



June 3, 2010

Municipal Permit Comments
Washington State Department of Ecology
P.O. Box 47696
Olympia, WA 98504-7696
Via email: SWPermitComments@ecy.wa.gov

Re: Phase I Municipal Stormwater Permit Modification, 2010
Clark County Modifications, Appendix 10

To Whom It May Concern:

These comments are submitted by Earthjustice on behalf of the Rosemere Neighborhood Association, Columbia Riverkeeper, and the Northwest Environmental Defense Center (“Conservation Organizations”). The Conservation Organizations are opposed to the proposed modifications to the Phase I Municipal Stormwater Permit (the “Phase I Permit”) for Clark County. The proposed modifications are not equivalent to the requirements of Appendix 10 of the Phase I Permit and Ecology’s 2005 Stormwater Manual, and the proposed modifications do not reduce stormwater runoff and stormwater pollutants to the maximum extent practicable (“MEP”) and fail to meet the standard of applying All Known and Reasonable Technologies (“AKART”) to the control of stormwater runoff and pollutants. Further, they will result in additional, incremental degradation to water quality and beneficial uses in Clark County. The Conservation Organizations’ specific objections to the Permit Modifications are set forth in detail below.

I. CLEAN WATER ACT REQUIREMENTS FOR STORMWATER

Under the Phase I Permit, Clark County must implement a program to control stormwater runoff from new and redevelopment. Phase I Permit S.5.C.5. In order to do this, Clark County must develop a stormwater management plan designed to reduce stormwater runoff and pollutants to the maximum extent practicable (“MEP”), and adopt the “minimum requirements, thresholds, and definitions” of the 2005 Ecology Stormwater Manual for Western Washington (“Manual”) or their equivalent. These requirements shall be included in ordinances or other enforceable documents. Id.

One of the Manual’s most important and consequential requirements, flow control, is intended to address the changes in hydrology (and attendant water quality problems) that occur with development. Under the flow control standard, post-development discharges above certain thresholds must match the durations of pre-development flows. Phase I Permit, App. 1 § 4.7. The Pollution Control Hearings Board recently concluded that the flow control standard currently required by the Phase I Permit does not represent control of stormwater to the

maximum extent practicable, and has remanded the Phase I Permit to Ecology. Puget Soundkeeper Alliance v. Department of Ecology, 2008 WL 5510413 (Wash. PCHB August 7, 2008). Ecology is currently engaged in a process to revise the Permit to strengthen the flow control standards, but the existing standard remains in place until that process is complete. Therefore, compliance with the Phase I Permit as currently written is the absolute minimum necessary to address stormwater runoff and its negative effects on the environment. The proposed Permit Modifications fail to even meet this absolute minimum standard.

The Phase I Permit allows certain requirements to be tailored to local circumstances through the use of basin plans or other similar water quality planning efforts. However, “such local requirements and thresholds shall provide equal or similar protection of receiving waters and equal or similar levels of pollutant control as compared” to the specifics in the Phase I Permit. Id. S.5.C.5.b.i. (emphasis added).

Clark County was required by the Phase I Permit to adopt its plan, ordinances, and other authorities, no later than August 16, 2008. Phase I Permit, § S.5.C.5.b(iv).

Clark County’s Phase I Permit also requires the County to notify Ecology of any stormwater discharge that is causing or contributing to a known or likely violation of water quality standards in any receiving water. Id. § S.4.F. The Phase I Permit imposes an obligation on Clark County to propose, schedule, and implement best management practices (“BMPs”), additional to those required by the 2005 Manual, necessary to address any such discharges. Id.

Finally, under the Phase I Permit, Clark County is required to adopt a program to “construct stormwater controls to prevent or reduce impacts to waters of the state caused by discharges from the” municipal system. Phase I Permit, § S.5.C.6.a. The Phase I Permit requires Clark County, by February of 2008, to have developed a retrofit program and begin implementing it six months later. Clark County is required to submit to Ecology a list of retrofit projects along with other documentation in their annual report. Id. § S.5.C.6.b.

II. CLARK COUNTY NON-COMPLIANCE

On or about March 17, 2009, Ecology issued Notice of Violation No. 6514 to Clark County, notifying the County that it had violated its Phase I Permit by adopting a flow control policy and ordinance that does not provide equal or similar protection to receiving waters as set forth in the Manual, and by adopting an exemption for infill and redevelopment projects that fails to conform to the flow increase thresholds in the Manual. As a result of negotiations following the Notice of Violation, Ecology has excused Clark County from the requirements of the Phase I Permit outlined above on the basis of an Agreed Order which includes the same terms as the Permit Modifications that are now proposed. The Conservation Organizations have challenged the Agreed Order before the Pollution Control Hearings Board and that matter is pending.

III. THE PROPOSED PERMIT MODIFICATIONS FAIL TO MEET MEP AND AKART STANDARDS AND THE MODIFICATIONS ARE NOT EQUAL TO THE MINIMUM LEVELS OF PROTECTION PROVIDED BY THE PHASE I PERMIT.

In adopting the proposed Permit Modification, Ecology must independently ensure that the modified Phase I Permit will reduce stormwater runoff to MEP and that the modified permit will apply all known, available, and reasonable methods to control runoff (“AKART”). Moreover, while the Phase I Permit authorizes permittees to adopt standards for new development and redevelopment that vary from the specific requirements of the Phase I Permit, it can only do so where they provide “equal or similar” levels of protection to the standards adopted in the Phase I Permit.

The approach Ecology proposes in the Permit Modification for Clark County—authorizing a significantly weaker standard for new and redevelopment and “mitigating” the impacts via structural retrofit projects—is not MEP or AKART and it is not equal or similar to the Phase I Permit. The following flaws with the proposal, at a minimum, demonstrate that the proposed modification fails to meet governing requirements:

- a) Ecology previously found that the flow control standard imposed by S.5.C.5(b)(i) and § 4.7 of App. 1 of the Phase I Permit is both practicable and necessary to protect streams, and the PCHB found in Puget Soundkeeper Alliance v. Ecology, 2008 WL 5510414 *26 (Aug. 8, 2008), that the existing flow control standard does not constitute MEP and AKART and something more is required. Therefore, the less-protective standards set forth in the Permit Modification clearly do not constitute MEP and AKART. Further, by excusing Clark County from meeting even the existing flow standard, Ecology creates a situation where the implementation of Low Impact Development, as ordered by the PCHB, is made even more difficult as flow control requirements will now be divorced from the actual new and redevelopment projects where LID can and is to be used. It is unclear how Ecology plans on complying with the PCHB’s order while also allowing the weaker standards and mitigation plan proposed by the Permit Modification.
- b) The Permit Modification allows Clark County to use its existing retrofit programs for mitigation, including those imposed by Section S.5.C.6 of the current Phase I Permit. Yet the structural retrofit program is already required under § S.5.C.6 of the Phase I Permit and is required by federal rules to be in addition to and separate from the standards for new development and redevelopment. See Condition S.5.C.6., Phase I Permit. Clark County is not proposing any new funding or additional work other than that which it has already identified as required for compliance with this program. In fact, specific projects that it has previously identified as part of its C.6 retrofit program are now being considered as

“mitigation” for new development. At least one of these projects was built with Ecology grant funding. Therefore, there is no actual mitigation of the new damage that will occur from the failure of Clark County to require proper flow control from new and redevelopment.

- c) Clark County lacks the budget to fund the mitigation program for more than a few years, and no new funds have been proposed. There are no financial assurances in the program that the mitigation will be constructed or that mitigation project and facilities be adequately maintained.
- d) Clark County will allow any structural retrofit project completed after April 13, 2009 to “count” towards the mitigation requirement, even though some of those mitigation projects would have been initiated and committed to long before the mitigation obligations arose. The Conservation Organizations are aware of at least one such project, conceived and approved well before the date of the negotiated Permit Modification, that is expected to “count” against future stormwater mitigation obligations. It is conceivable that Clark County will already have enough in the “mitigation bank” to allow substantial amounts of new development to proceed under weak, inadequate flow control standards, with no mitigation at all.
- e) Clark County will authorize development that fails to meet the Permit standards based on mitigation that occurs in a completely different location, even a different watershed, from the location of the development. First, this makes an assumption that is not scientifically supported. There is no evidence that allowing environmental damage in one watershed can be “mitigated” in another watershed such that the damage is “offset.” Second, even if it is accepted that harm to one watershed could potentially be mitigated by work in another, such sites may have completely different soil and site conditions that make it impossible to assess whether the water quality benefits of the mitigation are comparable to the harm imposed by the new development.
- f) The Permit Modification provides that Clark County will require mitigation based only on an acreage and land-use type measures of disturbed land as opposed to an assessment of the actual, often cumulative, damage to the environment from the failure to impose proper flow control on new and redevelopment. There is no technical and scientific basis for using acreage and land cover as the metrics for determining the mitigation obligation, when such metrics are blind to significant site conditions like soils and slope, as well as actual in-stream impacts. Moreover, it appears that some projects that may be approved for mitigation were never intended as such and will be allowed to count as mitigation simply because

of the blind metrics. Such projects will do little to actually negate adverse impacts on the environment from development.

- g) The Permit Modification allows Clark County to authorize development that fails to meet Phase I Permit requirements based on mitigation that can take up to three years to occur, allowing up to three years of unmitigated, often cumulative, damage to the environment (and possibly more given that the mitigation may not actually address the problem in the watershed experiencing it).
- h) There are no requirements in the Permit Modification that Clark County maintain, monitor, or inspect mitigation projects and facilities to ensure that they operate to protect the environment from the impact of stormwater in perpetuity.
- i) The Permit Modification allows Clark County to forego mitigation for new construction that fails to meet the original Phase I Permit standards as long as the permit application for the construction was submitted prior to April 13, 2009, regardless of when the construction and resulting environmental damage actually occurs. At a minimum, the failure to mitigate for development that occurred after August 17, 2008, when Clark County was initially required to adopt a compliant stormwater ordinance, is a violation of MEP and AKART and demonstrates that the Permit Modification does not provide protections equal to those of the 2005 Manual standards. Clark County's records demonstrate that mitigating for projects that were approved during the period between August 17, 2008 and April 13, 2009, would cost over seven million dollars.

Clark County's Phase I Permit also contains stand-alone requirements, in addition to those outlined above, requiring it to ensure that it is not authorizing discharges that cause or contribute to any violation of water quality standards and that it shall reduce the discharge of pollutants to the maximum extent practicable. See Phase I Permit, § S.4.B-C. Clark County's program of inadequate development standards and flawed and incomplete "mitigation" violate this provision, as do the provisions that allow Clark County to continue issuing development permits that vest prior to December 9, 2009 and/or do not require any mitigation for permits issued after August 2008 that were inconsistent with the Permit. Discharges from new development and redevelopment consistent with Clark County standards are not controlled to MEP because substantially more protection can be achieved for water bodies with minimal additional costs. They also will cause or contribute to violations of water quality standards, particularly where discharging to streams that are already listed as impaired under section 303(d) of the Clean Water Act.

The mitigation requirement imposed by the Permit Modification unlawfully authorizes stormwater discharges from new development and redevelopment that will result in harm to salmon species listed as threatened or endangered under the federal Endangered Species Act

(“ESA”), particularly in light of the provisions allowing for mitigation in watersheds different from the location of the impact and allowing acreage and land cover as the metric for determining mitigation requirements.

Finally, the Conservation Organizations object to the decision to allow the County to use county taxpayer funds (and in some instances state public monies) to mitigate the adverse effects of stormwater runoff from private, profit-driven, development projects. Use of public funds to mitigate environmental damage from private projects shifts public funds away from public-benefit projects such as stormwater retrofits and/or habitat recovery projects in favor of preserving private profit margins. Further, spending public dollars to mitigate environmental damage from private projects is a highly questionable decision given Clark County’s extremely dire (according to press reports and the minutes of various county commission meetings over the past year) financial circumstances. Over the past year numerous reports have detailed the need to take extreme measures to address a declining county budget such as park closures and county employee layoffs.¹ This further calls into serious question whether the County will actually be able to fund the mitigation required by the Permit Modification, and whether the “mitigation” simply robs existing programs that are supposed to provide an environmental benefit.

IV. ECOLOGY’S APPROVAL AND ISSUANCE OF THE PERMIT MODIFICATION WILL SIGNIFICANTLY WEAKEN THE ENTIRE STORMWATER PROGRAM FOR WESTERN WASHINGTON.

The Conservation Organizations also object to the proposed Permit Modification serving as a model, format, or guidance for any other stormwater permittee to avoid the obligations and

¹ See, e.g., “The Board of Clark County Commissioners took action on Tuesday to prevent a deficit in the county budget for 2009-2010, by cutting plans for spending in most county programs and increasing fees to improve cost recovery for services related to building.” Clark County news release, June 17, 2009, <http://www.co.clark.wa.us/bocc/news-release.asp?pkNewsSeq=1793>. “The Board of Clark County Commissioners will consider freezing pay at 2008 levels for 286 management employees and at 2009 levels for 159 hourly workers not represented by labor organizations.” “The county is facing extraordinary financial constraints and working hard to reduce spending plans to prevent a budget deficit of about \$12.7 million,” Reis said. “Most county programs are facing their third round of budget cuts since 2008.” Clark County news release, November 5, 2009, <http://www.clark.wa.gov/news/news-release.asp?pkNewsSeq=1910>. “Clark County cut \$1.6 million from its General Fund parks maintenance and operations budget in December 2009 using a combination of spending cuts, fee increases and redirection of existing dollars. This represents about 13 percent of the projected \$12.5 million overall budget gap the county faced in 2010. These cuts will result in layoffs of six county park maintenance employees and 14 park caretakers for three months in the winter.” Vancouver-Clark Parks and Recreation web page, FAQ, <http://www.cityofvancouver.us/parks-recreation/budgetinfo.htm#Q2>.

protections required by the Phase I or Phase II Municipal Stormwater Permits. In the Statement of Basis prepared in support of the proposed Permit Modification, Ecology notes that it is making a “functional equivalent” determination with respect to Clark County’s proposed modifications to Appendix 10. Ecology further acknowledges that Clark County’s proposed Permit Modification may be used by other permittees. Despite the admonitions in the Statement of Basis regarding the need for Ecology approval prior to implementation and the fact that Ecology must address any such proposals on a case-by-case basis, the reality is that Ecology will be opening the door to weakened flow control standards and weakened environmental protection throughout Western Washington. Once Clark County’s program is finalized as an alternative under the Permit, it is likely that other permittees will seek to similarly weaken their standards and that Ecology will be hard-pressed to disapprove proposals that are consistent with Clark County’s plan. This will result in weakening of stormwater permits across the region. This result is contrary to the Clean Water Act and in particular is contrary to the orders of the PCHB to, in fact, strengthen the flow control requirements of the Phase I Permit.

Even if other permittees do not propose to adopt Clark County’s weaker standards wholesale, there is a danger that specific provisions such as the late vesting requirements for flow control standards will be taken up by other permittees with the result that the already-too-weak flow control standards of the existing Phase I Permit will not be required on the ground for many years to come. The net negative impact of the proposed Permit Modification is significant and will be felt by the environment throughout the State of Washington.

V. SUMMARY AND CONCLUSION

The Conservation Organizations object to the approval and issuance of the Permit Modification and request that Ecology withdraw the proposed Permit Modification and retain the original Phase I Permit requirements for Clark County until they are replaced with more stringent requirements as ordered by the PCHB. Please contact the undersigned should you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read 'JH', with a horizontal line extending to the right.

Jan Hasselman
Janette K. Brimmer
*Counsel for Rosemere Neighborhood Association,
Columbia Riverkeeper, and Northwest
Environmental Defense Center*

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cc: Rosemere Neighborhood Association
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