

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
OF THE STATE OF WASHINGTON

WHATCOM COUNTY,)
)
 Appellant,)
 vs.)
)
 WASHINGTON STATE)
 DEPARTMENT OF ECOLOGY,)
)
 Respondent.)

APPEAL OF PERMIT
NO. WAR04-5557

cc: Enf. Database Coord.
 Rev/Rec - Cost Recovery
 Ann Ludlow
 File - Fax to ATG
 ATG Docket Clerk
 Bill Morse (HQ 100)

initials: MC 2/20/07

I. Appellant's Name and Address:
Whatcom County (Public Works Department)
322 North Commercial Street, Suite 210
Bellingham, WA 98225

II. Date and Docket Number of Permit Appealed:
January 17, 2007 (date of issuance)
Permit WAR04-5557

III. Description of substance of permit that is subject to appeal:

The permit subject to appeal is the National Pollutant Discharge Elimination System and State Waste Discharge General Permit for Discharges from Small Municipal Separate Storm Sewers in Western Washington (the phase II municipal stormwater permit for Western Washington). This permit issued by the Washington State Department of Ecology (DOE) identifies cities and areas within counties in Western Washington that are subject to the permit, and establishes conditions that these

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1 jurisdictions must meet in the operation of their MS4s (municipal separate storm water
2 systems).

3 IV. Clear, Separate, and Concise Statement of every error alleged to have been
4 committed:

5 The Department (DOE) committed error by:

- 6 1) including within the scope of permit coverage the Urban Growth Areas of the
7 City of Ferndale, except as those urban growth areas coincide with, or are
8 contiguous to the Urbanized Areas established and depicted by the U.S. Census
9 Bureau based upon the 2000 U.S. Census;
- 10 2) including the City of Ferndale within the list of jurisdictions that are required to
11 seek coverage under the permit;
- 12 3) not providing criteria or procedure for the exclusion of urban growth areas which
13 otherwise could be excluded from coverage under the criteria set forth in Section
14 S1. C of the permit.

15 V. Clear and Concise Statement of Facts upon which Whatcom County relies to
16 sustain its statements of error:

- 17 1) A very small portion of the City of Ferndale is included within the Urbanized
18 Area determined by the U.S. Census Bureau based upon the 2000 U.S. Census.
- 19 2) The area of the City of Ferndale that is included within the census-defined
20 Urbanized Area includes a population of less than 1000 people and:
- 21 a. Ferndale's MS4 is not contributing substantially to the pollutant loadings
22 of a physically connected MS4 that is regulated by the NPDES
23 stormwater program;
- 24 b. The discharge of pollutants from Ferndale's MS4 have not been
25 identified as a cause of impairment of any water body to which the MS4
discharges; and

1 c. There is no EPA approved TMDL for this area, and thus no stormwater
2 controls on the MS4 have been identified as necessary.

3 3) Because of the foregoing facts stated in #2 above, the City of Ferndale is not
4 required to obtain coverage under the newly issued Phase II permit (see S1. C at
5 the bottom of page 2 of 50 and top of page 3 of 50). The City of Ferndale's
6 coverage under the permit is not properly required under the criteria established
7 in the permit, but is voluntary, based upon its receipt of grant money from DOE.

8 4) Furthermore, in accord with and in confirmation of this conclusion, the City of
9 Ferndale is not, and does not have a "regulated small MS4" because under the
10 language within the permit that defines such an entity, it is not a regulated MS4
11 if it is eligible for a waiver or exemption under the terms of S1. C as set forth in
12 #2 above. Since Ferndale is eligible for a waiver or exemption under S1. C, by
13 virtue of the definition that DOE itself provides in the permit, Ferndale is not a
14 "regulated small MS4" and thus it is not required to apply for and obtain
15 coverage under the permit.
16

17 5) The provision that addresses the extent of coverage for a county required to
18 have coverage under the permit, provides that "the geographic area of coverage
19 is the urbanized areas and urban growth areas associated with cities under the
20 jurisdictional control of the county. The geographic area of coverage also
21 includes any urban growth area contiguous to urbanized areas under the
22 jurisdictional control of the county." The language defining the permit's
23 geographic coverage may be grammatically flawed, but taking it at face value, it
24 appears to say that urban growth areas are covered under the permit if they are
25

1 associated with cities under the jurisdictional control of the county. Not only is
2 the City of Ferndale not required to be covered as defined in the permit, but the
3 City of Ferndale is not under the jurisdictional control of the County, thus the
4 inclusion of its urban growth areas under the coverage area is an erroneous
5 application of the coverage criteria. It may be that DOE intended to include
6 urban growth areas under the jurisdictional control of the County if those areas
7 are associated with cities that are required to be regulated under the permit,
8 but that is not what the permit states. As it stands, Ferndale's urban growth
9 areas are included under the coverage of the County's permits simply because
10 Ferndale chose to be covered under the permit though it was not required to be
11 so covered. The County has asserted that it is an error of law to include
12 Ferndale's urban growth areas that are not adjacent to urbanized areas simply
13 because Ferndale voluntarily opted for coverage under the permit.

- 14
- 15 6) The provision of the permit under which Ferndale's urban growth areas are
16 ostensibly included within coverage, without recourse by the County, is patently
17 unfair and unreasonable. While Ferndale, which is immediately adjacent to and
18 partially within an Urbanized Area, can choose not to apply for coverage under
19 the permit based upon the minimal population and pollution arising from the
20 area, the urban growth areas of the same city which are even further away from
21 the Urbanized Area and are populated at a significantly lower level of density
22 than the City, are declared by DOE to be included under the permit simply
23 because the adjacent City has voluntarily chosen to be covered by the permit.
24
25

1 This is grossly disparate treatment of the respective parties, with no rational
2 basis for such disparity.

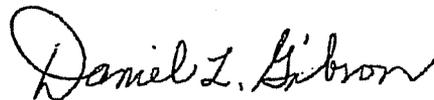
3 VI. Relief Requested.

4 Whatcom County requests that the urban growth areas of the City of Ferndale that
5 are not contiguous to or included within the Urbanized Area as depicted upon the 2000
6 U.S. Census map of the Urbanized Area for Bellingham, Washington, be removed from
7 the area covered, and required to be covered, by the permit in issue here, and that the
8 permit be revised accordingly.

9
10 The County further requests that the effectiveness of the permit in these areas that
11 are the subject of this appeal be stayed by the Board during the pendency of this appeal
12 and any further proceedings attendant to the appeal.

13 DATED this 15th day of February, 2007.

14 Respectfully submitted,

15 

16 DANIEL L. GIBSON
17 WSBA # 11036
18 Asst. Chief Civil Deputy
19 Prosecuting Attorney
20 Attorney for Whatcom County