 Permit imposes a prescriptive monitoring program that
7 precludes Clark County from developing and implementing a focused monitoring program that
8 is better adapted to the unique circumstances of Clark County, even when such a focused
9 monitoring program would provide more useful information and data that could then be
10 utilized to develop a more effective stormwater management program to better protect human
11 health and the environment from stormwater impacts within Clark County.

12 In addition, inconsistencies and anomalies in S8 may prevent Permittees from
13 complying with the required monitoring program. For example, S8.D.2 requires collection of
14 samples from a number of storms meeting stated criteria. However, it is likely not possible to
15 successfully sample the number of storms required to meet the permit requirements, taking into
16 account Northwest weather, the uncertainties of precipitation forecasting, the limitations of
17 monitoring equipment, the size of the geographic area that must be covered and the limitations
18 associated with the criteria in S8.D.1 and S 8.D.2. Permittees may not be able to collect the
19 type or volume of stormwater sample required for analysis.

20 Condition S8.D 2.d improperly imposes toxicity testing and associated criteria.
21 Notwithstanding Ecology's careful consideration of many concerns during the public review
22 process, the toxicity testing and criteria were not included in the review draft, but was instead
23 imposed as a new provision in the final Permit. This provision was not subject to public
24 review and comment, and its inclusion in the MS4 Permit without public comment is improper
25 and constitutes an unlawful rulemaking under the Administrative Procedures Act.

1 S8.D.2.d also contains numerous flaws and uncertainties that prevent Permittees from
2 complying with, or comprehending the required procedures. The toxicity testing requirement is
3 not described in an understandable way, contains impracticable first flush storm event criteria,
4 is untried and inappropriate to municipal stormwater, and requires an unreasonable and
5 impracticable sample size given the limitations associated with S8.D.1.

6 Condition S8.H.1 requires the reporting of monitoring data that is collected from the
7 preceding January 1 to December 31 time period. Applying this reporting requirement to S8.D
8 ignores the professional practice of analyzing wet and dry seasons for stormwater on a water
9 year basis that generally begins October 1. The Permit requires each annual report to include
10 only a portion of a given wet season (October 1 – December 31), and requires that the data
11 from that same wet season (January 1 – April 30) be reported in the following year's report. In
12 addition, applying this reporting schedule to the S8.E and S8.F monitoring does not take into
13 account that these projects will not necessarily be scheduled to coincide with either the
14 calendar year or water year. Thus, S8.H.1 will provide a less useful annual report and requires
15 permittees to create artificial breaks in its data reporting.

16 Condition S8 exceeds Ecology's lawful authority insofar as it requires Permittees to
17 perform monitoring and analyses that are not necessary or helpful to Clark County's efforts to
18 develop an effective stormwater management plan, but instead are solely intended to assist
19 Ecology in developing a statewide database for its own purposes

20 (6) The MS4 Permit imposes numerous requirements that will require substantial
21 financial resources to implement. Yet, the MS4 Permit does not prioritize such requirements,
22 does not provide a reasonable schedule to implement such requirements given the limited
23 resources of the Permittees, and does not acknowledge that unforeseen circumstances, such as
24 the extraordinary floods of November 2006, may divert the limited stormwater funds away
25 from permit implementation efforts to deal with more emergent and dire circumstances.

1 The Permit creates a situation in which the Permittee will likely violate the Permit and
2 be vulnerable to agency and citizen enforcement actions notwithstanding the Permittee's best
3 efforts to comply. The MS4 Permit should prioritize these tasks and provide a reasonable
4 implementation schedule that takes into account the substantial financial resources that will be
5 required. The Permit should also include provisions that give the Permittee some flexibility to
6 respond to emergent situations, such as the extraordinary flood events of November 2006, by
7 diverting budgeted stormwater funds without being penalized for such efforts. This could be
8 accomplished by adding a hardship provision, a broad force majeure clause or some other
9 appropriate mechanism.

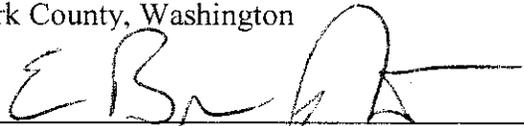
10 (7) Clark County continues to review the requirements of the MS4 Permit to identify
11 additional potential issues that may be articulated at or prior to the prehearing conference on
12 this appeal.

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14 III. RELIEF REQUESTED

15 The Pollution Control Hearings Board should invalidate conditions of the MS4 Permit
16 and remand the Permit to Ecology with orders to make appropriate revisions.

17 DATED this 15th day of February, 2007

18
19 Clark County, Washington

20 By 

21 E. Bronson Potter WSBA #9102
22 Attorneys for Clark County
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