

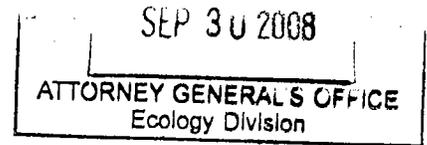


STATE OF WASHINGTON
ENVIRONMENTAL HEARINGS OFFICE

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September 29, 2008



TO ALL PARTIES IN PHASE II:

RE: APPEALS OF PHASE II MUNICIPAL STORMWATER PERMITS
PCHB Nos. 07-22 & 07-023

Counsel:

Enclosed is an Order on Summary Judgment in this matter.

Sincerely,

William H. Lynch, Presiding

WHL/dj/P07-022/023

Enc.

Cc: Kathleen Emmett, Ecology

CERTIFICATION

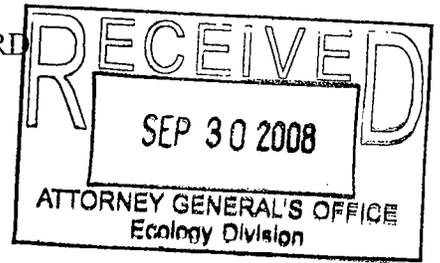
On this day, I forwarded a true and accurate copy of the documents to which this certificate is affixed via United States Postal Service postage prepaid to the parties of record herein.

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

DATED Sept 29 2008, at Lacey, WA



POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON



PUGET SOUNDKEEPER ALLIANCE;
PEOPLE FOR PUGET SOUND;
COALITION OF GOVERNMENTAL
ENTITIES

Appellants,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent,

STATE OF WASHINGTON,
DEPARTMENT OF
TRANSPORTATION,

Intervenor.

PCHB NOS. 07-022, 07-023

ORDER ON SUMMARY JUDGMENT

(PHASE II MUNICIPAL
STORMWATER PERMIT)

On March 3, 2008, the parties to the appeals of the Phase II Municipal Stormwater Permits filed motions for partial summary judgment with the Pollution Control Hearings Board (Board) on some of the legal issues in the case.¹ The Department of Ecology (Ecology) moves for summary judgment on Issues 2, 4, 5, 9, and 10; the Coalition of Governmental Entities (Coalition) moves for summary judgment on Issues 1, 2, 3, 9, 10, and 12;² and Puget

¹ The legal issues are as listed in the Third Pre-Hearing Order for the Phase II Permit appeal issued on December 11, 2007. A Fourth Pre-Hearing Order was subsequently issued by the Board on May 1, 2008, but the legal issues did not change.

² PSA does not take any position on the merits of Issues 3, 9, and 10. PSA's Response to Phase II Coalition's Motions for Summary Judgment (Phase II), p 9, fn 6.

1 Soundkeeper Alliance and People for Puget Sound (PSA) moves for summary judgment on
2 Issues 12, 13, 14, 15, and 19. The Coalition withdraws issues 4, 6, 7, 8, and 11, and the Board
3 dismisses these issues from the appeal. The Board previously issued an Order on Clarification of
4 Issues because PSA had only appealed the Western Phase II Permit and was not taking a position
5 on the Eastern Phase II Permit. Therefore, Issues 12, 13, 14, 15, and 19 are limited in
6 applicability to the Western Phase II Permit only.

7 Board members William H. Lynch, Presiding,³ Kathleen Mix, Chair, and Andrea
8 McNamara Doyle, reviewed and considered the pleadings and record pertinent to this motion,
9 including the following:

- 10 1. Ecology's Motion for Partial Summary Judgment (Phase II), with attached Exhibits A
11 and B; Declaration of Bill Moore in Support of Ecology's Motion for Partial
12 Summary Judgment.
- 13 2. Appellants Puget Soundkeeper Alliance and People for Puget Sound's First Motion
14 for Partial Summary Judgment (Issues 12, 13, 14, 15, 19) (Phase II); Exhibits in
15 Support of PSA's First Motion for Partial Summary Judgment (Exhibits A-G) (Phase
16 II); Declaration of Jan Hasselman in Support of PSA's First Motion for Partial
17 Summary Judgment and Exhibits 1-40 (Phase II).
- 18 3. Coalition of Governmental Entities' Motion for Partial Summary Judgment on Legal
19 Issues 9, 1 and 2 (Phase II Appeals); Declaration of Paul S. Fendt in Support of Phase
20 II Coalition of Governmental Entities' Motion for Summary Judgment, with attached
21 Exhibit A; Declaration of Peter Rogalsky in Support of Phase II Coalition's Motion
for Summary Judgment; Declaration of David A. Tucker in Support of Phase II
Coalition's Motion for Summary Judgment;
4. Coalition of Governmental Entities' Motion for Partial Summary Judgment on Legal
Issues 3, 9 and 10 (Phase II Appeals); Declaration of Kathryn L. Gerla in Support of
Coalition of Governmental Entities' Motion for Partial Summary Judgment on Legal
Issues 3, 9 and 10 with Exhibits 1-6;
5. Puget Soundkeeper Alliance's Response to Phase II Coalition's Motions for
Summary Judgment;

³ Administrative Appeals Judge Kay M. Brown presided over the Condition S4 hearing (involving both Phase I and Phase II), and the Phase I appeal. Board Member William H. Lynch is presiding over the Phase II appeal, remaining issues.

- 1 6. Respondent Department of Ecology's Response to Coalition of Governmental
2 Entities' Motion for Partial Summary Judgment on Legal Issues 9, 1 and 2;
3 Declaration of Bill Moore in Support of Department of Ecology's Response to
4 Coalition of Governmental Entities' Motion for Partial Summary Judgment on Legal
5 Issues 9, 1 and 2;
- 6 7. Phase II Coalition of Governmental Entities' Response in Opposition to Puget
7 Soundkeeper Alliance's First Motion for Partial Summary Judgment (Issues 12, 13,
8 14, 15, 19); Declaration of David A. Tucker, P.E.; Declaration of Phyllis Varner;
9 Declaration of Lori A. Terry in Support of Phase II Coalition of Governmental
10 Entities' Response in Opposition to Puget Soundkeeper Alliance's First Motion for
11 Partial Summary Judgment (Issues 12, 13, 14, 15, 19) with Exhibits 1-12;
- 12 8. Coalition of Governmental Entities' Response to Department of Ecology's Motion for
13 Partial Summary Judgment (Phase II Appeals); Declaration of Kathryn L. Gerla in
14 Support of Coalition of Governmental Entities' Response to Ecology's Motion for
15 Partial Summary Judgment with Exhibits 1-17; Declaration of Paul S. Fendt, P.E., in
16 Support of Phase II Coalition of Governmental Entities' Response to Department of
17 Ecology's Motion for Summary Judgment with one attachment; Legal Authority Re:
18 Coalition of Governmental Entities' Response to Ecology's Motion for Partial
19 Summary Judgment;
- 20 9. Respondent Department of Ecology's Response to Puget Soundkeeper Alliance's
21 First Motion for Partial Summary Judgment (Phase II) with attachments;
10. Respondent Department of Ecology's Response to Coalition of Governmental
11 entities' Motion for Partial Summary Judgment on Legal Issues 3, 9 and 10;
12 Declaration of Bill Moore in Support of Department of Ecology's Response to
13 Coalition of Governmental entities' Motion for Partial Summary Judgment on Legal
14 Issues 3, 9 and 10;
- 15 11. Phase II Coalition of Governmental Entities' Reply in Support of Motion for
16 Summary Judgment on Issue: 12 (Low Impact Development); Declaration of Lori A.
17 Terry in Support of Governmental Entities' Reply Brief on Issue: 12 (Low Impact
18 Development) with Exhibit A-B;
- 19 12. Coalition of Governmental Entities' Reply in Support of its Motion for Summary
20 Judgment on Issues 9, 1 and 2; Declaration of Kathryn L. Gerla in Support of
21 Coalition of Governmental Entities' Reply in Support of its Motion for Summary
Judgment on Issues 9, 1 and 2 with Exhibit 1 & 2; Declaration of Paul A. Bucich,
P.E. in Support of Phase II Coalition of Governmental Entities' Reply in Support of
Motion for Partial Summary Judgment; Declaration of Michael P. Mactutis, P.E., in
Support of Phase II Coalition of Governmental Entities' Reply in Support of Motion
for Partial Summary Judgment; Legal Authority Re: Coalition of Governmental
Entities' Reply in Support of Its Motion for Summary Judgment on Issues 9, 1 and 2
(Phase II Appeals);

- 1 13. Phase II Coalition of Governmental Entities' Reply in Support of Its Motion for
2 Summary Judgment on Issues 3, 9 and 10; Declaration of Kathryn L. Gerla in Support
3 of Coalition of Governmental Entities' Reply in Support of Its Motion for Summary
4 Judgment on Issues 3, 9 and 10 with Exhibits 1-3; Legal Authority Re: Coalition of
5 Governmental Entities' Reply in Support of Its Motion for Summary Judgment on
6 Issues 3, 9 and 10 (Phase II Appeals);
7 14. Puget Soundkeeper Alliance's Reply in Support of Motion for Partial Summary
8 Judgment (Issues 12, 13, 14, 15, 19)(Phase II); Declaration of Jan Hasselman in
9 Support of Puget Soundkeeper Alliance's Reply in Support of First Motion for Partial
10 Summary Judgment and Exhibit 41 (Phase II); Exhibits in Support of Puget
11 Soundkeeper Alliance's Reply in Support of First Motion for Partial Summary
12 Judgment (Exhibits H-I)(Phase II);
13 15. Respondent Department of Ecology's Reply in Support of Motion for Partial
14 Summary Judgment (Phase II);
15 16. Phase II Coalition of Governmental Entities' Statement of Supplemental Authority
16 Re: Motion for Partial Summary Judgment on Phase II Legal Issues 1 and 2;

17 Based on its review of the record and foregoing pleadings, and being fully advised, the
18 Board enters the following ruling.

19 I. BACKGROUND AND DECISION SUMMARY

20 On January 17, 2007, the Department of Ecology (Ecology) issued three National
21 Pollutant Discharge Elimination System (NPDES) and State Waste Discharge General Permits.
The first permit regulates discharges from Large and Medium Municipal Separate Storm Sewer
Systems (Phase I Permit). The second permit regulates discharges from Small Municipal
Separate Storm Sewer Systems in Western Washington (Western Phase II Permit). The third
permit regulates discharges from Small Municipal Separate Storm Sewer Systems in Eastern

1 Washington (Eastern Phase II Permit).⁴ Puget Soundkeeper Alliance and People for Puget
2 Sound (PSA) filed appeals of the Phase I Permit and the Western Phase II Permit, but not the
3 Eastern Phase II Permit. The Coalition filed appeals of both the Eastern and Western Phase II
4 Permits. All appeals on the Eastern and Western Phase II Permits were consolidated into one
5 case, for purposes of hearing only.

6 The Board issued an Order on Dispositive Motions for the Phase I Municipal Stormwater
7 Permit on April 8, 2008; and, after a hearing on the merits regarding the Phase I permit, issued
8 its Findings of Fact, Conclusions of Law, and Order on August 7, 2008. The Board also issued
9 an Order on Dispositive Motions regarding Special Condition S4 of the Phase I and Phase II
10 permits on April 2, 2008. After a hearing on the merits, the Board issued its Findings of Fact,
11 Conclusions of Law, and Order re: Condition S4 on August 7, 2008.

12 In this order, the Board concludes that Issues 1, 2, 3, 5, 9, and 10 are appropriate for
13 summary judgment and grants summary judgment on each of these issues in favor of Ecology.
14 The Board further concludes that, with regard to Issues 12, 13, 14, 15, and 19, material facts
15 remain in dispute and/or PSA has failed to demonstrate it is entitled to judgment as a matter of
16 law, and we deny summary judgment on these issues. Issues 4, 6, 7, 8, and 11 have been
17 withdrawn and are dismissed from the appeal.

18 ANALYSIS

19 Summary judgment is a procedure available to avoid unnecessary trials where formal
20 issues cannot be factually supported and cannot lead to, or result in, a favorable outcome to the

21 ⁴ References in this opinion to the “Phase II Permits” or “Permits” are to both the Eastern and Western Phase II Permits.

1 opposing party. *Jacobsen v. State*, 89 Wn.2d 104, 108, 569 P.2d 1152 (1977). The summary
2 judgment procedure is designed to eliminate trial if only questions of law remain for resolution.

3 The party moving for summary judgment must show there are no genuine issues of
4 material fact and the moving party is entitled to judgment as a matter of law. *Magula v. Benton*
5 *Franklin Title Co., Inc.*, 131 Wn.2d 171, 182, 930 P.2d 307 (1997). A material fact in a
6 summary judgment proceeding is one affecting the outcome under the governing law. *Eriks v.*
7 *Denver*, 118 Wn.2d 451, 456, 824 P.2d 1207 (1992). If the moving party satisfies its burden,
8 then the non-moving party must present evidence demonstrating material facts are in dispute.
9 *Atherton Condo Ass'n v. Blume Dev. Co.* 115 Wn.2d 506, 516, 799 P.2d 250 (1990),
10 *reconsideration denied* (1991). Summary judgment may also be granted to the non-moving
11 party when the facts are not in dispute. *Impecoven v. Department of Revenue*, 120 Wn.2d 357,
12 365, 842 P.2d 470 (1992).

13 ISSUES PRESENTED BY THE PARTIES:
14

15 **Issue 1. Statutory and Constitutional Violations:** Did Ecology act unreasonably,
16 unjustly, or unlawfully in imposing Special Condition S5.C.4 and in Appendix 1 of the
17 Western Washington Phase II Municipal Stormwater Permit, that among other things,
purport to require stormwater discharges from new development and redevelopment
activities to meet flow control requirements for pre-developed conditions.

18 The Coalition requests the Board grant summary judgment in its favor regarding Issue 1.
19 The Coalition first argues that the flow control standard required in Condition S5.C.4.a.i and
20 Appendix 1, § 4.7 is unlawful and unreasonable to the extent that it requires local government to
21

1 regulate in a manner that results in disproportionate mitigation and could constitute an
2 unconstitutional taking of property. The Coalition also argues that the standard requires
3 municipalities to violate RCW 82.02.020 by requiring them to impose charges on development
4 projects. The flow control standard generally requires new development and redevelopment to
5 discharge to surface waters at a rate that does not increase the rate of erosion over
6 predevelopment flows for a range of storm events.⁵

7 Ecology responds to the Coalition's first argument by stating that developers do not have
8 a constitutional right to discharge stormwater into publicly owned MS4s, and that local
9 government can properly require developers comply with the flow control requirement as a
10 condition to making such discharges. Ecology also points out that local governments, as
11 permittees, have sufficient flexibility under the permit to minimize or eliminate the risk of
12 takings claims altogether; for example, by constructing necessary regional stormwater control
13 facilities and allowing developers to use those facilities to ensure discharges meet the flow
14 control requirements.

15 To the extent that the Coalition requests the Board to rule on potential constitutional
16 issues, the Board declines. First, the Board does not have the authority to address the facial
17 constitutionality of a statute, but has ruled, on occasion, on the constitutionality of a statute as
18 applied. *See Cornelius, et al. v. Ecology & Washington State University*, PCHB No. 06-099, p 9

19 ⁵ The Board also notes that although the Coalition makes repeated reference in its briefs to the "forested flow
20 condition", the pre-developed condition permittees must match in basins that have had at least 40 percent total
21 impervious area since 1985 is the existing land cover. It may be possible that this exception is applicable to some
Phase II jurisdictions. *See* Phase I, p 29-30 (Findings of Fact, Conclusions of Law, and Order, August 7, 2008)
(discussion of exception to pre-developed discharge rates).

1 (Order on Summary Judgment, December 7, 2007) (discussing Board’s authority). When ruling
2 on an “as applied” challenge, the Board has limited its jurisdiction to addressing procedural
3 defects or issues that arise from in particular cases. *See, Inland Foundry Co., Inc., v SCAPCA*,
4 PCHB No. 94-150 (1995); *City of Burlington v. Puget Sound Energy*, (Order Denying Summary
5 Judgment), PCHB No. 07-071 (2007), p.12, fn 3. The Coalition’s arguments also do not fall
6 within the type of implied authority of the Board to ensure expeditious and efficient disposal of
7 appeals from Ecology actions. *Motley-Motley, Inc. v. Ecology*, 127 Wn. App. 62, 74, 110 P.3d
8 812 (2005) (holding that the Board has the implied authority to hear an equitable defense.)

9 The Coalition’s request for summary judgment also fails because it is founded on
10 speculation that local governments *may be* subject to takings claims sometime in the future based
11 on the possibility that courts may extend decisions involving possessory property interests to
12 local government regulation of discharges into publically owned MS4s. The Coalition concedes
13 that there is no Washington law directly addressing the issue they raise. At this point in time, the
14 Board has before it the Western Phase II Permit, but no facts or context about the application and
15 regulation of individual properties or projects pursuant to the permit. The Board agrees with
16 Ecology that liability for regulation of property, and a takings claim such as the Coalition
17 attempts to present, are fact-specific inquiries that involve consideration of numerous factors that
18 must be considered in the context of a specific case. *See, Guimont v. Clarke*, 121 Wn.2d. 586,
19 854 P.2d 1(1993). Even assuming, *arguendo*, the Board had jurisdiction over such a claim as an
20 as applied constitutional challenge, we cannot conclude that the Western Phase II Permit, will
21 require the Coalition to do anything that is either disproportionate or unconstitutional as a matter

1 of law. Accordingly the Board concludes that the complexity of constitutional claims regarding
2 the taking of property and substantive due process are not ripe for review and are more
3 appropriately addressed in superior court at another time. The Board does not express any
4 opinion on the validity of such constitutional claims.

5 The Coalition also argues that the Permit's flow control standard is unlawful or
6 unreasonable because it requires local governments to violate RCW 82.02.020, and that it is not
7 required by federal law. RCW 82.02.020, in general, prohibits any county, city, town, or other
8 municipal corporation from imposing any direct or indirect tax, fee, or charge on the construction
9 or reconstruction of buildings or on the development of land. The Coalition's main argument is
10 that a developer is required under the flow control standard to mitigate for pre-existing impacts
11 that are not a direct result of the proposed development or redevelopment project. The Coalition
12 maintains that the exception/variance language developed by Ecology in Section 6 of Appendix
13 1 of the Western Phase II Permit to address such concerns is insufficient to conform to
14 constitutional doctrines.⁶ This exception/variance section allows a Permittee to grant an
15 exception if the application of the minimum requirements imposes a "severe and unexpected
16 economic hardship on a project applicant." Gerla Declaration, Ex. 1 (Western Phase II Permit,
17 Appendix 1), at p. 29. A site-specific exception may be granted without prior approval by
18 Ecology, but if the Permittee is seeking a jurisdiction-wide exception, Ecology must approve it in

19 ⁶ Ecology requests that the Coalition's challenge to the exception/variance language contained in Section 6 of
20 Appendix 1 of the Permit be stricken or limited to the flow control requirement for discharges from new
21 development and redevelopment, because it was not raised as a separate issue. The Board limits the Coalition's
challenge to the adequacy of the exception/variance language to being within the challenge of the flow control
requirement.

1 advance. The Permittee must keep records of all local exceptions to the minimum requirements.

2 *Id.*

3 Ecology and PSA answer that RCW 82.02.020 has no applicability to the provisions of an
4 NPDES permit issued by the state because the state is not a “county, city, town, or other
5 municipal corporation.” Further, they argue that the Western Phase II Permit does not require
6 local governments to impose any taxes or fees on developers, but even if it did, the state is not
7 prohibited by RCW 82.02.020 from imposing or requiring local governments to impose an
8 exaction on development or redevelopment. Ecology points out that the permit “authorizes”
9 local government to require developers to construct the necessary stormwater controls to meet
10 the flow control requirement, but does not “require” local governments to impose such a
11 requirement. Local governments have options and choices to meet the permit’s flow control
12 requirements.

13 The Coalition relies on *Isla Verde Int’l. v. City of Camas*, 146 Wn.2d 740, 49 P.3d 867
14 (2002) and the recent Court of Appeals Division I decision of *Citizens’ Alliance for Property*
15 *Rights, et al. v. Ron Sims, et al.*, No. 59416-8-1 (July 7, 2008), to support the argument that the
16 Permits violate RCW 82.02.020. Although both appellate Courts rejected the argument that
17 RCW 82.02.020 does not apply to open space set-asides or clearing limits regulations, the Board
18 finds that these cases are distinguishable from the permit case before us. In general, the local
19 ordinance at issue in *Citizens’ Alliance* restricted the amount of land that could be cleared on a
20 given parcel of property zoned as rural, depending on the lot size, without sufficient
21 demonstration that the restriction was reasonably necessary as a direct result of the proposed

1 development. In *Isla Verde*, the city required that every proposed subdivision retain 30 percent
2 of its area as open space, also without any showing that the set-aside was reasonably necessary
3 as a result of proposed development.

4 In contrast, the Western Phase II Permit regulates local governments, and allows
5 municipal permittees considerable flexibility as to how they will regulate the development or use
6 of private property in order to comply with the federally required MEP and state-driven AKART
7 standards for controlling the discharge of pollutants to the waters of the state. Unlike *Isla Verde*,
8 and cases discussed therein, the Western Phase II Permit's flow control standard sets neither a
9 condition on development, nor requires a developer to dedicate land for open space. It does not
10 require a developer to make a payment in lieu of compliance with a particular condition, such as
11 land dedication or certain improvements. Rather, the permit requires municipalities to develop,
12 implement and enforce a program to reduce pollutants in stormwater runoff to MS4s from new
13 development, redevelopment, and construction site activities. It informs the permittees of the
14 state and federal clean water law regulatory standards and then offers the permittees some
15 flexibility in both the manner in which they will achieve these standards, and the manner in
16 which they will impose requirements on developers who discharge to the MS4. The open space
17 condition required for plat approval in *Isla Verde* was uniformly applied without any
18 individualized determination that the open space set aside was necessary. Similarly, the
19 ordinance that restricted the amount of land clearing at issue in *Citizens' Alliance* applied unless
20 modified by an approved farm management or rural stewardship plan, or a more stringent
21 requirement was applicable. In contrast, the purpose of the Permits is to ensure that the rate of

1 stormwater discharge from property is maintained within a certain level, and this flow level has
2 been determined by Ecology to be necessary to prevent harm to the environment. The flow
3 control standard is aimed at achieving a particular environmental result, and the Permits provide
4 considerable flexibility how this result is achieved. The purpose of the Permits is to control
5 discharge of pollutants and not to control land use. RCW 82.02.020 was not intended to classify
6 every environmental requirement as an exaction. Ecology's ability to regulate pollution as
7 required by state and federal law would be severely compromised under the arguments advanced
8 by the Coalition.

9 The Western Phase II Permit implements "minimum requirements" that federal
10 regulations require municipalities to have in place to better manage MS4 stormwater discharges,
11 as well as several additional state law requirements. Ecology has determined that, collectively,
12 these requirements, which include the flow control standard, are necessary to satisfy the federal
13 MEP and state AKART standards. While developers ultimately may have to undertake actions
14 consistent with the flow control standard of the Western Phase II Permit if they seek to discharge
15 into an MS4, the requirements originate in state and federal law, and the imposition of these
16 requirements on municipalities derives from the delegated NPDES and state waste discharge
17 programs, not local government-initiated regulation of development.

18 The Board agrees with Ecology that the restrictions contained in RCW 82.02.020 are
19 inapplicable to the terms of the Western Phase II Permit. It is premature to conclude that the
20 regulations ultimately adopted by permittees pursuant to the permit's federal and state
21 requirements will run afoul of RCW 82.02.020. We conclude that the Western Phase II Permit

1 itself, unlike the *Isla Verde* and *Citizen' Alliance* cases, does not as a matter of law result in the
2 imposition of any tax, fee, or charge, directly or indirectly, on the development or redevelopment
3 of land in violation of RCW 82.02.020.

4 The Board grants summary judgment to Ecology on Issue 1.

5
6 **Issue 2. Indemnification:** Did Ecology act unreasonably, unjustly, or unlawfully by
7 failing to include in the Western Washington Phase II Municipal Stormwater Permit a
8 condition stating that the Department of Ecology will indemnify cities and counties in the
9 event claims are filed against cities and counties for violation of constitutional provisions
10 or RCW 82.02.020 arising out of implementation of the Western Washington Phase II
11 Municipal Stormwater Permit.

12 Ecology and the Coalition both move for summary judgment on Issue No. 2. The
13 Coalition maintains that there are instances where implementation of the Permit requirements
14 could result in constitutional violations, citizen suits or other claims against local governments.
15 As discussed above, the Coalition expresses specific concern over compliance with the flow
16 control standard required in Condition S5.C.4.a.i and Appendix 1, § 4.7 on the basis that it might
17 result in disproportionate mitigation and could constitute an unconstitutional taking of property.
18 Declaration of Gerla in Support of Coalition of Governmental Entities' Motion for Partial
19 Summary Judgment on Legal Issues 9, 1, and 2, Ex. 1 (Western Washington Phase II Permit) p.
20 17, Appendix 1, p. 26-27. The Coalition argues that the Phase II permit is so prescriptive of
21 local government regulation that the State must indemnify and protect local governments from
the results of implementing such a state-mandated program.

1 The Coalition cites to *Orion Corporation v. State*, 109 Wn.2d 621, 747 P.2d 1062 (1987)
2 as an example of where the State can be found liable when it mandates action by local
3 governments which result in a constitutional violation. In *Orion*, a tideland property owner filed
4 a regulatory takings claim against Skagit County on the basis that Orion could not make any
5 profitable use of its land. Skagit County adopted a shoreline management master program
6 (SCSMMP), which designated Orion's property as aquatic. The effect of this designation was to
7 limit the property to recreation and aquaculture, but the presence of a nearby state sanctuary
8 precluded Orion from getting an aquaculture conditional use permit. The SCSMMP did not
9 differ in any substantial way from the state regulatory guidelines. Ecology approved the
10 SCSMMP pursuant to the Shoreline Management Act, and it became a state regulation upon
11 Skagit County's adoption of the program. 109 Wn.2d 643-44. The Supreme Court dismissed
12 Skagit County from the case on the basis that the county acted solely in its capacity as the State's
13 agent.

14 Both the Association of Washington Cities (AWC) and the Washington State Association
15 of Counties expressed similar legal concerns about the flow control standard in a joint letter
16 submitted to Ecology in July, 2005. Gerla Declaration in Support of Coalition's Response to
17 Ecology's Motion for Partial Summary Judgment, Ex. 1. AWC sent another letter expressing the
18 same concern in May, 2006. *Id*, Ex. 2.

19 Ecology subsequently added the exception/variance provision, discussed above, in
20 Appendix 1, § 6 to the minimum requirements (permittee may grant an exception if application
21 of permit minimum requirements imposes a severe and unexpected economic hardship on project

1 applicant). The Coalition maintains that the exception/variance language developed by Ecology
2 is insufficient to conform to constitutional doctrines.⁷ Permit Condition S5.C also states that the
3 components of the SWMP are mandatory “to the extent allowable under state or federal law.”

4 The Coalition requests that the Board interpret and modify this language in Condition
5 S5.C to state that a permittee is not required to comply with Condition S5.C if the permittee itself
6 determines that compliance would result in violation of a state or federal law, and that the
7 exception/variance process is not mandatory. Ecology asserts that this interpretation would
8 constitute a self-regulatory program that is invalid under the Clean Water Act. *Environmental*
9 *Defense Center, Inc. v. EPA*, 344 F.3d 832, 856 (9th Cir. 2003). Ecology contends that, as the
10 regulatory agency, it would need to make the final determination regarding the legality of permit
11 requirements as it pertains to a particular project.

12 Ecology argues that it may or may not be required to indemnify local governments for
13 implementing Permit requirements, but that indemnification, like a takings claim, must be
14 considered in the context of a specific case before the courts, rather than as a blanket requirement
15 or commitment in the Permit. Ecology distinguishes *Orion* on numerous grounds, including the
16 fact that the SWMP required by the Permit is not adopted or approved by Ecology before it
17 becomes effective, the SWMP does not become a state regulation, and the particular program
18 adopted by a local government may have substantial differences than what Ecology set forth in

19 ⁷ Ecology requests that the Coalition’s challenge to the exception/variance language contained in Section 6 of
20 Appendix 1 of the Permit be stricken or limited to the flow control requirement for discharges from new
21 development and redevelopment, because it was not raised as a separate issue. The Board limits the Coalition’s
challenge to the adequacy of the exception/variance language to being within the challenge of the flow control
requirement.

1 the Permit. Ecology also questions whether a blanket indemnification provision would be lawful
2 because it may constitute a payment of state funds without an appropriation. *See*, Washington
3 State Constitution, Article 8, section 4, and RCW 43.88.130.

4 The Board agrees with Ecology's position that the absence of a general indemnification
5 provision in the Permit is neither unreasonable nor unlawful. It is well-established that
6 administrative agencies have only those powers that are expressly granted by the legislature, or
7 necessarily implied from their statutory delegation of authority. *Ass'n of Wash. Bus. v. Dep't of*
8 *Revenue*, 155 Wn.2d 430, 437, 120 P.3d 46 (2005). Although the Coalition argues that there is
9 no law that prohibits the inclusion of an indemnification provision in a permit, the Coalition fails
10 to cite to any law that provides Ecology the authority to do so, or requires the inclusion of such a
11 provision. The parties have provided no authority for the proposition that Ecology may bind
12 future legislatures by an open-ended commitment to indemnify municipalities for possible, yet
13 unknown, claims that may arise out of administration of the Phase II permit.

14 The Board also finds that there are significant distinctions between the facts under *Orion*
15 and the regulatory provisions of this Permit. Even if it is assumed that there is little difference
16 between the regulatory regime in *Orion* and this Permit, there is no reason why the legal process
17 and factors utilized by the courts in *Orion* cannot be employed in separate litigation, if a
18 challenge is raised under this Permit. Ecology's authority, and responsibility, to indemnify must
19 be made in the context of a fact-specific case, not in the abstract, and not in the context of a
20 water quality permit which, on its face, does not authorize violations of state or federal law. The
21 Board concludes that under the proper circumstances, the state courts will resolve any specific

1 indemnification issues that may arise from the Permit. The Board grants summary judgment on
2 Issue 2 in favor of Ecology.

3 **Issue 3. Adoption of Rules:** Did Ecology act unreasonably, unjustly, or unlawfully in
4 imposing conditions in the Permits that mandate use of Ecology's Stormwater
Management Manuals or equivalent measures.

5 **Issue 10. Adoption of Rules:** Did Ecology violate the State Administrative Procedure
6 Act, chapter 34.05 RCW, by failing to adopt as rules provisions included in or
incorporated into the Permits.

7
8 The Coalition has moved for summary judgment on Issues 3 and 10.⁸ These issues are
9 discussed together in this opinion because they raise similar arguments. The Coalition argues
10 that Ecology adopted a Stormwater Management Manual for Western Washington and a
11 Stormwater Management Manual for Eastern Washington that contain detailed provisions for
12 managing stormwater, and that these Manuals should have been adopted as rules under the
13 Administrative Procedures Act, chapter 34.05 RCW.⁹ The Western Washington Manual is
14 referenced in numerous places in the Western Washington Phase II Permit, and Appendix 1 to
15 both Permits are largely "cut and paste" from the Manuals. The Coalition states that this is
16 evidence the provisions in the Manuals are meant to be binding requirements. The Coalition
17 cites to Ecology's adoption of the Wetland Delineation Manual as a rule in support of its
18 argument that the provisions of the Manuals in the Permits are invalid because Ecology failed to

19
20 ⁸ The Coalition also argues that if the Board finds that the Manuals should have been adopted as rules, Ecology
failed to follow other requirements for rulemaking, such as preparing an economic impact analysis as raised in Issue
9.

21 ⁹ The original Manual was published in 1992 for the Puget Sound Basin. This Manual was expanded to cover all of
western Washington in 2001, and was updated in 2005. The Manual for Eastern Washington was published in 2004.
Coalition of Governmental Entities' Motion for Partial Summary Judgment on Legal Issues 3, 9, and 10, p. 3.

1 adopt them as rules. The Coalition further argues that it is unjust for the Phase II Permittees to
2 be unable to propose an equivalent manual, especially since Phase I Permittees may propose
3 equivalent manuals.

4 Ecology disputes that the Manuals are rules, asserting that they are, instead, guidance
5 documents. Ecology quotes the policy statement from the Washington State Register regarding
6 the Western Washington Manual:

7 The manual does not have any independent regulatory authority and it does not establish
8 new environmental regulatory requirements or standards. The manual is a guidance
9 document which provides local governments, state and federal agencies, developers and
project proponents with a set of stormwater management practices to assist in the design
of stormwater site or pollution prevention plans.

10 Ecology's Motion for Partial Summary Judgment (Phase II), p. 10.

11 Ecology states that the Manuals present a presumptive approach to compliance with
12 water quality standards, and allow for a discharger to demonstrate alternative approaches to
13 compliance. The Permits refer to the Manuals, but the Western Permit allows Permittees to
14 adopt a technical manual developed by a Phase I jurisdiction or to utilize basin planning, and the
15 Eastern Permit allows the use of an alternative manual. Ecology also notes that the Permits
16 contain narrative standards that can be tailored to the particular circumstances of the discharger.
17 Ecology states that it is not required to go through the rulemaking process in order to implement
18 federal requirements, such as MEP, in permits. In addition, Ecology states that it does not have
19 the resources to review proposed manuals by the Phase II jurisdictions.

20 This appeal is not the proper forum to challenge whether the Manuals themselves are
21 improper rules. The Court of Appeals (Division II) held that the PCHB does not have

1 jurisdiction to render a declaratory judgment on the validity of a rule promulgated by Ecology,
2 and that the Administrative Procedures Act (APA) made Thurston County Superior Court the
3 exclusive venue for this type of challenge. *Seattle v. Ecology*, 37 Wn. App. 819, 683 P.2d 244
4 (1984) (construing RCW 34.04.070, which has been replaced by RCW 34.05.570(2)). The
5 Washington Supreme Court subsequently questioned the authority of the PCHB to determine
6 whether or not a numeric standard established by Ecology was a rule under the APA, and cited to
7 *Seattle v. Ecology. Simpson Tacoma Kraft Co. v. Ecology*, 119 Wn.2d 640, 647, 835 P.2d 1030
8 (1992). The Court of Appeals (Division I) subsequently held that the Forest Practices Appeals
9 Board does not have jurisdiction to determine the validity of rules promulgated by the Forest
10 Practices Board. *Snohomish County v. State*, 69 Wn. App. 655, 850 P.2d 546 (1993). *See also*
11 *Kettle Range Conservation Group v. DNR*, 120 Wn. App. 434, 458, 85 P.3d 894 (2003);
12 *Northwest Ecosystem Alliance v. Forest Practices Board*, 149 Wn.2d 67, 66 P.3d 614 (2003).

13 The Board has primary jurisdiction, however, to review how a rule is applied in the
14 issuance of specific permits. *D/O Center v. Ecology*, 119 Wn.2d 761, 837 P.2d 1007 (1992).
15 Any alleged infirmity in the process used to develop or adopt the Manuals is cured, for purposes
16 of this appeal, by the fact that individual provisions of the Manuals have been incorporated into
17 the Phase II general permits.¹⁰ The fact that Ecology *could* have adopted the Stormwater
18 Management Manuals as a rule, like it did with the Wetland Delineation Manual (Ch. 173-22
19 WAC), does not provide legal support for the Coalition's argument that Ecology was required to
20 do so in the context of issuing the municipal stormwater general permits.

21 ¹⁰ Because the question of whether the Stormwater Management Manuals themselves should have been adopted through an APA rulemaking process is not properly before this Board, we express no opinion on this issue.

1 The municipal stormwater general permits themselves are certainly not “rules” subject to
2 APA rulemaking requirements. Rather, their development and adoption are governed by the
3 separately established permit procedures contained in Chapters 173-220 and 173-226 WAC
4 (State Waste Discharge General Permit Program, and NPDES Permit Program), which provide a
5 process for public notice, comment, and appeal of their requirements separate from an APA
6 rulemaking proceeding.

7 To the extent a general permit incorporates requirements from any other reference
8 manual or technical resource, any party objecting to the use of the externally developed material
9 can challenge its use as a permit requirement through the permit’s public comment and appeal
10 procedures. The Coalition fails to identify any difference between incorporating provisions of
11 the Stormwater Management Manuals and incorporating requirements from any other external
12 resource document. Such incorporation does not somehow transform the external resource
13 document into a “rule” that must go through a formal APA rulemaking process. Rather, it
14 transforms the external resource into a permit condition that must be reviewed, along with all
15 other permit conditions in the context of the permit development and adoption process, for
16 compliance with applicable legal standards.

17 This Board has upheld Ecology’s incorporation of external resource documents as permit
18 conditions in the past, most recently in the Combined Animal Feeding Operation (CAFO)
19 General Permit. In that case, Appellants challenged Ecology’s use of a federal guidance
20 document containing a series of best management practices and technical reference and
21 specification documents developed nationally and tailored at the state level for various

1 agriculture practices. The Board concluded that Ecology's reliance on the federal practice
2 standards was both lawful and reasonable under the circumstances because the weight of
3 scientific evidence supported Ecology's determination that the externally developed standards
4 represented the best available standards to protect water quality and reduce CAFO discharges.
5 *Community Association for Restoration of the Environment (CARE) v. Ecology, et al., PCHB No.*
6 *06-057 (Findings of Fact, Conclusions of Law, and Order) (August 1, 2007), at COL 14-16.*

7 Summary judgment should be granted in favor of Ecology on Issues No. 3 and 10 to the
8 extent we agree that Ecology had the legal authority to incorporate provisions of the Manuals
9 into the permits without undertaking an APA rulemaking process. This authority extends to
10 incorporating portions of the Manuals as mandatory permit requirements and also as default
11 requirements for which provisions from alternative manuals could be substituted. While we
12 reject the Coalition's procedural argument based on improper rulemaking (encompassed in both
13 Issues No. 3 & 10), this does not resolve, as a matter of law, whether the specific requirements
14 contained in the Manual or alternative manual are reasonable, where a party has challenged those
15 requirements directly.

16
17 **Issue 5. Repeal of existing requirements:** Did Ecology act unreasonably, unjustly, or
18 unlawfully in imposing Special Conditions S5.A.4 and S5.C.4 in the Western
19 Washington Phase II Municipal Stormwater Permit, Special Conditions S5.A.2 and
20 S5.B.4.a in the Eastern Washington Phase II Municipal Stormwater Permit, and
provisions in Appendix 1 in both Permits that prohibit permittees from repealing any
existing local requirements to control stormwater that go beyond the minimum standards
set forth in the Permits.

21 Ecology has moved for summary judgment on Issue 5. Condition S5.A.4 of the Western

1 Washington Permit and Condition S5.A.2 of the Eastern Washington Permit state: “Permittees
2 shall not repeal existing local requirements to control stormwater that go beyond the
3 requirements of this permit for new development and redevelopment sites.” The Coalition
4 argues that it is unreasonable for jurisdictions that are applying stormwater controls to sites
5 smaller than the one-acre threshold required by the Permits to continue to regulate at this level.

6 Ecology points to the requirements of the Permit to use the AKART and MEP standards
7 of state and federal law, respectively. Ecology argues that if it allows local governments to
8 repeal existing requirements in favor of less stringent requirements, than AKART and MEP will
9 not be met. The Board agrees with Ecology’s analysis, and grants summary judgment in favor of
10 Ecology on Issue 5.

11
12 **Issue 9. Economic Impact Analysis:** Did Ecology act unreasonably, unjustly, or
13 unlawfully by failing to conduct an economic analysis under WAC 173-226 and by
14 otherwise failing to adequately evaluate and consider economic impact of the Permits.

15 The Coalition contends that WAC 173-226-120 requires Ecology to prepare an economic
16 impact analysis on the Phase II Permits to reduce the impact of the Permits upon small business.
17 Subsection (1) of this rule requires Ecology to prepare an economic impact analysis on all draft
18 general permits which are intended to directly cover small business. The Coalition points to the
19 fact that much of the same activity regulated under the Permits is currently regulated under the
20 Construction Stormwater General Permit (CSGP), and that Ecology performed an economic
21 impact analysis for the CSGP. Arguing that Ecology recognized that the CSGP would result in

1 disproportionate impacts upon small businesses, the Coalition asserts that the Phase II permits
2 are even more stringent than the CSGP. The Coalition argues that ordinarily a municipality can
3 consider the economic impacts of regulations and ordinances upon businesses and individuals
4 and provide some flexibility to mitigate the economic impacts.

5 Ecology explains that the reason it conducted an economic impact analysis for the CSGP
6 is because the CSGP *directly* regulated small businesses. Ecology asserts that it is not required
7 to conduct an economic impact analysis for the Phase II Permits because these permits do not
8 directly cover small businesses, rather, they directly cover municipalities. Ecology states that any
9 such analysis would be highly speculative because the local governments have flexibility in how
10 they implement the provisions of the Permits. Ecology also argues that since WAC 173-226-
11 120(4)(b) excludes from the economic impact analysis those costs associated with requirements
12 of the general permit for complying with federal law, the very costs the Coalition seeks to have
13 analyzed are not to be included as part of the analysis. Ecology also notes that it did include
14 requirements that reduce the cost of compliance, such as setting the threshold for the regulation
15 of discharges from sites at one acre, and not requiring the monitoring of construction site
16 discharges. Ecology's Response to Coalition's Motion for Partial Summary Judgment on Legal
17 Issues 9, 1, and 2 (Phase II), p. 6, fn 2.

18 The Coalition points to a decision by the Shorelines Hearings Board (SHB) in which the
19 SHB rejected a similar argument by Ecology that the Shoreline Management Act guidelines did
20 not regulate businesses because they only dictated to local governments how to develop master
21 programs. The SHB found that the shoreline guidelines contained numerous mandatory

1 requirements for the master programs that, in turn, directly regulated nongovernmental parties.
2 *Association of Washington Business v. Ecology*, SHB No. 00-037 (2001). The Coalition also
3 argues that not all of the Phase II Permit provisions are required under federal law.
4

5 WAC 173-226-120 includes an exemption from any economic impact analysis for two
6 categories of compliance costs. The Board concludes that the exemptions in WAC 173-226-
7 120(4)(a) and (b) are applicable and that an economic impact analysis is not required for the
8 permits. It is therefore unnecessary for the Board to address the question of whether the permits
9 are intended to directly regulate small business.¹¹

10 Neither party addresses the first exemption contained in WAC 173-226-120(4)(a), which
11 we believe is dispositive of this issue. This exemption excludes from any required economic
12 impact analysis compliance costs associated with a general permit that are “necessary to comply
13 with chapters 173-200 [Ground Water Quality Standards], 173-201[A] [Surface Water Quality
14 Standards], 173-204 [Sediment Management Standards], and 173-224 [Wastewater Permit
15 Discharge Fees] WAC.” *WAC 173-226-120(4)(a)*.

16 While Ecology and the Coalition may disagree as to whether individual permit
17 requirements are specifically required by the EPA Phase II Rule, there can be no dispute the
18 permits’ construction, development, and redevelopment requirements are directed at achieving

19 ¹¹ We note, however, that Ecology’s argument the Permit does not directly regulate small business is difficult to
20 reconcile with its argument that RCW 82.02.020 does not apply to the permit since it is the *state*, not local
21 government, that is directing the actions being challenged as an impermissible tax, fee, or charge on development.
Ecology’s Response to Coalition’s Motion for Partial Summary Judgment on Legal Issues 9, 1, and 2 (Phase II), at
p. 3 & p. 8.

1 compliance with state water quality standards, including AKART, as well as compliance with the
2 MEP standard contained in the federal CWA. To that end, the permits' Stormwater Management
3 Program requirements represent Ecology's determination of what is necessary to conform or
4 comply with those laws and regulations, and they are exempt from the economic impact analysis
5 requirement. *See Condition S4 Findings of Fact, Conclusions of Law, and Order* (August 7,
6 2008), at FOF 5-7 and COL 2-3.

7 The Coalition points to the Economic Impact Analysis conducted for the Construction
8 Stormwater NPDES and State Waste Discharge Permit in support of its argument that a similar
9 analysis is required here. But that effort explicitly recognized the exemptions in WAC 173-226-
10 120(4)(a) and (b), and analyzed only limited elements of the permit (such as monitoring,
11 inspections, and record keeping costs). *Gerla Declaration*, Ex. 4, at pp. 8, 15-16. It did not
12 include costs associated with developing and implementing the Stormwater Pollution Prevention
13 Plans and best management practices Ecology had identified as necessary to meet the federal
14 BCT and BAT requirements for stormwater and state AKART requirements. *Id.*, at p. 6.
15 The Phase II permit requirements for which the Coalition seeks an economic impact analysis are,
16 similarly, those requirements related to implementing the programs and best management
17 practices to prevent and control MS4 stormwater discharges necessary to meet state and federal
18 water quality requirements.

19
20 The Board also agrees with Ecology that the exclusion contained in WAC 173-226-
21 120(4)(b) for the costs associated with requirements of the general permit for complying with

1 federal law is applicable. The Board finds that this interpretation is warranted based in part,
2 upon the history of the Phase I Permit. The original Phase I Permit contained a very flexible
3 approach for local governments to meet its requirements. Positive results in stormwater
4 management from this flexible approach in the original Phase I Permit were sorely lacking, and it
5 is reasonable for Ecology to have determined that a more prescriptive approach is necessary for
6 the local governments to achieve compliance with the federal requirement for MS4s to reduce
7 the discharge of pollutants to the maximum extent practicable (MEP). Federal law also
8 anticipates that the states will impose more stringent requirements. The Board concludes that it
9 is appropriate to give deference to Ecology on what is necessary for the Permits and the local
10 governments to conform to or comply with the federal MEP requirements.

11 While we are mindful that these permit requirements may result in large and small
12 businesses bearing some increased costs, we cannot conclude that Ecology's decision not to
13 conduct an economic impact analysis either violates WAC 173-226-120 or invalidates the
14 permits. The Board grants summary judgment to Ecology on Issue 9.

15
16 **Issue 12. Low Impact Development:**

- 17 a. Does the permit fail to require maximum onsite dispersion and infiltration of
18 stormwater, through the use of "low impact development" techniques, basin
19 planning, and other appropriate technologies, and if so, does that failure
20 unlawfully cause or contribute to violations of water quality standards?
21 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"),

1 and/or fail to reduce the discharge of pollutants to the maximum extent
2 practicable (“MEP”)?

3 PSA and the Coalition have both moved for summary judgment on Issue 12. In the Phase
4 I Permit decision on the merits, the Board concluded that LID methods at the site, parcel, and
5 subdivision level are known and available methods to control municipal stormwater discharges,
6 and that such LID methods are reasonable both technologically and economically. *PSA v.*
7 *Ecology*, PCHB Nos. 07-021, 026, 027, 028, 029, 030, 037, (COL 16) (2008). The Board found
8 that a combination of aggressive use LID techniques, best conventional engineering techniques
9 to manage high flows, and land use actions, are necessary to reduce pollutants in stormwater and
10 to preserve water quality, consistent with the state AKART standard and the federal CWA
11 requirement to reduce pollutants to the maximum extent practicable (MEP). With respect to
12 Phase I jurisdictions, the Board found that “there is no dispute that *in combination* these
13 approaches offer the best available, known and tested methods to address stormwater runoff.”
14 *Id.*, Finding of Fact 57. In making findings and conclusions with respect to the Phase I Permit,
15 the Board relied in part, on the decision of the Washington Court of Appeals which clarified that
16 the “reasonableness” prong of the state AKART standard involves both technological and
17 economic feasibility. *See, Puget Soundkeeper Alliance v. Ecology*, 102 Wn. App. 783, 792-793,
18 9 P.3d. 892, 897 (2000). The Board entered specific Findings of Fact with respect to the
19 economic feasibility of use of LID as various site, subdivision and basin or watershed levels. *Id.*,
20 at Findings of Fact 60-66.

1 PSA filed a Motion in Limine to limit the evidence in the Phase II proceeding to address
2 any differences between the Phase I and Phase II jurisdictions that would dictate a different
3 result. The Board will issue a separate order granting PSA’s motion, which specifically
4 addresses the arguments raised by the parties regarding this motion. To summarize that order,
5 the Board’s decision that LID techniques are both “known” and “available” is established by the
6 Phase I decision on the merits, and will not be revisited in this case. However, in the context of
7 the Phase II permit, the Board finds that there are material facts in dispute with regard to the
8 economic ability of Phase II Permittees to incorporate and utilize LID techniques within their
9 stormwater management programs as readily as the Phase I Permittees, and therefore there are
10 questions as to whether or not LID methods must be employed to the same extent to meet the
11 AKART and MEP standards in Phase II jurisdictions. The Coalition’s Response to PSA’s
12 Summary Judgment motion on this issue points out that Phase II jurisdictions have much more
13 limited resources than Phase I jurisdictions and more diverse physical situations among the
14 different permittees. The Coalition also disputes PSA’s assertions with respect to the status of
15 use and implementation of LID methods by the Phase II jurisdictions. *See, Coalition’s Response*
16 *in Opposition to PSA’s First Motion for Partial Summary Judgment, Tucker Decl., Varner Decl.*
17 These disputed facts leave open the question of whether imposition of LID techniques for the
18 Phase II jurisdictions is “reasonable” under the AKART standard and “practicable” under the
19 MEP standard, specifically whether it is reasonable and feasible from an economic perspective to
20 impose such a requirement in the same manner or to the same degree as in the Phase I

21

1 jurisdictions. The Board therefore denies summary judgment and holds this issue over for the
2 hearing on the merits.

3
4 **Issue 13. One Acre Threshold:**

- 5 a. Does the exemption from the requirement to regulate stormwater runoff from
6 development and redevelopment that disturbs less than one acre unlawfully
7 cause or contribute to violations of water quality standards?
8 b. Does the exemption from the requirement to regulate discharges from
9 development and redevelopment that disturbs less than one acre allow
10 permittees unlawfully to discharge pollutants that have not been treated,
11 reduced or prevented with AKART, and/or fail to reduce the discharge of
12 pollutants to the MEP?

13 PSA has moved for summary judgment on this issue. The permit term at issue requires
14 municipalities to have a program to reduce pollutants in stormwater runoff from construction
15 activities that result in a land disturbance of greater than or equal to one acre. PSA argues that
16 this one acre threshold violates the state AKART standard and the federal MEP standard because
17 the one acre threshold sets a weaker standard than already set forth in Ecology's 2005
18 Stormwater Management Manual (Manual). PSA asserts that in the Manual, varying thresholds
19 trigger specific requirements, and that some construction site BMP requirements apply,
20 regardless of the size of the construction site. PSA points to deposition testimony and other
21 documents to support its assertion that the one acre threshold is inadequate to prevent new and
serious water quality degradation. This deposition testimony, according to PSA, demonstrates
that Ecology permit writers considered the one acre threshold to be inadequate to protect water
quality and not based in technology, but ultimately compromised on the point in the final permit.

1 PSA also asserts that a large percentage of Phase II jurisdictions already regulate to tighter
2 thresholds than required by the Phase II permit.

3 Ecology points out that the one acre threshold is one of the six minimum requirements in
4 EPA's Phase II rules (40 C.F.R. 122.34(b)). Ecology reasons that because it followed EPA's
5 guidance, which recommended the agency set only minimum control measures on regulated
6 small MS4s, that it has appropriately determined that the one acre threshold meets the MEP and
7 AKART standards. Ecology asserts that the permit term represents what is "practical or
8 reasonable for a municipality to do," is not designed to regulate at the site level, and therefore
9 consistent with legal standards.

10 The Coalition asserts that the one acre threshold is lawful and reasonable because it is
11 consistent with the Construction Stormwater General Permit coverage of construction sites, and
12 that there is no rational basis upon which to distinguish the two permit approaches. The
13 Coalition agrees with Ecology's argument that the one acre threshold is consistent with EPA's
14 Phase II rule, and consistent with the programmatic nature of the permit, making it a reasonable
15 and fair permit requirement.

16 The Board concludes that questions of fact are presented as to whether the one acre
17 threshold requirement is adequate to satisfy the MEP and AKART standards. Questions are
18 presented about the relationship of the one acre threshold to existing manual requirements and
19 what is a reasonable permit requirement for municipalities under the applicable legal standards.
20 Therefore summary judgment must be denied to PSA on Issue 13. This issue will be held over
21 until the hearing on the merits.

1
2 **Issue 15. Monitoring:** Does the permit unlawfully or unreasonably fail to require
3 monitoring of stormwater discharges, effectiveness of control techniques, and/or
4 receiving water quality?

5 PSA has moved for summary judgment on this issue. PSA identifies no state law or
6 regulation expressly requiring Ecology to include any monitoring in the Phase II municipal
7 stormwater permits. State regulations governing waste discharge general permits and NPDES
8 permits both provide Ecology the authority, but not the obligation, to impose monitoring
9 requirements. *See* WAC 173-226-090(1)(a) and WAC 173-220-221(1)(a).

10 The EPA Phase II Rule likewise does not require monitoring as part of the Phase II
11 permits. *See* 40 C.F.R. 122.34(g). In the federal register notice accompanying the Phase II
12 Rule's "Evaluation and assessment" requirements, the EPA explained that it wrote this element
13 of the rule "to provide flexibility to both MS4s and permitting authorities regarding appropriate
14 evaluation and assessment" and recommended that, at least for the first permit cycle, "in general,
15 NPDES permits for small MS4s should not require the conduct of any additional monitoring
16 beyond monitoring that the small MS4 may already be performing." 64 Fed. Reg. at 68769.

17 In support of its argument that Ecology must require monitoring in the first cycle of the
18 Phase II permit, PSA relies instead on a collection of general statutory provisions authorizing
19 monitoring and Board decisions recognizing the important role monitoring plays in determining
20 compliance with permit requirements, informing future permit conditions, and assessing progress
21 toward water quality goals.

1 We have recently held in the Phase I final decision, that because decisions pertaining to
2 monitoring requirements in a general permit fall within an area of Ecology's technical expertise
3 and may involve complex scientific issues, the agency's monitoring decisions are entitled to
4 deference. *See Phase I Findings of Fact, Conclusions of Law, and Order, August 7, 2008, p. 51*
5 (citing *Port of Seattle v. PCHB*, 151 Wn.2d 568, 593-94, 90 P.3d 659 (2004)). In response to
6 PSA's motion, Ecology has provided a cursory explanation of, and rationale for, the permits'
7 monitoring-related requirements. The Board believes PSA has failed to meet its burden to
8 demonstrate it is entitled to judgment as a matter of law and denies summary judgment on Issue
9 15. This issue will be held over until the hearing on the merits.

10 PSA also argues that the Phase II permit fails to either articulate "measurable goals" for
11 each SWMP component or direct the permittees to do so, as required by federal rules. Ecology
12 and the Coalition disagree with PSA's position and contend that the Permit contains specific
13 timelines and deadlines for implementing Permit requirements. The Coalition also objects to the
14 Board considering PSA's argument regarding measurable goals because it was not identified as a
15 separate legal issue for purposes of the appeal. The Board concludes that Issue 15 is written
16 sufficiently broad enough to encompass PSA's measurable goals argument as a subissue. The
17 Board does not believe that any party has sufficiently established that they are entitled to
18 summary judgment on measurable goals and monitoring, so this subissue will be held over until
19 the hearing on the merits.

1 **Issue 19: Coverage Area:** Is the coverage area of the permit, which is restricted to
2 cities above a specific size and the urban areas of counties, unlawfully or unreasonably
3 limited?

4 PSA has moved for summary judgment on this issue. PSA does not dispute that Ecology
5 complied with the federal requirement to develop criteria to be used in designating additional
6 jurisdictions for coverage under the Phase II permits. 40 C.F.R. 123.35(b)(1). Nor does PSA
7 dispute that Ecology did, in fact, apply its criteria to small MS4s located outside of urbanized
8 areas with population densities of at least 1,000 people per square mile and total populations of
9 at least 10,000 (the “bubble cities”), as required by 40 C.F.R. 123.35(b)(2), which resulted in the
10 designation of additional jurisdictions.

11 Rather, PSA argues that Ecology was required by the federal rules governing the scope of
12 the Phase II permits to designate two additional groups of small municipalities for coverage
13 under the permits: (1) smaller MS4s (those below the minimum population thresholds of the
14 bubble cities) that are contributing to violations of water quality standards or otherwise
15 significantly contributing to pollution; and (2) smaller MS4s that are physically interconnected
16 with regulated MS4s. PSA relies on 40 C.F.R. 123.35(b)(3) and (4),¹³ as well as 40 C.F.R.
17 122.26(a)(9)(D),¹⁴ as the basis for arguing Ecology erred in not making additional designations
18 prior to issuing the Phase II permits. PSA also contends that Ecology has, or should have

19 ¹³ These provisions require permitting authorities to: “(3) Designate any small MS4 that meets your criteria by
20 December 9, 2002... You may apply these criteria to make additional designations at any time, as appropriate.” and
21 “(4) Designate any small MS4 that contributes substantially to the pollutant loadings of a physically interconnected
municipal separate storm sewer that is regulated by the NPDES storm water program.”

¹⁴ 40 C.F.R. 122.26(a)(9)(D) provides: “The Director, or in States with approved NPDES programs either the
Director or the EPA Regional Administrator, determines that the discharge, or a category of discharges within a
geographic area, contributes to a violation of a water quality standard or is a significant contributor of pollutants to
waters of the United States.

1 obtained, both general information and site-specific data that some small jurisdictions are
2 contributing to water quality standards violations and generating stormwater pollution. PSA
3 further contends that Ecology has, or should have, information about the physical
4 interconnectivity between regulated and unregulated jurisdictions.

5 The Board believes PSA has failed to meet its burden to demonstrate it is entitled to
6 judgment as a matter of law and denies summary judgment on Issue 19. This issue will be held
7 over until the hearing on the merits.

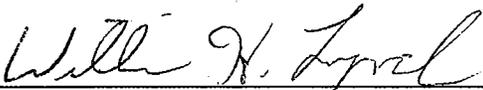
1 Based on this analysis, the Board enters the following order:

2 **ORDER**

- 3 1. The Board grants summary judgment to Ecology on Issues 1, 2, 3, 5, 9, and 10, and
4 denies summary judgment to the Coalition on Issues 1, 2, 3, 9, and 10.
5 2. The Board denies summary judgment to PSA on Issues 12, 13, 14, 15, and 19. These
6 issues will proceed to hearing.

7 SO ORDERED this 29th day of September, 2008.

8
9 **POLLUTION CONTROL HEARINGS BOARD**

10
11 
12 _____
13 WILLIAM H. LYNCH, PRESIDING (Phase II)

14
15 
16 _____
17 KATHLEEN D. MIX, CHAIR

18
19 
20 _____
21 ANDREA MCNAMARA DOYLE, MEMBER