

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



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April 8, 2008

Sent by e-mail and regular mail

TO ALL PARTIES IN PHASE I & II APPEALS:

RE: APPEALS OF PHASE I MUNICIPAL STORMWATER PERMIT
PCHB Nos. 07-021, 026, 027, 028, 029, 030 & 037

APPEALS OF PHASE II MUNICIPAL STORMWATER PERMIT
PCHB Nos. 07-022 & 023

Counsel:

Enclosed is the Phase I Order on Dispositive Motions.

If you have any questions, please feel free to call.

Sincerely yours,

Kay Brown, Administrative Appeals Judge,
Presiding

KB/jg/Phase I

Enc.

Cc: Bill Moore, Ecology
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 April 8, 2008, at Lacey, WA



POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

PUGET SOUNDKEEPER ALLIANCE;
PEOPLE FOR PUGET SOUND; PIERCE
COUNTY PUBLIC WORKS AND
UTILITIES DEPARTMENT; CITY OF
TACOMA; PORT OF SEATTLE;
SNOHOMISH COUNTY; CLARK
COUNTY; PACIFICORP; and PUGET
SOUND ENERGY,

Appellants,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent,

CITY OF SEATTLE; KING COUNTY;
PORT OF TACOMA; PACIFICORP;
PUGET SOUND ENERGY; STATE OF
WASHINGTON, DEPARTMENT OF
TRANSPORTATION,

Intervenors.

PCHB NOS. 07-021, 07-026, 07-027
07-028, 07-029, 0-030,
07-037

ORDER ON DISPOSITIVE MOTIONS
(PHASE I MUNICIPAL
STORMWATER PERMIT)

On January 16, 2008, the following parties filed motions for summary judgment on some of the Municipal Stormwater General Permit Phase I issues: Port of Tacoma (Issues E.1 and E.2), Port of Seattle and Port of Tacoma (issues E.3 and E.7), and PSA (issues F.1, F.2, F.5, F.6),¹ On February 4, 2008, the following parties filed responses to the motions for summary

¹ PSA also moved for summary judgment on an additional issue it wanted to add to the pre-hearing order. The request to add the additional issue was denied.

1 judgment on the Phase I (remaining issues): Ecology, City of Seattle, Phase I Permittees, and the
2 Coalition, on issues F.1, F.2 F.5, and F.6, and Ecology, on issues E.1, E.2, E.3 and E.7. Also
3 filed on the same day was a reply by PSA on the Phase I remaining issues (F.1, F.2, F.5 and F.6)
4 and by the Port of Seattle and Tacoma on the issues E.1, E.2, E.3 and E.7.

5 The Board considering these motions was comprised of Kathleen D. Mix, Chair, William
6 H. Lynch, and Andrea McNamara Doyle. Administrative Appeals Judge, Kay M. Brown
7 presided for the Board.

8 The following documents were received and considered in ruling on this motion:

- 9 1. Port of Tacoma's Motion for Partial Summary Judgment on Issues: Port's Special
10 Conditions S3.A, S6.E.4, S6.E, S6.E6, S6.E.7 and S6.C with Exhibits 1-5,
11 Declaration of Y. Cindy Lin, Ph.D. in Support of Phase I Permittee Motion for
12 Summary Judgment;
- 13 2. Port of Seattle and Port of Tacoma's Motion for Partial Summary Judgment on Issue
14 E7;
- 15 3. Port of Seattle and Port of Tacoma's Motion for Partial Summary Judgment on Issue
16 E3, Declaration of Tanya Barnett in Support of Port of Seattle and Port of Tacoma's
17 Motion for Partial Summary Judgment on Issue E3 with Exhibits 1-5;
- 18 4. Puget Soundkeeper Alliance's First Motion for Partial Summary Judgment (Issues
19 F.1, F.2, F.5, F.6 and Proposed F.12), Exhibits A-AD in Support of Puget
20 Soundkeeper Alliance's First Motion for Partial Summary Judgment (Issues F.1, F.2,
21 F.5, F.6 and Proposed F.12); Declaration of Jan Hasselman in Support of Puget
Soundkeeper Alliance's First Motion for Partial Summary Judgment (Issues F.1, F.2,
F.5, F.6 and Proposed F.12) with Exhibits 1-66;
5. Phase II Coalition of Governmental Entities' Amicus Brief in Response to PSA's
First Motion for Summary Judgment on Issue F1 (Low Impact Development for the
Phase 1 Permit), Declaration of Lori A. Terry in Support of Phase II Coalition's
Amicus in Response to PSA's First Motion for Summary Judgment on Issue F1 (Low
Impact Development) with Exhibits A-I;

- 1 6. Department of Ecology's Response to Puget Soundkeeper Alliance's First Motion for
2 Partial Summary Judgment (Issues F.1, F.2, F.5, F.6 and Proposed F.12)(Phase 1),
3 Declaration of Thomas J. Young in Support of Ecology's Response to Puget
4 Soundkeeper Alliance's First Motion for Partial Summary Judgment (Phase I) with
5 Exhibits 1-7;
- 6 7. Respondent Department of Ecology's Response in Opposition to Port of Seattle and
7 Port of Tacoma's Motion for Partial Summary Judgment on Issues E7 and E3 and
8 Port of Tacoma's Motion for Partial Summary Judgment on Issues E1 and E2 (Phase
9 I), Declaration of Ronald L. Lavigne in Support of Respondent Department of
10 Ecology's Response in Opposition to Port of Seattle and Port of Tacoma's Motion for
11 Partial Summary Judgment on Issues E7 and E3 and Port of Tacoma's Motion for
12 Partial Summary Judgment on Issues E1 and E2 (Phase I) with Exhibit A, Declaration
13 of Bill Moore in Support of Respondent Department of Ecology's Response in
14 Opposition to Port of Seattle and Port of Tacoma's Motion for Partial Summary
15 Judgment on Issues E7 and E3 and Port of Tacoma's Motion for Partial Summary
16 Judgment on Issues E1 and E2 (Phase I) with Exhibit A;
- 17 8. Phase I Permittees' Response in Opposition to Puget Soundkeeper Alliance's First
18 Motion for Partial Summary Judgment (Issues F.1, F.2, F.5 and F.6), Declaration of
19 Tad H. Shimazu with Exhibits 1-9, Declaration of Danny D. Wrye, Declaration of
20 Paul S. Fendt, P.E., in Opposition to Puget Soundkeeper's Alliance Motion for Partial
21 Summary Judgment (Issues F.1, F.2, F.5, F.6)(Phase 1);
9. Intervenor City of Seattle's Response to Puget Soundkeeper Alliance's First Motion
for Partial Summary Judgment (Issues F.1, F.2, F.5, F.6 and Proposed F.12)(Phase I);
10. Port of Seattle's Reply Brief in Support of Motion for Partial Summary Judgment on
Issues E7 and E3 and Reply to Port of Tacoma's Motion for Partial Summary
Judgment on Issue E2, Supplemental Declaration of Tanya Barnett in Support of Port
of Seattle and Port of Tacoma's Motion for Partial Summary Judgment on Issues E7
and E3 with Exhibit 1;
11. Port of Tacoma's Reply Brief in Support of Partial Summary Judgment on Issues:
Port's Special Conditions S3.A, S6.E.4, S6.E.6, S6.E.7, and S6.C; and,
12. Puget Soundkeeper Alliance's Reply in Support of First Motion for Partial Summary
Judgment (Issues F.1, F.2, F.5, F.6 and Proposed F.12)(Phase II), Declaration of Jan
Hasselmann in Support of First Motion for Partial Summary Judgment (Issues F.1, F.2,
F.5, F.6 and Proposed F.12)(Phase II) with Exhibits 67-70.

1 Based on the record and evidence before the Board on the motions for partial summary
2 judgment, the Board enters the following decision.

3 I.

4 PROCEDURAL BACKGROUND AND DECISION SUMMARY

5 On January 17, 2007, the Department of Ecology (Ecology) issued National Pollutant
6 Discharge Elimination System (NPDES) and State Waste Discharge General Permit (State Waste
7 Permit) for discharge from Large and Medium Municipal Separate Storm Sewer Systems (Phase
8 I Permit). The effective date of the Phase I permit is February 16, 2007.

9 Appeals were filed by Puget Soundkeeper Alliance and People for Puget Sound (PSA)
10 (PCHB No. 07-021), Pierce County Public Works and Utilities Department (PCHB No. 07-026),
11 City of Tacoma (PCHB No. 07-027), Port of Seattle (PCHB No. 07-028), Snohomish County
12 (PCHB No. 07-029), Clark County (PCHB No. 07-030), and PacifiCorp and Puget Sound
13 Energy (PCHB No. 07-037) challenging various provisions of the permit. The Board granted
14 leave to intervene to King County, the City of Seattle, and the Port of Tacoma, PacifiCorp and
15 Puget Sound Energy, and The Washington State Department of Transportation (WSDOT); and
16 all of the Phase I Appeals were consolidated for hearing purposes.

17 The Board conducted pre-hearing conferences and entered a pre-hearing order setting
18 forth 36 issues for the Phase I Appeal. Eight of the Phase I issues are the subject of the motions
19 at issue here.

20 The Phase I issues that are the subject of motions are:

- 1 E.1 Whether Special Conditions S3.A., S6.E.4, S6.E.5, S6.E.6, and S6.E.7 are
2 unlawful, unreasonable, unjust, or invalid to the extent that they impose on Ports
3 requirements not imposed on other Secondary Permittees?
4 E.2 Whether Special Condition S6.C is unlawful, unreasonable, unjust, or invalid
5 because it imposes requirements that unreasonably conflict with Secondary
6 Permittees' other legal obligations, and/or fails to recognize limitations on the
7 legal authority of Secondary Permittees?
8 E.3 Whether the minimum performance measures in Special Condition S6.E.3 that
9 require that Ports "ensure" compliance with illicit discharge policies and that non-
10 stormwater discharges comply with requirements of a SWPPP reviewed by the
11 Port, are unlawful, unreasonable, unjust, or invalid?
12 E.7 Whether Special Condition S9.D is unlawful, unreasonable, unjust, or invalid
13 because it requires Permittees to make "all records related to this permit and the
14 Permittee's SWMP", including those that may be privileged or otherwise exempt
15 from disclosure, available for public inspection?
16 F.1 (b) Does the permit fail to require maximum onsite dispersion and infiltration of
17 stormwater, through the use of "low impact development" techniques, basin
18 planning, and other appropriate technologies, and if so, does that failure
19 unlawfully allow permittees to discharge pollutants that have not been treated
20 with all known available and reasonable methods of treatment ("AKART"),
21 and/or fail to reduce the discharge of pollutants to the maximum extent
practicable ("MEP")?²
F.2 (a). Does the absence of any standard and/or technology requirements for reducing
stormwater discharges from existing development and existing stormwater
systems unlawfully cause or contribute to violations of water quality standards?
F.2 (b) Does the absence of any standard and/or technology requirements for reducing
stormwater discharges from existing development and existing stormwater
systems unlawfully allow permittees to discharge pollutants that have not been
treated with AKART, and/or fail to reduce the discharge of pollutants to MEP?
F.5 (a) Does the permit unlawfully provide for compliance with permit terms on a
schedule that is indefinite and unenforceable, not as expeditious as possible,
and/or in excess of statutory deadlines?
F.5(b) Does the permit unlawfully allow a permittee to create and implement permit
requirements without Ecology's oversight or involvement?
F.6 Does the permit unlawfully provide for modification of permit terms without
adherence to permit modification procedures?

² PSA clarified in its reply brief that it was not moving for summary judgment on F.1(a).

1 The Board denies summary judgment to the Ports and grants summary judgment to
2 Ecology on issues E.1, E.2, E.3 and E.7. With respect to issue F.1(b), the Board concludes that
3 Ecology does have the authority to require low impact development techniques, if, as a factual
4 matter, they constitute AKART. The determination of whether low impact development
5 techniques should have been required is a factual question that should proceed to hearing. On
6 issues F.2 (a) and (b) the Board concludes that the permit does contain standards, but that the
7 issue is whether the standards are adequate. This is a factual matter that should proceed to
8 hearing. The Board also concludes that issue F.5 is a factual issue. On F.6, the Board concludes
9 that condition S5.C.5.b.ii is invalid as drafted because it fails to require that the use of a
10 substitute manual go through the permit modification process. The Board grants summary
11 judgment to PSA on this issue, and directs Ecology to replace condition S5.C.5.b.ii with the
12 language set out in this order.

13 II.

14 FACTS

15 A. Background Facts for Ports' Issues (Legal Issues E.1, E.2, E.3, and E.7)

16 The Phase I Permit was issued to regulate discharges from large and medium sized
17 municipal separate storm sewer systems (MS4s). The Permit establishes three categories of
18 permittees ("Permittee," "Co-Permittee," and "Secondary Permittee"), based generally on the
19 geographic area covered and the nature of the entity that owns or operates the municipal system.
20 *Condition S1.* Permittees include the Cities of Tacoma and Seattle, and the counties of Clark,
21

1 King, Pierce, and Snohomish. *Condition S1.B.*³ Secondary permittees under the permit include
2 operators of municipal separate storm sewers that meet the requirements for MS4s, but which are
3 not owned or operated by cities, towns, or counties. Secondary Permittees include the Port of
4 Seattle (excluding Seattle-Tacoma International Airport) and the Port of Tacoma; as well as
5 certain active drainage, diking, and flood control districts, and other owners and operators of
6 MS4s, that are located within the jurisdiction of a Permittee. *Condition S1.D.* Although some
7 conditions of the Phase I Permit apply to both Permittees and Secondary Permittees, others were
8 written specifically for one of the two categories. *Hasselman Decl., Ex. 1 p.1, 2, Ex. 26, p.1, 20-*
9 *22, (Condition S1); Barnett Decl., Ex. 1.*

10 Likewise, some permit conditions differentiate between two sub-groups of Secondary
11 Permittees. For example, the permit requires the Ports of Seattle and Tacoma to comply with a
12 number of requirements that do not apply to the other Secondary Permittees, including: (1)
13 compliance with minimum technical requirements for new and re-development; (2)
14 establishment of an operation and maintenance (O&M) program for all stormwater treatment and
15 flow control facilities and catch basins; and (3) preparation of Stormwater Pollution Prevention
16 Plans (SWPPPs) for all developed areas not already covered by a stormwater permit.

17 Specifically, Phase I Permit Conditions S3.A, S6.E.4, S6.E.5, S6.E.6 and S6.E.7 apply only to
18 the Ports, and the Port of Tacoma objects to this differential treatment within the category of
19 Secondary Permittees. *See Hasselman Decl., Ex.1 (Condition S6.E. - addressing SWMPs for the*

20
21 ³ Although not relevant to this motion, King County is also covered as a “Co-Permittee” with the City of Seattle for discharges from outfalls King County owns or operates within the City of Seattle. *Condition S1.C.*

1 *Ports*). Ecology's rationale for treating the Ports differently than other Secondary Permittees is
2 explained in the Fact Sheet for the Phase I Permit. It states:

3 Ecology has determined that special consideration is needed for the Ports of
4 Seattle and Tacoma, distinguishing them from the broader group of Secondary
5 Permittees such as diking and drainage districts and public universities. These
6 ports are both located on urban bays with documented water quality and sediment
7 contamination problems that may be linked to stormwater discharges. The
8 infrastructure in both Seattle and Tacoma is fairly old and the MS4s are heavily
9 interconnected between each port and the respective city. Also, both ports lease
10 properties to tenants, of whom many, but not all, are required to have coverage
11 under the Industrial Stormwater General Permit. For these reasons, this permit
12 establishes SWMP components that are specific to these two entities. *Lake Decl.,
13 Ex. 1 (Phase I Permit Draft Fact Sheet at 42).*

14 The Port of Tacoma also challenges Condition S6.C, which applies to all Secondary
15 Permittees including the Ports. Condition S6.C requires Secondary Permittees to demonstrate
16 their legal authority to address discharges. It states:

17 To the extent allowable under state law and federal law, each Secondary Permittee shall be
18 able to demonstrate that it can operate pursuant to legal authority which authorizes or enables
19 the Secondary Permittee to control discharges to and from municipal separate storm sewers
20 owned or operated by the Secondary Permittee.

21 This legal authority may be a combination of statutes, ordinances, permits, contracts, orders,
interagency agreements, or similar instruments.

One required component of the Ports' Stormwater Management Plans (SWMP), which is
challenged by both the Ports of Tacoma and Seattle, involves the provision for "illicit
discharges" contained in Condition S6.E.3. "Illicit discharge" is defined for all permittees to be
"any discharge to a municipal separate storm sewer that is not composed entirely of stormwater
except discharges pursuant to a NPDES permit (other than the NPDES permit for discharges

1 from the municipal separate storm sewer) and discharges resulting from fire fighting activities.”

2 *Hasselman Decl., Ex. 1 (Definitions and Acronyms).*

3 Finally, the Ports object to permit condition S9.D, which requires them to make all records
4 related to the permit, and the Permittee’s SWMP, available to the public. *Hasselman Decl., Ex.*
5 *1, at 50.*

6 B. Background facts for LID issues (Legal issue F.1.b)

7 The Permit defines low impact development (LID) to be:

8 stormwater management and land development strategy applied at the parcel and
9 subdivision scale that emphasizes conservation and use of on-site natural features
10 integrated with engineered, small-scale hydrologic controls to more closely mimic pre-
development hydrologic functions.

11 *Hasselman Decl., Ex. 1, at 62.* Edward O’Brien, Ecology’s technical expert, describes LID
12 techniques as including both watershed scale land use controls, such as retention of native
13 vegetation, impervious surface coverage limits, and site design requirements, as well as smaller
14 scale construction techniques such as permeable pavements, green roofs, rain gardens, and the
15 like. *Young Decl., Ex. 2 at 133, 178.*

16 The fact sheet accompanying the Permit offers this description and explanation of how
17 the permit addresses LID standards:

18 [Low impact development] is partially addressed through the application of “on-site
19 stormwater management BMP’s” as specified by Minimum Requirement # 5 in the
20 western Washington manual. However, it should be more fully addressed through local
21 governments’ adoption of: 1) site development standards that are far less disruptive of the
natural hydrology (i.e. low impact development standards); and 2) comprehensive land
use plans that consider the cumulative hydrologic and pollutant impacts of potential land

1 development on the aquatic natural resources. This second action goes beyond the scope
2 of this NPDES permit.

3 *Hasselman Decl., Ex 26, at 32-33.*

4 The Permit itself contains some specific provisions which either allow or to some extent
5 require the use of LID techniques. *See e.g.* Condition S5.C.5.b.i (allowing local governments to
6 tailor certain requirements applicable to new development through the use of basin plans or other
7 similar water quality and quantity planning effort); Condition S5.C.5.b.iii (requiring SWMPs to
8 allow non-structural preventative actions and source reduction approaches such as LID
9 techniques); Condition S5.C.6.a (stating that permittees should consider other means to address
10 impacts from existing development such as reduction or prevention of hydrologic changes
11 through the use of on-site (infiltration and dispersion) stormwater management BMPs and site
12 design techniques, riparian habitat acquisition, or restoration of forest cover and riparian buffers .
13 . .); Appendix 1 § 4.5 (imposes, as a minimum requirement, on-site stormwater management
14 where feasible. This includes use of roof downspout controls and dispersion and soil quality
15 BMPs or their functional equivalent)⁴. *Hasselman Decl., Ex. 1, at 9-13, Young Decl., Ex. 1, Vol.*
16 *1 § 2.5.5.*

17 Ecology's 2005 Stormwater Management Manual for Western Washington (Manual)⁵
18 includes an appendix chapter on LID techniques. The use of these techniques is voluntary;
19

20 ⁴ This same requirement is included in Ecology's 2005 Stormwater Management Manual for Western Washington.

21 ⁵ Parts of the Manual are included in document form in the record for this motion. *See Hasselman Decl., Ex. 2, Young Decl., Ex. 1, Terry Decl., Ex. I.* The entire Manual can be viewed on line at <http://www.ecy.wa.gov/biblio/0510031.html>.

1 however Ecology allows credits for using them when calculating post-development flow rates
2 using the hydrologic model. *Terry Decl., Ex. 1 (Vol. III, Appendix III-C)*.

3 C. Background facts for Existing Development issue (Legal issues F.2.a and b)

4 PSA challenges the validity of the Phase I permits' provisions regarding existing
5 development on the grounds that they do not meet the AKART and MEP standards because they
6 do not contain an objective standard for reducing impacts from areas of existing development.

7 There are two provisions in the permit addressing existing development. The first, permit
8 condition S5.C.6.b.i. addresses structural stormwater controls. *Hasselman Decl., Ex. 1, at 12*. It
9 requires permittees to develop a structural retrofit program to address impacts not adequately
10 controlled by other aspects of the SWMP. Ecology describes this provision as a "capital
11 investment program in stormwater controls." *Young Decl., Ex 4 at 111-113*. Ecology
12 acknowledges in the fact sheet that it "has not set a minimum expectation for the level of effort
13 for this requirement." *Hasselman Decl., Ex. 26, at 35*.

14 The second provision in the permit addressing existing development is Condition S5.C.7.
15 *Hasselman Decl., Ex. 1, at 13-14*. This condition addresses source control approaches and
16 includes requirements that the permittees inventory pollutant-generating land uses, develop an
17 audit/inspection program, and a progressive enforcement policy. While the condition calls for a
18 program that "reduces" pollutants in runoff, it does not set an objective standard for an amount
19 of reduction.

1 D. Background facts for Compliance Issue (Legal issue F.5)

2 PSA challenges the validity of several Phase I permit provisions on the grounds that they do
3 not require implementation of the permit within three years. PSA provides several examples of
4 permit conditions that allow implementation after three years. Some of these examples include
5 Condition S5.C.2.b.ii (requiring outfalls to be mapped no later than four years from the effective
6 date of the permit); Condition S5.C.8.b.vi (requiring screening for illicit discharges in portion of
7 each jurisdictions to be completed within four years.); and Condition S.5.C.9.b.ii(3) (allowing
8 permittees up to four years to develop a schedule to inspect treatment and flow control facilities).
9 PSA also provides examples of conditions that impose duties that are tied to the expiration of the
10 permit. Some examples of these conditions include Condition S6.A.3 (full development of the
11 SWMP no later than 180 days prior to the expiration of the permit); and S6.D.1. a.ii (Secondary
12 permittees shall label all inlets 180 days prior to expiration of the permit). *Hasselmann Decl., Ex.*
13 *1 at 7, 18, 20, 21, 25, 27.*

14 E. Background facts for Permit Modifications Issue (Issue F.6)

15 Permit Condition S5 sets out the requirements for Permittees' SWMPs. Condition S5.C.5.b
16 addresses the component of the SWMP aimed at controlling runoff from new development,
17 redevelopment and construction sites. It requires permittees to enact ordinances regulating new
18 developments and redevelopments that discharge to the MS4 to the standards contained in
19 Appendix I to the permit, or an equivalent approved by Ecology. *See Hasselmann Decl., Ex. 1 at*
20 *9-10.* Appendix I contains nine requirements, taken from the Manual, addressing flow control,
21

1 runoff treatment, source control, infiltration, and wetlands protection. *Young Decl., Ex 1. App. 1*

2 § 4.

3 III.

4 ANALYSIS

5 A. Summary Judgment

6 Summary judgment is a procedure available to avoid unnecessary trials on formal issues
7 that cannot be factually supported and could not lead to, or result in, a favorable outcome to the
8 opposing party. *Jacobsen v. State*, 89 Wn.2d 104, 107, 108, 569 P.2d 1152 (1977). The
9 summary judgment procedure is designed to eliminate trial if only questions of law remain for
10 resolution. Summary judgment is appropriate when the only controversy involves the meaning
11 of statutes, and neither party contests the facts relevant to a legal determination. *Rainier Nat'l*
12 *Bank v. Security State Bank*, 59 Wn. App. 161, 164, 796 P.2d 443 (1990), *rev. denied*, 117
13 Wn.2d 1004 (1991).

14 The party moving for summary judgment must show there are no genuine issues of
15 material fact and the moving party is entitled to judgment as a matter of law. *Magula v. Benton*
16 *Franklin Title Co., Inc.*, 131 Wn.2d 171, 182, 930 P.2d 307 (1997). A material fact in a
17 summary judgment proceeding is one that will affect the outcome under the governing law.
18 *Eriks v. Denver*, 118 Wn.2d 451, 456, 824 P.2d 1207 (1992). In a summary judgment, all facts
19 and reasonable inferences must be construed in favor of the nonmoving party as they have been
20 in this case. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002).

1 B. Issues Raised by the Ports

2 1. Differential Treatment Between Ports and Other Secondary Permittees (Legal Issue
3 E.1) (Permit Conditions S3.A, S6E)

4 As noted above, the permit requires the Ports of Seattle and Tacoma to comply with a
5 number of requirements that do not apply to other Secondary Permittees, including: (1)
6 compliance with minimum technical requirements for new and re-development; (2)
7 establishment of an operation and maintenance (O&M) program for all stormwater treatment and
8 flow control facilities and catch basins; and (3) preparation of SWPPPs for all developed areas
9 not already covered by a stormwater permit. *Conditions S3.A.3 and .4, S6.E.* At the same time
10 the Stormwater Management Program (SWMP) requirements for the two ports detailed in
11 Condition S6.E are more stringent than those imposed on Secondary Permittees, they are also
12 less stringent than those imposed on Phase I Permittees.

13 The Port of Tacoma (POT) contends that Ecology failed to show a rational basis when it
14 imposed these requirements on the Ports of Seattle and Tacoma that do not apply to other
15 Secondary Permittees. The POT argues that it was insufficient for Ecology to rely on
16 information provided by port staff as a basis for differentiating the ports from other Secondary
17 Permittees, that stricter compliance requirements are not justified, and that added costs of the
18 additional requirements do not result in any reciprocal environmental benefit.

19 Ecology's decision to classify the numerous permittees covered under this general permit
20 into different categories, and apply varying permit requirements based on those differences is not
21 specifically governed by statute or regulation. Instead, it represents an exercise of the agency's

1 discretion based on professional judgment. The Port of Tacoma makes a general allegation that
2 Ecology exceeded its statutory authority, but points to no law that precludes Ecology from
3 making such distinctions between classes of permittees. In reviewing this aspect of the general
4 permit, the Board therefore gives due deference to the specialized knowledge and expertise of
5 Ecology, while acknowledging that such deference does not extend to action that is “manifestly
6 unreasonable or exercised on untenable grounds” or that is “willful and unreasoning actions in
7 disregard of facts and circumstances.” *Shuh v. Department of Ecology*, 100 Wn.2d 180, 186, 667
8 P.2d 64 (1983); *Department of Ecology v. Theodoratus*, 135 Wn.2d 582, 598, 957 P.2d 1241,
9 (1998), citing *Hillis v. Department of Ecology*, 131 Wn.2d 373, 383, 932 P.2d 139 (1997).

10 As a practical matter, Ecology could have included the Ports as Phase I Permittees rather
11 than as Secondary Permittees, or it could have written a separate Phase I municipal stormwater
12 permit specifically for one or both of the Ports. *Moore Decl.* ¶ 7. Based on the undisputed facts
13 before us, we cannot conclude as a matter of law, that Ecology’s decision to treat the Ports more
14 like the city and county permittees for purposes of their SWMP, and less like the diking,
15 drainage, and flood control district permittees or university permittees was in error. The POT’s
16 motion falls far short of meeting its burden on summary judgment, and likewise fails to establish
17 a prima facie case that Ecology either failed to consider an important aspect of the problem or
18 runs counter to the evidence before the agency.⁶ The Port of Tacoma’s motion for summary

19
20 ⁶ The Port of Tacoma challenges the adequacy/sufficiency of Ecology’s information about port infrastructure, which
21 both sides agree came in large part from port officials during a November 2001, meeting with Ecology staff. We
find that reliance on information provided by port representatives under these circumstances was reasonable and
rational and note that the POT has provided no evidence to suggest the ports’ information was inaccurate or
misleadingly incomplete. We further note that neither the existence of contradictory evidence nor the possibility of

1 judgment on this issue should be denied, and having failed to present a prima facie case that
2 Ecology's decision was unreasonable, summary judgment on Issue E.1 should be granted to
3 Ecology.

4 2. Ports' Legal Authorities (Legal Issue E.2) (Permit Condition S6.C)

5 Condition S6.C requires Secondary Permittees to demonstrate their legal authority to
6 control discharges to and from the municipal sewers they own or operate. The permit requires
7 Secondary Permittees to make use of this legal authority in order to undertake all of the
8 applicable activities listed in Condition S6.D, .E and .F.

9 The Board acknowledges the current state of the law presents some uncertainty as to the
10 extent of Port authority to manage, regulate, and control its municipal storm sewers. The parties
11 have identified a potential conflict between two provisions of the Port District enabling statutes,
12 and note that no court has yet been asked to reconcile these two provisions.⁷ Depending on how
13 these different provisions are read together affects the manner in which Ports may choose or be
14 allowed to manage, regulate, and control discharges from their municipal sewers. However, we
15 do not need to resolve that potential conflict here, nor would it be proper for us do so in this
16 context.

17
18
19 deriving conflicting conclusions from the evidence necessarily renders an agency decision arbitrary and capricious.
Rios v. Department of Labor & Industries, 145 Wn.2d 483, 504, 39 P.3d 961 (2002).

20 ⁷ RCW 53.08.220 establishes a system whereby, rather than having *direct* authority to adopt regulations, ports "may
21 formulate all needful regulations ... and *request* the adoption, amendment, or repeal of such regulations" as part of
the ordinances of the city, town, or county in which the port facilities are situated. In contrast, RCW 53.08.043
provides: "A port district may exercise all the powers relating to systems of sewerage authorized by RCW 35.67.010
and 35.67.020 for cities and towns."

1 It is unnecessary for us to reconcile the two statutes here because the permit requirement
2 on its face applies only “to the extent allowable under state law and federal law... .” Thus, we
3 read this condition not as requiring the Ports to *exceed* their statutory authority as alleged by the
4 POT, but instead as requiring them to demonstrate the legal authority they possess and make use
5 of it to control discharges to and from their systems. Because Condition S6.C does not require
6 Secondary Permittees to do more than the law allows them to do, we conclude it is not unlawful,
7 unreasonable, unjust or invalid, and summary judgment should be granted to Ecology on this
8 issue.

9 3. Illicit Discharge Detection and Elimination (Legal Issue E.3) (Permit Condition
10 S6.E.3)

11 Condition S6.E.3 addressees the illicit discharges, and requires the Ports to include a
12 program within their SWMP to address such discharges. It states, in relevant part:

13 The SWMP shall include a program to detect, remove and prevent illicit connections and
14 illicit discharges, including spills, into the municipal separate storm sewers owned or
15 operated by the Port.

16 Minimum Performance Measures

17 ...

18 b. Develop and adopt appropriate policies prohibiting illicit discharges and illegal
19 dumping no later than one year from the date of permit coverage. Identify possible
20 enforcement mechanisms no later than one year from the date of permit coverage and, no
21 later than eighteen months from the date of permit coverage, develop and implement an
enforcement plan using these mechanisms to ensure compliance with illicit discharge
policies. These policies shall address, at a minimum: illicit connections; non-stormwater
discharges as defined below; and spilling, dumping, or otherwise improperly disposing of
hazardous materials, pet waste, and litter.

1 The Ports complain that Ecology has exceeded its authority by requiring the Ports to
2 “ensure” compliance with illicit discharge policies that they must develop under the permit. The
3 Ports read this language to require them to “ensure” that there are no violations of illicit
4 discharge policies, and assert that such a burden is unreasonable, as they cannot control
5 intentional, negligent, or other actions of third parties. The Ports argue this requirement is more
6 stringent than, and inconsistent with, both the relevant EPA regulations, and the conditions
7 imposed on other Phase I permittees.

8 Ecology responds by stating that EPA regulations require a permittee to both
9 “implement” an illicit discharge program and “prevent” illicit discharges. Ecology asserts that
10 there is no practical difference in the permit terms applicable to the Ports (to “implement” an
11 enforcement plan for illicit discharges to “ensure” compliance with such policies), and either
12 EPA requirements, or the related Phase I Permittee permit condition on the same topic. That
13 permit condition requires implementation of ordinances, orders, or similar means to “prevent”
14 illicit discharges. Ecology goes on to assert that the requirements imposed on the Ports are
15 actually less stringent than those imposed on the Phase I permittees, as the Ports and other
16 secondary permittees have some discretion regarding the development of the illicit discharge
17 policies, and it is their own policies they must enforce. In contrast, Phase I permittees are
18 required to “effectively prohibit” illicit discharges.

19 The Board concludes that the permit conditions applicable to the Ports for managing
20 illicit discharges are not more stringent than those imposed on the Phase I permittees, and are
21 consistent with the EPA regulations. As all parties have argued, EPA municipal stormwater

1 regulations require municipal stormwater management programs to address a number of
2 elements, one of which is control of illicit discharges. *See*, 40 C.F.R. 122.26(d)(2)(iv)(B)(1).
3 These regulations require the municipality to implement a program “to detect and remove...illicit
4 dischargers and improper disposal into the storm sewer,” which includes a program, including
5 inspections “to implement and enforce an ordinance, orders or similar means to prevent illicit
6 discharges....” The permit term applicable to the Ports implements this requirement by directing
7 the Ports to adopt policies prohibiting illicit discharges and illegal dumping, identify
8 enforcement mechanisms, then develop and implement an enforcement plan using such
9 enforcement mechanisms “to ensure compliance with illicit discharge policies.” *Phase I Permit*
10 *Condition S6.E.3.*

11 In contrast to the requirement placed on the Ports, other Phase I permittees are directed in
12 the applicable permit condition to “effectively prohibit non-stormwater, illegal discharges, and/or
13 dumping into the Permittee’s municipal separate storm sewer system.” *Phase I Permit Condition*
14 *S5.C.8.b.ii.* As Ecology points out, there is little practical difference in the language used in
15 these slightly differing permit terms. The Ports must “ensure” (to make happen) compliance
16 with their own policies; the other Phase I permittees must “prevent” or “prohibit” (to keep from
17 happening) illicit discharges to the storm sewer system. The Board concludes that both
18 standards are consistent with the EPA regulations, and Ecology has the authority to impose the
19 terms, even with the slight variation, as written. The Port’s Motion for Summary Judgment on
20 Legal Issue E.3 is denied.

1 4. Public Disclosure of Records (Legal Issue E.7) (Permit Condition S9.D)

2 The Ports both object to Special Condition S9.D, which applies to all permittees and
3 pertains to disclosure of records to the public. This condition states:

4 Each Permittee shall make all records related to this permit and the Permittee's SWMP
5 available to the public at reasonable times during business hours. The Permittee will provide
6 a copy of the most recent annual report to any individual or entity, upon request.

7 The Ports object to this condition because they believe it requires the disclosure of
8 records that would otherwise be exempt from disclosure under the Public Records Act, Ch. 42.56
9 RCW. The Ports note, correctly, that as "local agencies," all Phase I permittees are subject to the
10 Public Records Act. *See* RCW 42.56.010(1), RCW 42.17.020(2). Under the Act, a number of
11 records may be exempt from disclosure, such as attorney-client communications. RCW
12 42.56.070(1), RCW 42.56.290. The Ports argue that permit condition S9.D, by requiring that
13 "all records" be made available, without acknowledgement of the ability of local agencies to
14 withhold certain types of documents, conflicts with the Public Records Act. They assert Ecology
15 lacks authority to impose such a condition.

16 Ecology responds by stating: "In drafting Condition S9.D, Ecology did not intend that
17 this permit condition would require the disclosure of documents that are exempt from disclosure
18 under the PDA, and believes that Condition S9.D can be interpreted as being subject to the
19 PDA." *Ecology's Response in Opposition to Port's Motion (Issues E7 and E3), p.3.* If
20 necessary, Ecology offers to modify the permit to remove any ambiguity.

21 In construing the terms of a general permit, the Board reads the provisions as a whole to
22 harmonize their meaning and render an interpretation consistent with the total regulatory scheme.

1 *Community Association for Restoration of the Environment (CARE) v. Ecology*, PCHB No. 06-
2 057 (August 1, 2007) (Order on Motions), citing *Puget Soundkeeper Alliance; et. al., v. Ecology*
3 *and Association of Washington Business*, PCHB No. 00-173 (August 29, 2001) (Order Denying
4 Motion to Dismiss). The Board concludes that, as matter of law, permit condition S9.D requires
5 the Ports to disclose records consistent with the statutory obligations of the public records and
6 disclosure laws. Such obligations include the ability to claim exemptions from disclosure of
7 certain types of documents, as well as the obligation to, for example, make records “promptly
8 available to any person,” as set out in Ch.42.56 RCW. It was not incumbent upon Ecology to
9 spell out all the applicable terms of this statute in the permit, nor could Ecology contravene or
10 effectively modify the public records and disclosure requirements of state law as they apply to
11 local governments through the permit. Should Ecology wish to clarify this in a subsequent
12 permit modification, they may do so, but it is unnecessary for the Board to order it, as it has
13 construed the current language to be consistent with Ch. 42.56 RCW, as a matter of law.
14 Summary Judgment will be denied to the Ports on Legal Issue E.7 (related to Permit Condition
15 S9.D).

16 C. Low impact development (Issue F.1.b)

17 The Federal Clean Water Act requires that NPDES permits issued for discharges from
18 MS4s must reduce pollution to the “maximum extent practicable” (MEP). 33 U.S.C. 1342
19 (p)(3)(B)(iii). Washington State law contains a similar concept in requiring that all state and
20 federal wastewater discharge permits should incorporate permit conditions which require “all
21 known, available, and reasonable methods to control toxicants in the applicant’s wastewater,” the

1 so-called AKART standard. RCW 90.48.520, 90.48.010. See also RCW 90.52.040 and RCW
2 90.54.020(3)(b). Ecology's rules define "AKART" as "the most current methodology that can
3 be reasonably required for preventing, controlling, or abating the pollutants associated with a
4 discharge." WAC 173-201A-020.

5 PSA contends that that the Phase I permit fails to require the use of low impact
6 development (LID) techniques, and that the use of these techniques is required for compliance
7 with the MEP and AKART standards. The Board concludes that this complex issue is not
8 amendable to summary judgment, and should proceed to hearing.

9 In its motion, PSA anticipated that Ecology would respond that it lacks the authority to
10 impose LID requirements because to do so would constitute an intrusion into land use regulation.
11 Instead, Ecology responded that the FWCA and the WPCA do not preclude land use controls as
12 a way of meeting statutory objectives.⁸ Here, no party challenges Ecology's authority to require
13 LID techniques if they are necessary to meet the AKART or MEP standards, and the Board
14 agrees that Ecology does have the necessary statutory authority to define certain LID techniques
15 as permit terms or as AKART.⁹ As pointed out by PSA, it is impossible to untangle stormwater
16

17 ⁸ Ecology's Response Brief, at 8 ("While the federal Clean Water Act and the state Water Pollution Control Act do
18 not preclude land use controls as a way of meeting statutory objectives, neither of these Acts expressly provide for
land use controls.")

19 ⁹ Ecology has both a broad duty and broad authority to condition NPDES and waste discharge permits to protect the
20 quality of Washington's waters. See RCW 90.48.180 (Ecology has authority to specify conditions necessary to
21 avoid discharges from pollution); RCW 90.48.260 (Ecology is the State Water Pollution Control Agency for all
purposes of the FCWA and is authorized to "take all action necessary to . . . meet the requirements of that act.");
RCW 90.48.520 (Ecology shall condition discharge permits to require all known, available, and reasonable, methods
to control toxicants). See also RCW 43.21A.020 (Ecology is established as "a single state agency with the authority
to manage and develop our air and water resources in an orderly, efficient, and effective manner and to carry out a
coordinated program of pollutions control involving these and related land resources."); RCW 90.48.035 (Ecology is

1 management from land use. Even the commonly accepted water quality technique of requiring a
2 stormwater retention pond at a site takes up significant area in a development, potentially
3 reducing the number of buildable sites and constituting a land use restriction. The challenge, as
4 recognized by both Ecology and PSA, is to most effectively harmonize Ecology's authority over
5 site design and land use standards under the water pollution laws with other state laws that are
6 specifically aimed at addressing land use on a broader scale.

7 The Phase I Permit does require the use of some LID techniques. For example, it
8 requires permittees to require on-site stormwater management BMPs to infiltrate, disperse and
9 retain stormwater on site to the maximum extent feasible without causing flooding or erosion
10 impacts. *Permit, Appendix I § 4.5, Young Decl., Ex. I, at 2-26 through 2-30*. This requirement
11 includes use of roof downspout controls and dispersion and soil quality BMPs or their functional
12 equivalent.

13 Whether additional LID techniques are necessary to meet the MEP and/or AKART
14 standards is a factual matter. PSA, relying on the *Port of Seattle* decision, tries to make this a
15 legal question by arguing that Ecology was required to do an "AKART" analysis on the "suite of
16 LID techniques" prior to issuing the permit, and that because this analysis wasn't done, the
17 permit is invalid and should be remanded to Ecology. *See Port of Seattle v. Ecology*, PCHB
18 Nos. 03-140, 03-141 and 03-142 (October 18, 2004) *affirmed in part and reversed in part*, 151
19 Wn. 2d. 568, 90 P.3d 659 (2004) (The PCHB held, following a factual hearing, that Ecology's
20 failure to evaluate whether secondary treatment of wastewater from the airport was economically

21 instructed to promulgate rules "it shall deem necessary" for maintaining clean water "including but not limited to
rules and regulations relating to standards of quality for waters of the state . . .").

1 reasonable, when its permit writer considered the treatment to be known and available, was an
2 error justifying a remand to Ecology for further AKART consideration). PSA's argument
3 attempts to turn an amorphous, open-ended "suite" of techniques into a single known and
4 available technology that Ecology failed to evaluate for economic feasibility prior to issuance
5 of the permit. This argument ignores the factual showing necessary to establish which LID
6 techniques, not now included in the permit, are known, available, and reasonable technology, not
7 for control of stormwater on individual sites, but for programmatic permits issued to
8 municipalities for discharges from MS4s.¹⁰

9 The Board concludes that issue F.1.b is not amenable to summary judgment, and defers
10 ruling on this issue until after a factual hearing.¹¹

11 D. Existing Development (Issue F.2)

12 The two provisions in the Phase I permit addressing existing development, as stated
13 above in Section II.C., call for the development of programs to reduce impacts from existing
14 development. PSA contends these provisions do not provide any objective standards by which to
15 judge compliance i.e. minimum amount of dollars to be spent on construction, minimum number
16 of facilities to be built, specific pollution control goals that should be met. PSA contends that the

17 ¹⁰ Ecology raises a number of concerns about requiring LID techniques, including effectiveness, maintenance,
18 enforceability, and differing site characteristics. *Young Decl., Ex. 2.*

19 ¹¹ The Phase I Permittees, in footnote 74 in their response brief, indicate their opinion that many of exhibits filed
20 with PSA's motion should be stricken from the record or disregarded because they are inadmissible for various
21 reasons. PSA responds, in its reply brief at footnote 13, that if the permittees wanted to move to strike any of these
exhibits, they should have filed a motion to strike. The Board's presiding officer agrees with PSA on this point, and
declines to formally strike exhibits in response to a footnote in a brief. It should be noted, however, that some of the
documents questioned in the footnote were already stricken in response to a motion to strike filed on February 4,
2008, and granted in part by order issued on February 14, 2008. Further, the factual weight given to any of these
exhibits is limited given that the Board has determined the issue they were offered to support is not amenable to
summary judgment.

1 lack of objective standards violates AKART and MEP, because there is nothing in the provision
2 that prevents permittees from adopting a *de minimis* reduction that meets the letter of the
3 requirement, but fails to reduce pollutants to the level required by MEP and/or fails to apply
4 AKART. PSA also contends that because Ecology does not review every SWMP, but instead
5 relies upon the standards contained in the permit to ensure that the SWMPs are adequate, the
6 combination of lack of review and lack of objective standards results in impermissible self-
7 regulation.

8 The Board does not agree with PSA's initial premise that the permit contains no objective
9 standards for existing development. The source control condition, Condition S5.C.7, contains
10 several objective requirements including adoption and implementation of ordinances,
11 inventorying of businesses and identifying potential sources, implementation of a program to
12 audit, implementation of an enforcement policy, and training of staff. The structural stormwater
13 control provision, Condition S5.C.6, requires permittees to list planned projects that are
14 scheduled for implementation during the permit term, document progress in meeting program
15 goals and planning process, and providing information for expected impacts from individual
16 projects. These are all objective standards which must be met through implementation of the
17 permit's SWMP requirements.

18 The real question raised by this issue is whether these requirements are enough to satisfy
19 the AKART and MEP standards. This is an issue of fact that should proceed to hearing.
20
21

1 E. Compliance (Issue F.5)

2 Through the FCWA, Congress set out a number of deadlines related to permits for
3 industrial and large municipal dischargers, including a deadline for EPA to establish regulations
4 setting forth permit application requirements, a deadline for filing permit applications, and a
5 deadline for EPA's approval or denial of the permits. 33 U.S.C. 1342 (p)(4)(A). The final
6 sentence in 33 U.S.C. 1342 (p)(4)(A) states: "Any such permit shall provide for compliance as
7 expeditiously as practicable, but in no event later than 3 years after the date of issuance of the
8 permit."

9 PSA argues that several of the conditions of the Phase I permit violate this statutory
10 standard because the conditions allow actions required by the permit to occur outside of the
11 deadlines set out in 33 U.S.C. 1342 (p)(4)(A). PSA reads this statutory provision as requiring all
12 timelines set out in the permit to meet this three-year compliance timeline set out in the statute.
13 The Phase I Permittees argue that PSA is misreading 33 U.S.C. 1342 (p)(4)(A), and that the
14 timelines set out in the statute refer to times to correct permit non-compliance, not to timelines to
15 achieve compliance with water quality standards. Ecology argues that the timelines contained in
16 33 U.S.C. 1342 (p)(4)(A) apply to EPA's rulemaking, not to conditions in discharge permits.
17 Ecology also points out that PSA is apparently not contending that the permit must require
18 compliance with water quality standards within 3 years, because in a prior motion it has
19 advocated for compliance with water quality to occur within 10 years. Ecology argues that, at a
20 minimum, 33 U.S.C. 1342 (p)(4)(A) must be read as referring to compliance with the MEP
21

1 standard, and therefore the question becomes whether the timelines set out in the statute are
2 practicable.

3 While the question of the correct interpretation of the statute may ultimately be legal in
4 nature, the Board concludes that in this context the legal issue is intertwined with the factual
5 issues related to the requirements and operation of the “compliance pathway” contained in
6 Condition S4.F. The Board has ruled on the Condition S4 dispositive motions that the Condition
7 S4.F issue will proceed to hearing. Prior to ruling on issue F.5 in the Phase I (remaining issues)
8 case, the Board desires a more complete understanding of the operation of Condition S4.F.
9 Therefore, the Board declines to rule on issue F.5 on summary judgment, and defers this issue to
10 the Phase I (remaining issues) factual hearing.

11 F. Permit Modification (Issue F.6)

12 PSA challenges Phase I Permit condition S5.C.5.b.ii, because it allows permittees to use
13 either the site planning process, BMP selection and design criteria in the 2005 Stormwater
14 Management Manual for Western Washington, or an equivalent manual approved by Ecology.
15 PSA argues that this condition is functionally the same as the one the Board found unlawful in
16 the Construction Stormwater General Permit because it allows for the substitution of alternative
17 manuals without any guarantee of public review or input, and without any ability for an
18 aggrieved person to seek administrative review of a substitution decision that effectively changes
19 the substantive requirements of the general permit. *See Associated General Contractors v.*
20 *Ecology*, PCHB Nos. 05-157, 158 and 159, Order Granting PSA’s Fourth Motion for Partial
21 Summary Judgment (January 4, 2007).

1 Ecology and the Phase I Permittees respond that this condition is different than the one
2 invalidated in *Associated General Contractors* because: (1) the permit contains specific
3 standards for the approval of equivalent manuals, and (2) the permittees are governmental
4 entities that are already required by state law to utilize open and public decision-making
5 processes.

6 The Board agrees with PSA that these differences do not fully address the problem identified
7 in *Associated General Contractors*. In that case, the Board was troubled by the fact that
8 alternative manuals would not necessarily be adopted through a public process. The Board was
9 also concerned that because the alternative manuals were not incorporated into the general
10 permit at the time of the permit's approval, and because Ecology did not have a formal process
11 for making its later equivalency determination, there was no opportunity for the public to
12 challenge the alternative manuals adequacy. *Id.*

13 The first concern regarding a lack of public process for the alternative manuals is addressed
14 in most cases by the fact that the permittees here, unlike in *Associated General Contractors*, are
15 governmental entities. However, the second concern is not. While local governments may
16 provide a public involvement process around the creation of their SWMPs and alternate
17 stormwater manuals, there is still no notice, comment, or appeal period associated with
18 Ecology's decision to consider a proposed manual equivalent to the Ecology stormwater manual
19 for purposes of compliance. This lack of process is not addressed by the inclusion of
20 requirements for alternative manuals, since there is still no opportunity available to challenge
21 Ecology's determination that these standards are met. It is Ecology's equivalency determination

1 that constitutes the modification of the General Permit because it has the potential to change the
2 substantive requirements of the permit.

3 The Board concludes that this approach, like that in the Construction Stormwater General
4 Permit, creates the potential for an unauthorized modification of the permit. Allowing the use of
5 an alternative manual approved by Ecology after completion of the permit modification process
6 outlined in WAC 173-220-190 and 40 C.F.R. § 122.62, § 122.63 and § 124.5, would remedy the
7 deficiency in public process. With this modification, the Board concludes Condition S5.C.5.b.ii
8 would be in compliance with state and federal law.

9 Based on the foregoing analysis, the Board enters the following:

10 ORDER

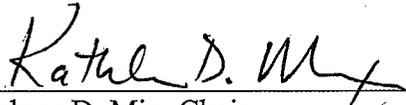
- 11 1. The Board denies summary judgment to the Ports, and grants summary judgment to
12 Ecology on issues E.1, E.2, E.3 and E.7.
- 13 2. The Board denies summary judgment to PSA on F.1(b). The Board concludes that
14 Ecology does have the authority to require low impact development techniques, if, as
15 a factual matter, they constitute AKART. However, the determination of whether
16 low impact development techniques should have been required is a factual question
17 that will proceed to hearing.
- 18 3. The Board denies summary judgment to PSA on Issues F.2 (a) and (b). The Board
19 concludes that the permit does contain standards, but whether the standards are
20 adequate is a factual question that should proceed to hearing.
- 21 4. The Board denies summary judgment to PSA on Issue F.5 because it is a factual
issue.
5. The Board grants summary judgment to PSA on Issue F.6. Ecology shall replace
S5.C.5.b.ii with the following language (shown in underline):
 - ii. The local requirements shall include a site planning process and BMP selection and
design criteria that, when used to implement the minimum requirements in Appendix 1,

1 will protect water quality, reduce the discharge of pollutants to the maximum extent
2 practicable, and satisfy the state requirement under chapter 90.48 RCW to apply all
3 known, available, and reasonable methods of prevention, control and treatment (AKART)
4 prior to discharge. Permittees shall document how the criteria and requirements will
5 protect water quality, reduce the discharge of pollutants to the maximum extent
6 practicable, and satisfy the state AKART requirements.

7
8 Permittees who choose to use the site planning process, and BMP selection and design
9 criteria in the 2005 *Stormwater Management Manual for Western Washington*, or an
10 equivalent manual approved by Ecology and incorporated into this permit in accordance
11 with the permit modification requirements of WC 173-220-190, may cite this choice as
12 their sole documentation to meet this requirement.

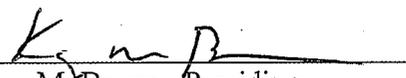
13
14 SO ORDERED this 8th day of April, 2008.

15
16 POLLUTION CONTROL HEARINGS BOARD

17
18 
19 Kathleen D. Mix, Chair

20
21 
William H. Lynch, Member


Andrea McNamara Doyle, Member

22
23 
24 Kay M. Brown, Presiding
25 Administrative Appeals Judge