

COPY

STATE OF WASHINGTON
POLLUTION CONTROL HEARINGS BOARD

In the matter of:

CLARK COUNTY, WASHINGTON,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT
OF ECOLOGY,

Respondent.

PCHB No.

CLARK COUNTY'S NOTICE OF
APPEAL OF PHASE I MUNICIPAL
STORMWATER PERMIT ISSUED
AUGUST 1, 2012 AND EFFECTIVE
AUGUST 1, 2013

I. APPELLANT

The appellant is Clark County, Washington. Clark County's contact information
is:

Clark County Department of Environmental Services
Kevin J. Gray, P.E., Director
P.O. Box 9810
1300 Franklin
Vancouver, WA 98666-9810
kevin.gray@clark.wa.gov

1
2 Counsel for Clark County is:

3 Christine M. Cook, WSBA No. 15250
4 Deputy Prosecuting Attorney
5 Clark County Prosecuting Attorney's Office
6 Civil Division
7 P.O. Box 5000
8 Vancouver, WA 98666-5000
9 Phone: 360-397-2478
10 Fax: 360-397-2184
11 christine.cook@clark.wa.gov

12
13
14
15
16
17
18 II. ADDITIONAL PARTIES

19 The respondent is the Washington State Department of Ecology (Ecology).
20
21 King County, Pierce County, Snohomish County, the City Of Seattle, and the City
22 of Tacoma are also parties to this appeal by reason of being persons to whom the
23 respondent's decision is directed. *WAC 371-08-340*.

24
25
26
27
28 III. DECISION BEING APPEALED

29 The decision being appealed is the issuance by Ecology on August 1, 2012 of the
Phase I Municipal Stormwater Permit (National Pollutant Discharge Elimination System
and State Waste Discharge General Permit for Discharges from Large and Medium
Municipal Separate Storm Sewer Systems, effective August 1, 2013). A copy of this
permit, including Appendix 1 thereto, (together, Phase I Permit) is attached.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29

IV. STATEMENT OF FACTS AND GROUNDS FOR APPEAL

Clark County is covered by the current Phase I Municipal Stormwater Permit issued by Ecology and will be subject to and covered by the Phase I Permit. Clark County is the only Phase I Permittee in Southwest Washington and the only Phase I Permittee whose waters drain ultimately to the Columbia River, rather than to Puget Sound. Its geology is that of the northern Willamette Valley. Its history is of the earliest English and American settlement and deforestation in the Pacific Northwest.

Clark County owns and operates a municipal separate storm sewer system (MS4) into which stormwater runoff flows from many areas, and in amounts, which are at times beyond the county's control. For the reasons stated below, the Phase I Permit is legally flawed and should be remanded to Ecology for modification.

1. Special Condition S5.C.5.a.iii requires each Permittee to adopt and make effective, no later than June 30 2015, a local program that satisfies conditions S5.C.5.a.i through ii. The local program must include ordinances or other enforceable documents that govern specified aspects of development, redevelopment and construction.

S5.C.5.a.i. 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 2015, which have not started construction by June 30, 2020."

S5.C.5.a.iii (footnotes omitted). The footnotes to the quoted text define the terms "application" and "started construction" for purposes of the Phase I Permit without regard

1 to local ordinances that define these terms differently and apply to land use applications
2 within a Permittee's land use jurisdiction.

3
4 (A) S5.C.5.a.iii is contrary to the law of Washington in that it violates
5 the principles of vested rights as prescribed by RCW 19.27.09(5)(1) and 58.17.033(1) and
6 numerous decisions of the Washington Court of Appeals and Supreme Court. *E.g.*,
7 Noble Manor Co. v. Pierce Co., 133 Wn.2d 269, 943 P.2d 1378 (1997); West Main
8 Associates v. City of Bellevue, 106 Wn.2d 47, 720 P.2d 782 (1986); Westside Business
9 Park, LLC v. Pierce Co., 100 Wn. App. 599, 5 P.3d 13 (2000). The Washington vested
10 rights doctrine is implemented and governed in Clark County by Clark County Code
11 40.510.010.D, 40.510.020.G, 40.510.030.G. The decision of the Pollution Control
12 Hearings Board in Rosemere Neighborhood Association v. Department of Ecology,
13 PCHB No. 10-013, Findings of Fact, Conclusions of Law and Order (January 5, 2011),
14 that flow control requirements of the permit are not subject to vesting is under pending
15 appeal on that holding.

16
17
18 (B) S5.C.5 a.iii purports to govern local land use decisions made after
19 July 31, 2018, the date on which the Phase I Permit expires. Ecology lacks the authority
20 to apply the terms of this Permit beyond its expiration without formally extending the
21 duration of the permit.

22
23 2. The Phase I Permit contains a number of requirements that development
24 projects employ low impact development (LID) in order to manage stormwater.
25
26
27

1 (A) Special Condition S5.C.5.b sets forth low impact development
2 (LID) code-related requirements. S5.C.5.b.i requires Permittees to review, revise, and
3 make effective their local development-related codes and other development
4 requirements to incorporate and require LID Principles and specified LID Best
5 Management Practices (BMPs). Certain of the prescribed LID BMPs do not satisfy the
6 standards of MEP (controlling pollution to the maximum extent practicable) as required
7 by paragraph 402(p)(3)(B)(iii) of the federal Clean Water Act, or AKART (all known
8 available and reasonable methods to prevent, control and treat pollution) as required by
9 RCW 90.48.010 and 90.48.520, because these BMPs have not been sufficiently tested
10 and proven effective to be considered known, available, reasonable or practicable
11 methods of preventing, controlling or treating water pollution. In addition, the mandated
12 use of certain prescribed BMPs does not meet the requirements of MEP and AKART
13 because, these BMPs can not reliably, safely, or cost-effectively perform their primary
14 functions not related to stormwater flow control, when they are required to function as
15 BMPs. One example of a prescribed BMP that does not satisfy MEP or AKART for this
16 reason is permeable pavement.

17 (B) Minimum Requirement #5 (MR 5): On-site Stormwater
18 Management, is set forth in Appendix 1 of the permit. MR 5 generally requires that
19 development projects use certain prescribed LID BMPs, or meet an LID performance
20 standard, or both. The performance standard is untested and unproven in its effects and,
21 therefore, satisfies neither AKART nor MEP and is unlawful for that reason. The
22
23
24
25
26
27

1 requirements to use certain LID BMPs as prescribed by MR 5 are legally defective for
2 the reasons set forth in paragraph 2(A), immediately above. Additionally, the LID
3 performance standard is unlawful in that it requires matching of developed discharge
4 durations to a range of discharge durations for the pre-developed condition. The
5 requirement to control the impacts of current development in order to mitigate back to the
6 pre-developed condition is unlawful for the reasons set forth in paragraph 6, below.
7

8
9 3. Special Condition S5.C.5.c sets forth watershed-scale stormwater planning
10 requirements for the County Phase I Permittees.

11 (A) These requirements are contrary to law, arbitrary and capricious,
12 and inconsistent with the terms of the Phase I Permit itself, in that they require each
13 County Permittee to plan stormwater management strategies for areas that are not
14 geographically limited by the extent of their MS4's or their governmental authority.
15 S1.A states, "This permit covers discharges from Large and Medium Municipal Separate
16 Storm Sewer Systems (MS4s) as established at Title 40 CFR 122.26...." S5.C. states that
17 "[t]he requirements of the SWMP [*Stormwater Management Program*] shall apply to
18 MS4s , and areas served by MS4s owned or operated by the Permittee." Ecology lacks
19 authority to require that a Permittee's SWMP include activities that are beyond the
20 geographic scope of the MS4 and areas served by MS4s owned or operated by the
21 Permittee. It is contrary to the terms of the Phase I Permit, and arbitrary and capricious,
22 to require a Permittee to plan for areas not within its governmental jurisdiction.
23

24 Watershed-scale stormwater management planning by a Phase I County for areas beyond
25
26

1 its jurisdiction would also result in gifts of services to cities or other counties in which the
2 planned watershed is also located, but who might not participate fully in the planning
3 activities.
4

5 (B) The watershed-scale stormwater planning requirements at
6 S5.C.5.c.ii(3)-(5) are neither AKART, as required by RCW 90.48.010 and 90.48.520, nor
7 MEP, as required by paragraph 402(p)(3)(B)(iii) of the federal Clean Water Act. The
8 efforts required by this aspect of the SWMP, instead of utilizing known and available
9 methodology, are experimental, in that no completed models of these mandatory
10 processes exist or have been validated and calibrated. To the extent that this sort of
11 planning exercise has been partially implemented, it has proven extremely expensive,
12 rather than reasonable or practicable.
13
14

15 4. Special Condition S5.C.8.c.i.(1) requires each Permittee to “implement an
16 ongoing field screening program of on average, 12% of the Permittee’s conveyance
17 systems each year.” Special Conditions S5.C.8.c.i(2) and (3) require field screening at
18 least once within a specified time period of all the conveyance systems within cities’
19 incorporated areas and counties’ urban/higher density rural sub-basins. These
20 requirements are unlawful as overly vague, because the term “conveyance systems” is not
21 defined in the Phase I Permit and does not have a commonly understood meaning.
22 Therefore, no one can know whether and when a Permittee will have complied with these
23 requirements, leaving Permittees vulnerable to enforcement by Ecology and citizen suit
24 under the federal Clean Water Act.
25
26
27

1 5. Special Condition S8.B.2 requires Clark County, for the duration of the
2 August 1, 2012 Phase I Permit, to continue stormwater discharge monitoring at two of the
3 three locations selected for monitoring, pursuant to the February 2007 Phase I Permit.
4

5 (A) The county estimates that the annual expense of discharge
6 monitoring at two sites has been approximately \$120,000 as of 2011. In order to meet the
7 same general permit requirement, however, all of the other Phase I Permittees are
8 permitted by S8.B.1.a to opt for paying into a fund to implement regional stormwater
9 monitoring, instead of conducting their own monitoring. Ecology based the required
10 payments under S8.B.1.a on the population of the Permittee. No Phase I Permittee,
11 except for the City of Seattle, with a population of more than 600,000, would pay as
12 much under S8B.1.a as the approximately 200,000 residents of unincorporated Clark
13 County will pay for its mandatory program under S8.B.2.¹ Unincorporated Snohomish
14 County, with a population of approximately 300,000, would pay \$74,540 annually, and
15 the City of Tacoma, with a population slightly under 200,000, would pay \$49,861
16 annually under the regional monitoring program. It is unlawful, unjust, and arbitrary to
17 single out the citizens of Clark County to bear a financial burden mandated by S8.B that
18 is much greater than the payments required of the citizens of the other Phase I Permittees
19 under S8.B.
20
21
22
23
24
25

26 ¹ In addition to the annual payments required of the Permittees other than Clark County under S8.B.1.a,
27 each of those Permittees must make an initial payment of \$15,000. Still no Phase I Permittee comes close
to the payments required of Clark County viewed on a per-resident basis.

1 (B) Special Condition S8.C requires that Permittees choose among
2 three alternatives for studying the effectiveness of stormwater management methods. In
3 general, these alternatives require that that the Permittees pay Ecology to fund studies
4 that are not specified by the permit and are, therefore, of unknown validity and
5 reasonableness. This requirement satisfies neither AKART nor MEP standards, and is
6 therefore unlawful.
7

8
9 6. Minimum Requirement #7: Flow Control (MR 7) is set forth in Appendix
10 1 of the Phase I Permit. The Standard Flow Control Requirement of MR 7 mandates the
11 following, in relevant part:

12 Stormwater discharges shall match developed discharge durations
13 to pre-developed durations for the range of pre-developed
14 discharge rates from 50% of the 2-year peak flow up to the full 50-
15 year peak flow. The pre-developed condition to be matched shall
16 be a forested land cover....

17 Because MR 7 requires Permittees to condition private property
18 development on achievement of a stormwater flow regime that was generally not in
19 existence immediately prior to the proposed development, it is unlawful. MR 7 requires
20 use of private land to mitigate stormwater impacts that were not caused by the current
21 development, and to an extent that is not roughly proportional to the impacts of the
22 current development. MR 7 thus leaves Permittees open to takings lawsuits under the
23 federal and state constitutions.
24

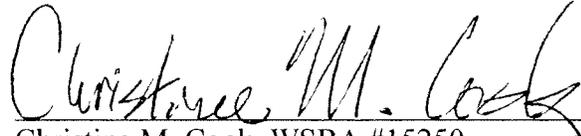
25 //////////////

26 //////////////

V. RELIEF SOUGHT

For these reasons, Clark County respectfully requests that the Board remand the Phase I Permit to Ecology, with instruction that Ecology appropriately modify the Phase I Permit.

Respectfully submitted this 31st day of August, 2012.



Christine M. Cook, WSBA #15250
Deputy Prosecuting Attorney
Of Attorneys for Appellant Clark County