

COPY
RECEIVED

SEP 04 2012
DEPARTMENT OF ECOLOGY
OFFICE OF DIRECTOR

POLLUTION CONTROL HEARINGS BOARD
FOR THE STATE OF WASHINGTON

BUILDING INDUSTRY ASSOCIATION OF
CLARK COUNTY,

Appellants,

v.

WASHINGTON STATE DEPARTMENT OF
ECOLOGY,

Respondents.

No.

BUILDING INDUSTRY ASSOCIATION
OF CLARK COUNTY NOTICE OF
APPEAL OF PHASE I MUNICIPAL
STORM WATER PERMIT ISSUED
AUGUST 1, 2012 AND EFFECTIVE
AUGUST 1, 2013

I. APPEALING PARTIES

The appealing party is:

Building Industry Association of Clark County
103 E. 29th Street
Vancouver, WA 98663

The representative of the appealing party is:

James D. Howsley, WSBA #32442
Jordan Ramis, PC
1498 SE Tech Center Place #300
Vancouver, WA 98664
360-567-3901
jamie.howsley@jordanramis.com

cc: Epl Database Coord.
 Revision - Clark County

 File for [unclear]
 ATG Desktop Clerk
 Bill Moore WQ HQ
Date: MC 9/4/12

1 Appellant Building Industry Association of Clark County ("BIA") is a trade organization
2 made of more than 500 businesses and represents more than 10,000 individual employees
3 involved in the land development and construction industry in Clark County. Members come
4 from all sectors of the building trades including bankers, plumbers, electricians, engineers,
5 planners, attorneys, excavators, developers and builders.

6 II. IDENTIFICATION OF OTHER PARTIES

7 The Washington Department of Ecology ("Ecology") is the respondent in this appeal.

8 III. DECISION UNDER APPEAL

9 BIA appeals Ecology's issuance of the Phase I Municipal Stormwater Permit issued on
10 August 1, 2012 to become effective August 1, 2013. A copy of the permit is attached to this
11 appeal.¹

12 IV. SHORT AND PLAIN STATEMENT FOR THE GROUNDS OF APPEAL

13 The new Phase I Municipal Stormwater Permit masquerades itself as necessary to comply
14 with the federal Clean Water Act. But this new permit moves well beyond the requirements of
15 the federal Clean Water Act and governing regulations. It also fails to meet the Clean Water Act
16 requirements at the same time. The new permit also fails to account for local conditions. This
17 new permit creates impractical and impossible to meet standards. And finally, the new permit
18 constitutes a taking under of the US and Washington State Constitutions and RCW 82.02.020.

19 V. CONCISE STATE OF THE FACTS

20 Clark County faces unique challenges based on its geography. Clark County is adjacent
21 to and competes with Oregon and the Portland Metropolitan area for economic development
22 opportunities. Further complicating matters Clark County contains vast areas of clay soils that
23
24

25

¹ Attachment A.
Page 2 – BUILDING INDUSTRY ASSOCIATION OF CLARK COUNTY
NOTICE OF APPEAL OF PHASE I MUNICIPAL STORM WATER PERMIT
ISSUED AUGUST 1, 2012 AND EFFECTIVE AUGUST 1, 2013

1 do not readily infiltrate. But the new permit's requirements for Low Impact Development
2 ("LID") methods under Special Condition 5(C)(b) fails to account for these unique
3 circumstances. In comments on the draft Phase I permit, BIA submitted a white paper on
4 infiltration produced by a number of civil engineers and geotechnical professionals. We have
5 attached a copy of this white paper for your convenience.² This paper concludes that LID may
6 be effective in limited circumstances, but is not reasonable or appropriate in all circumstances.
7 And yet this permit seeks to mandate LID unless an applicant can somehow demonstrate that
8 LID is not feasible. But economic factors are not a basis to determine feasibility.

9 And Special Condition 5(C)(b) requiring LID does not meet the federal Clean Water Act's
10 requirement to utilize "all known available and reasonable methods" ("AKART") to treat and
11 manage stormwater to the maximum extent practicable. LIDs have not been rigorously tested in
12 Western Washington to scientifically determine their effectiveness. Ecology recognizes this in
13 the new permit. That is why there is such an onerous monitoring requirement forced upon local
14 government to evaluate the effectiveness of LIDs. Permeable pavement for parking areas and
15 roads is a great example of an LID that is known to fail when leaves from trees destroy the
16 effectiveness of pervious pavement over time.

17
18 Additional costs to development abound in this permit. This new permit requires
19 additional test pits to be dug to demonstrate adequate infiltration on development sites. For a
20 single family residential subdivision, this would mean that a test pit is dug on every lot. Expert
21 testimony estimates that this will increase the average lot price by more than five thousand
22 dollars.
23
24
25

² Attachment B.
Page 3 -- BUILDING INDUSTRY ASSOCIATION OF CLARK COUNTY
NOTICE OF APPEAL OF PHASE I MUNICIPAL STORM WATER PERMIT
ISSUED AUGUST 1, 2012 AND EFFECTIVE AUGUST 1, 2013

1 In addition, the LID requirement adds costs to the construction of the LID improvement;
2 it adds costs to maintain and monitor those improvements. And even more troubling are the long-
3 term monitoring implications. LIDs will be located on private property. Under Special
4 Condition 5(C)(5)(iv), Special Condition 5(C)(9)(b)(i-v) and General Condition 5 it purports to
5 grant Ecology an unabated right to enter private property to inspect facilities. Simply put, this is
6 an extraordinary abuse of police powers.

7 The Clean Water Act's intent is to prevent backsliding from 1976 forward. And yet this
8 permit moves well beyond this standard seeking instead to restore watersheds by placing the
9 burden solely on new development rather than seeking to remedy developments built without
10 stormwater controls. Both the default forested conditions requirements of this permit and the
11 requirement of low impact development techniques on new development violates the U.S. and
12 Washington Constitutions and RCW 82.02.020.

13 Ecology continues to assert that vesting does not apply to regulations promulgated under
14 an NPDES permit. BIA believes that this violates *Westside Business Park v. Pierce County*³ and
15 RCW 19.27.095(1), RCW 58.17.033 among various others cases and ordinances.

16 BIA anticipates that Clark County will also file an appeal of this permit. BIA supports
17 and adopts by reference those arguments raised by Clark County in its appeal.

18 VI. RELIEF REQUESTED

19 Appellants request that this Board invalidate this permit for the reasons stated above.
20 This Board should order Ecology to modify this permit to recognize unique conditions found in
21 various localities rather than a one size fits all approach for Western Washington. Furthermore,
22 this Board should order Ecology to address the various other issues raised by this appeal.
23
24

25

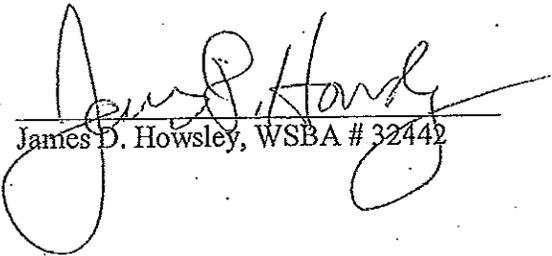
³ 100 Wn. App. 599 (2000).
Page 4 – BUILDING INDUSTRY ASSOCIATION OF CLARK COUNTY
NOTICE OF APPEAL OF PHASE I MUNICIPAL STORM WATER PERMIT
ISSUED AUGUST 1, 2012 AND EFFECTIVE AUGUST 1, 2013

1
2 VII. NOTICE

3 Copies of this appeal were sent to Ecology certified mail, return receipt requested on
4 August 31, 2012.

5 Dated this 31 day of August, 2012.

6 JORDAN RAMIS PC
7 Attorneys for Appellants BIA of Clark
8 County

9 By: 
10 James D. Howsley, WSBA # 32442

