

Pollution Control Hearings Board
Shorelines Hearings Board
Forest Practices Appeals Board
Hydraulic Appeals Board
Environmental and Land Use Hearings Board



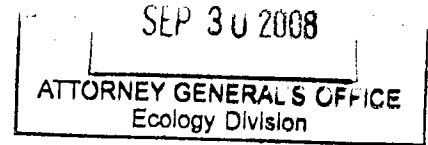
Telephone: (360) 459-6327
FAX: (360) 438-7699
Email: eho@eho.wa.gov
Website: www.eho.wa.gov

STATE OF WASHINGTON
ENVIRONMENTAL HEARINGS OFFICE

Mailing Address: PO Box 40903, Olympia, WA 98504-0903

Physical Address: 4224 - 6th Ave. SE, Bldg. 2, RoweSix, Lacey, WA 98504-0903

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

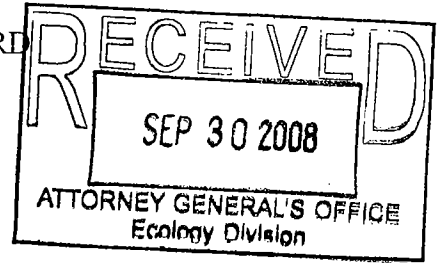
On this day, I forwarded a true and accurate copy of the documents to which this certificate is affixed via United States Postal Service postage prepaid to the parties of record herein.

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

