

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



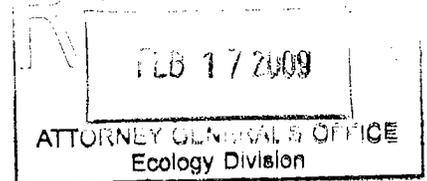
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STATE OF WASHINGTON
ENVIRONMENTAL HEARINGS OFFICE

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February 13, 2009



TO ALL PARTIES IN PHASE II:

RE: APPEALS OF PHASE II MUNICIPAL STORMWATER PERMITS
PCHB Nos. 07-22 & 07-023

Dear Parties:

Please find enclosed the Revised Concurrence and Dissent.

Sincerely,

William H. Lynch, Presiding

KDM/dj/P07-022 & 07-023

Enc.

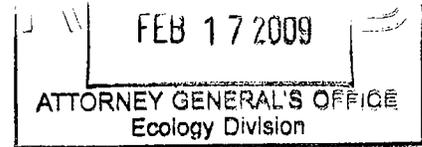
cc: Bill Moore, Ecology
Kathleen Emmett, Ecology

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 Feb 13 2009, 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

FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND ORDER

(PHASE II MUNICIPAL
STORMWATER PERMIT)

REVISED CONCURRENCE AND
DISSENT

I strongly concur with most of the majority opinion, but differ slightly with the majority on the issue of Low Impact Development (LID). My differences on LID pertain primarily to the timing of when Phase II jurisdictions can be expected to take certain actions to implement LID. I also believe that Ecology should be ordered to develop a performance standard for LID in order that LID can be implemented more widely and quickly.

A. Level of Permittees' Efforts and LID

With respect to the use of Low Impact Development, the majority directs Ecology to modify the Permit by setting forth additional requirements with respect to broader use of LID

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1 during this permit term, and in anticipation of the next. The additional requirements set forth by
2 the majority appear to be measures that can be implemented by many of the Phase II
3 jurisdictions, but I believe that they are beyond the capabilities of many other Phase II
4 jurisdictions during this Permit term. Because this is a general permit, I believe that the level of
5 effort required by permit conditions must be set at a point that can be reasonably achieved by all
6 of the jurisdictions. As explain below, I believe Ecology correctly identified the level of effort
7 required of Phase II permittees for this Permit cycle.

8 The majority opinion correctly identifies the resources and efforts of some Phase II
9 jurisdictions in complying with water quality laws. At the same time, however, these same
10 jurisdictions are faced with declining revenues and competing demands that greatly impact the
11 general health and welfare of their citizens. These competing demands are illustrated by
12 additional testimony provided by the city and county representatives at hearing.

13 Camas

14 Camas is a small city with a population of approximately 16,700. Camas has 2.9 full-
15 time equivalent employees working in the area of stormwater utilities. This includes street
16 sweeping that is required under the city's NPDES permit, as well as inspecting and cleaning
17 catch basins and detention ponds, and engineering staff. The city is just starting to map its
18 outfalls, which is estimated at about 90 miles. Mapping outfalls involves walking the streams.
19 Camas has no monitoring plan yet. It just adopted a stormwater management plan in March
20 2008. Camas thinks it is on track with being able to meet the current Phase II Permit
21 requirements. Camas has been able to borrow some expertise from neighboring Washougal on

1 occasion, but Washougal has little to spare. Camas employees know a little about LID, most
2 don't really have in-house expertise. It is difficult for the city to send employees away for
3 multiple days of training. Camas had to let a police officer position go unfilled and has no
4 money currently budgeted for street maintenance in 2009. The city is looking at substantial
5 increases in sewer and water rates to comply with current requirements. *Brachmann Testimony,*
6 *Ex. COA-0024.*

7 Port Angeles

8 Port Angeles has a population of approximately 19,200, and is one of the "bubble cities"
9 included under the Phase II Permit. The city created a stormwater utility five years ago to raise
10 money for capital projects to address numerous problems of overflowing within the city during
11 storm events. The stormwater utility was not created for addressing Phase II requirements. The
12 city increased pipe sizes in some of the problem areas. Growth in the city has been flat and the
13 Rainier plant has closed. Tax revenues in the city have been down and services have been cut.
14 The City cut support for the senior center, the marine life center, and community parks, and has
15 closed the swimming pool. Street repairs have not been done in three or four years other than
16 minor patching. The current stormwater budget is \$720,000 after having doubled the utility in
17 January 2007. About \$600,000 of the budget is spent on staff to comply with the Permit. Little
18 money is left over to address the necessary capital problems, and a majority of those problems
19 still exist. More and more people are becoming delinquent with their utility payments. The city
20 is also under an agreed order with the state regarding sewage, which will cost between \$35 and
21

1 \$40 million. The city will need to correct its combined sewer overflows by 2015. *Cutler*

2 *Testimony.*

3 Port Angeles has at least 60 outfalls to creeks and 20 to the bay. The city estimates it has
4 about 2300 catch basins and 65 miles of conveyance. Although some city council members are
5 excited about the potential use of LID, it would be hard for the city to deal with a requirement to
6 use LID where feasible at this time and still meet other requirements. LID does take more time,
7 including time for inspections. Some developers in the area are excited about using more LID,
8 but for the typical developer it is more difficult. For example, with LID, equipment cannot be
9 driven over areas where the water is supposed to infiltrate. *Sperr Testimony.*

10 Kitsap County

11 Kitsap County is one of the larger Phase II jurisdictions. Approximately 170,000 people
12 live in unincorporated Kitsap County. Kitsap County has about 111,000 separate parcels in the
13 county, which vary in size. There are about 228 miles of system in the county, and more than
14 11,000 catch basins. In addition, there are about 1400 miles of ditches along the roadways.
15 Kitsap County has a \$5.9 million operating budget and a \$1.7 million capital budget. A \$4.8
16 million shortfall is projected in the county's general fund. The county has laid-off 28 people,
17 will lay-off an additional 4 employees at the end of 2008, and lay-off 5 more employees in 2009.
18 The city of Poulsbo and the U.S. Navy bases are served by the county's sewage system, which
19 needs \$70 million in improvements. The rates will need to be raised as a result of these
20 improvements. Kitsap County has some physical interconnections between its municipal
21 stormwater system and the federal government and local tribes. *Tucker Testimony.*

1 The stormwater fee pays about 20 percent of the stormwater effort in Kitsap County. The
2 road fund is used to supplement the fees money. The fee was established in 2006 according to a
3 rate structure tied to the level of service provided, among other factors. The stormwater fee
4 raised about \$6.2 million in 2007. Kitsap County did receive a \$75,000 grant from Ecology to
5 start-up stormwater efforts. The County has an interlocal agreement with Bremerton, Gig
6 Harbor, and Poulsbo for public education. The sewer treatment plant needs upgrading because
7 the pipe is not reliable and more capacity is needed. The current regional response is based upon
8 the 1992 Manual. Kitsap County needs to get up to speed with the 2005 Stormwater Manual,
9 which is plenty for it to address right now without requiring LID. The 2005 Manual will raise
10 the level of treatment along with Appendix 1. The stormwater pollution prevention plans
11 (SWPPPs) will require a much higher level of detail than what jurisdictions are currently
12 regulating at. Staff was trained on how to use new modeling techniques. The County is trying to
13 modify its code to adopt the surface water management manual. *Tucker Testimony.*

14 Kitsap County ranks in the higher quarter of permittees in terms of staff experience and
15 having a utility in place. There are 26.5 personnel in the county to address stormwater. Even so,
16 the County has trouble getting people with the necessary skill set because the county competes
17 with the U.S. Navy and Poulsbo for staff. Staff members often have a connection with the
18 military and can be recalled to military service. Education outreach has just started but it takes
19 time to do every piece of the permit. The Homebuilders Foundation received a grant from
20 Ecology regarding LID, but there is trouble in getting agreement on technical specifications even
21 without dealing with performance. More intensive investigation is required with a LID project

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1 because staff need to verify what the developer states in the proposal. There is no performance
2 standard for LID yet, and this could slow down the County's progress in meeting deadlines under
3 the Phase II Permit. Kitsap County will need to retrain its staff on LID, which is hard to do
4 without a performance standard. A performance standard is needed because when a developer
5 comes in with a project, staff needs to know if they are meeting the necessary requirement. It
6 would be useful if Ecology came up with a flow control standard that stated enough LID must be
7 used to reduce runoff by a certain percentage. In 2007, Kitsap County amended its stormwater
8 management manual and some aspects of its code to recognize certain parts of the PSAT LID
9 Manual. The county used Appendix 5B. It took about 40 hours to write the code changes over a
10 six to eight week period. Public hearings begin in July 2006 and went until February 2007.

11 *Tucker Testimony; Ex. Muni-175.*

12 Port Orchard

13 Port Orchard has a population of approximately 8500. Its principle industry is residential
14 – it is mostly a bedroom community where people work outside the community if they do work.
15 The city currently has an eight percent shortfall in its budget and is looking to cut costs. Port
16 Orchard recently adopted a stormwater utility ordinance. The city worked with Kitsap County
17 and has an interlocal agreement in place for public outreach and education. The city has
18 established an initial budget but money won't be collected through the utility until January 2009.
19 Port Orchard previously received a \$75,000 grant, with which they hired a consultant to do some
20 mapping. The city adopted a stormwater plan that basically follows Kitsap County's plan, which
21 is based on the 1991 stormwater manual. Port Orchard has eight staff in charge of water, sewer,

1 and parks facilities. The city had no carry-over in cash in 2008, so the police department won't
2 get additional staffing or cars. Port Orchard will rely upon plans adopted by Kitsap County
3 instead of trying to make their own code amendments. A number of businesses are just making
4 it within the city, even without the new stormwater charges. *Dorsey Testimony, Ex. COA-0017.*

5 It is clear that by just comparing these four jurisdictions that there is a wide range of
6 capabilities within the Phase II group of permittees. Ecology recognized that Phase II
7 jurisdictions have less expertise and staff, which will affect their ability to use LID this permit
8 cycle. Ecology is trying to move the group of Phase II permittees together as a whole. *O'Brien*
9 *Testimony, Moore Testimony.* It is also clear that Phase II permittees have competing priorities
10 that make it difficult for many of these jurisdictions to go beyond what Ecology has already
11 required in the Phase II Permit.

12 Additionally, I believe that some lag in timing between Phase I and Phase II jurisdictions
13 for implementing LID elements is appropriate. The experience of Phase I jurisdictions with LID
14 may lead to the development of model codes or overlay ordinances that will assist Phase II
15 permittees to implement LID in the next version of the Permit at a much reduced cost. At this
16 point, I would find that requiring Phase II permittees to focus on developing and revising their
17 codes to allow for the use of LID techniques is reasonable for this permit cycle.

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19 B. Development of a Performance Standard for LID

20 Ecology is considering developing some placeholder language to put into the Phase I
21 Permit regarding the use of LID through a stakeholder process. This may include the

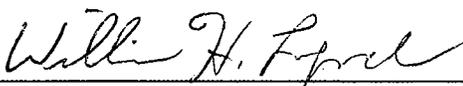
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1 development of a performance standard. Every expert agreed that a performance standard would
2 help establish the boundaries for local jurisdictions' use of LID. Kitsap County indicated that it
3 is hard to train staff on LID without a performance standard, and suggested what such a
4 performance standard could look like.

5 I believe that Ecology's development of a performance standard is critical for the
6 implementation of LID practices by both Phase I and Phase II permittees. Recognizing that only
7 the Phase II Permit is currently before the Board, I would direct Ecology to develop a LID
8 performance standard under the Phase II Permit. At the same time, I would not establish a
9 specific deadline for the performance standard to be developed, recognizing that Ecology has
10 limited resources and will work in good faith to accomplish this task. I would anticipate that this
11 could be accomplished within the term of this Permit cycle.

12 SO ORDERED this 13th day of February, 2009.

14 **POLLUTION CONTROL HEARINGS BOARD**

15
16 
17 WILLIAM H. LYNCH, PRESIDING (Phase II)