

POLLUTION CONTROL HEARINGS BOARD

FOR THE STATE OF WASHINGTON

ROSEMERE NEIGHBORHOOD ASSOCIATION,)	
COLUMBIA RIVERKEEPER, and NORTHWEST)	PCHB NO.
ENVIRONMENTAL DEFENSE CENTER)	
)
Appellant,)	NOTICE OF APPEAL – CLARK
)
vs.)	COUNTY PERMIT MODIFICATION
)
WASHINGTON STATE DEPARTMENT OF)	
ECOLOGY and CLARK COUNTY,)	
)
Respondents.)	

1. Identity of Appealing Parties and Representatives.

The appealing parties are:

Rosemere Neighborhood Association
P.O. Box 61471
Vancouver, WA 98666
(360) 281-4747

Columbia Riverkeeper
724 Oak Street
Hood River, OR 97031
(541) 965-0985
(541) 387-3029 [FAX]

Northwest Environmental Defense Center
10015 S.W. Terwilliger Boulevard
Portland, OR 97219
(503) 768-6673
(503) 768-6671 [FAX]

1 The representatives of the appealing parties are:

2 Jan Hasselman
3 Janette Brimmer
4 Earthjustice
5 705 Second Avenue, Suite 203
6 Seattle, WA 98104
7 (206) 343-7340
8 (206) 343-1526 [FAX]
9 jhasselman@earthjustice.org
10 jbrimmer@earthjustice.org

11 2. Identification of Other Parties.

12 The respondents in this appeal are the Washington State Department of Ecology and
13 Clark County.

14 3. The Decision Under Appeal.

15 This is an appeal of Washington State Department of Ecology's issuance of a formal
16 permit modification of the Phase I municipal stormwater permit. A copy the modified permit is
17 attached.

18 4. Short and Plain Statement Showing Grounds for Appeal.

19 The permit modification is contrary to law because it is inconsistent with the
20 requirements of the federal Clean Water Act and governing regulations promulgated by the U.S.
21 Environmental Protection Agency ("EPA"), the Washington State water pollution control laws
22 and governing regulations promulgated by the Washington State Department of Ecology
23 ("Ecology"), and other governing law and precedent.

24 5. Statement of Facts.

25 Under the Phase I Clean Water Act municipal stormwater permit issued by Ecology in
26 2007, all large cities and counties, including Clark County, must adopt controls that limit the
stormwater runoff from new development and redevelopment. One element of this duty is to

1 meet a specific hydrologic performance standard for “flow control,” i.e., the volume and rate of
2 runoff coming from a newly developed or redeveloped property. Flow control is required for all
3 new or re-development meeting certain size thresholds and is arguably the single most important
4 and consequential standard for addressing stormwater pollution from new construction. Flow
5 control is important because increased runoff from a site can carry increased pollutants, can
6 scour streams, adversely affect habitat, change the annual and seasonal patterns of runoff, and
7 have numerous other adverse effects.

8 Ecology adopted a technical standard for flow control through its stormwater manual.
9 That standard requires the use of detention or infiltration ponds to detain some of the post-
10 development runoff in a way that “matches” specific hydrologic parameters that existed prior to
11 European settlement.

12 Under the permit, all Phase I permittees were required to adopt ordinances that met the
13 permit standards by the summer of 2008. Clark County did not do so. Instead, several months
14 late, it adopted a much weaker flow control standard than the one required under the permit.
15 Under the new Clark County ordinance, developers are required to match the existing, developed
16 runoff condition rather than the “pre-settlement” hydrologic parameters required under the
17 permit. Under this standard, no improvement in highly degraded conditions is possible because
18 the baseline is effectively reset at the degraded condition. Moreover, since inadequately
19 controlled high flows cause ongoing harm every time there is a significant rain and flow event,
20 the developed runoff condition, which developers are allowed to meet, continues to degrade
21 downstream conditions over the life of the development. Water quality in Clark County is
22 already highly degraded due to stormwater runoff from new and existing development, with
23 many streams formally listed as impaired (failing to meet water quality standards) under the
24

1 Clean Water Act. Similarly, populations of salmon and steelhead, already so reduced that they
2 are listed under the federal Endangered Species Act (“ESA”), will continue to be adversely
3 affected by Clark County’s runoff.

4 Ecology issued a notice of violation against Clark County for adopting this weaker
5 standard in March of 2009. In response, Clark County proposed an alternative flow control
6 approach in which it would retain its current inadequate and unlawful standard, but keep track of
7 the flow control “deficit” between its standard and Ecology’s standard, and fund capital retrofit
8 projects that would mitigate for this difference at some point in the future, effectively
9 transferring a portion of the cost of meeting environmental compliance goals from private
10 developers to County taxpayers. On January 6, 2010, Ecology and Clark County executed an
11 “Agreed Order” adopting this alternative approach. Appellants formally appealed that Agreed
12 Order and initiated discovery and other proceedings, with a hearing date scheduled for
13 September 28-October 1, 2010. On September 1, 2010, the terms of the Agreed Order were
14 formally adopted as a modification of the Phase I permit applicable to Clark County.

15 There are a number of serious defects in the Agreed Order and permit modification that
16 give rise to these appeals. For example, Clark County is already required under this permit (like
17 its previous permit) to have a structural retrofit program for existing development and
18 redevelopment. It has had such a program in place for about a decade. It does not appear that
19 any new funding for the supposedly added mitigation for Clark County’s weak standard will be
20 sought or obtained. Rather, it appears that Clark County will keep doing what it has been doing
21 by way of retrofits that it is required to do already under the current permit, but now Clark
22 County will simply label the retrofits as mitigation for the inadequate flow control standard.
23 This is clearly much less than the permit requires in terms of overall stormwater improvements

1 in Clark County and will have the cumulative effect of further degradation from stormwater.

2 Moreover, the Agreed Order allows up to three years from the time of the development
3 before the mitigation has to be in place. The mitigation can also be anywhere within the same
4 Watershed Resource Inventory Area (“WRIA”)—thereby allowing increasing harm to one
5 waterbody in return for some possible future benefit to another waterbody. Relatedly, there
6 appears to be no technical or scientific basis for the concept that one can track a flow control
7 “deficit” and make it up in a different area with different physical conditions and soils.

8 Also, the mitigation duty only attaches to projects that are vested after April 2009, the
9 effective date of the new ordinances. This means that abundant new development that has
10 already vested under Washington law can occur in the years ahead with no mitigation at all.

11 While Clark County claims that using the existing conditions as the standard means
12 simply preserving the status quo, existing flow conditions almost always continue to degrade and
13 harm beneficial stream uses by scouring streams and depositing sediment every time there are
14 significant storm events. Use of this standard will allow new development to continue to
15 degrade water quality and contribute to water quality standard violations. Moreover, the status
16 quo will obviously not be preserved during the interim period where damage is allowed to occur
17 in return for future mitigation. It is scientifically and definitionally questionable that the “status
18 quo” can then be regained.

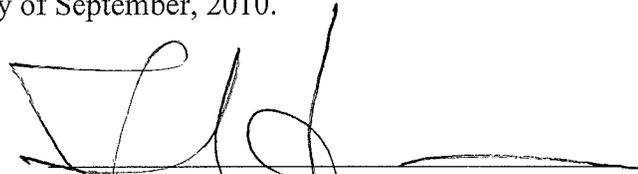
19 6. Relief Requested.

20 Appellants request that the Board order the Department of Ecology to rescind the Agreed
21 Order and permit modification, and order Clark County to come into compliance with the 2007
22 Phase I municipal stormwater permit immediately. Clark County should not be permitted to
23 issue any approvals or permits for development or redevelopment projects that do not need the
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1 Phase I permit standards. The Board should further direct Ecology and Clark County to ensure
2 that any building permits issued after August 2008 come into compliance with the appropriate
3 Ecology standard, or their impacts effectively and adequately mitigated.

4 7. Copies of this notice were sent to the respondents via Federal Express, on
5 September 1, 2010.

6 Respectfully submitted this 1st day of September, 2010.

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18 *Attorneys for Appellants Rosemere Neighborhood*
19 *Association, Columbia Riverkeeper, and Northwest*
20 *Environmental Defense Center*

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FOR THE STATE OF WASHINGTON

ROSEMERE NEIGHBORHOOD ASSOCIATION,)	
COLUMBIA RIVERKEEPER, and NORTHWEST)	PCHB NO.
ENVIRONMENTAL DEFENSE CENTER,)	
)	
Appellants,)	MOTION TO CONSOLIDATE
)	
vs.)	
)	
WASHINGTON STATE DEPARTMENT OF)	
ECOLOGY and CLARK COUNTY,)	
)	
Respondents.)	
)	

Pursuant to C.R. 42(a) and WAC 371-08-450, Rosemere Neighborhood Association et al. hereby respectfully move this Board for an order consolidating PCHB 10-013 with the above captioned appeal, filed herewith. Consolidation of the two appeals—which raise the identical factual and legal issues—is in the interests of justice and efficiency. Undersigned counsel has conferred with counsel for Clark County and Ecology about this motion. Ecology has indicated that it does not oppose this motion.

In Rosemere Neighborhood Association v. Ecology (10-013), appellants challenged an Agreed Order that allowed Clark County to implement a non-conforming flow control standard for new development in exchange for a plan to implement mitigation projects. Rosemere challenged the Agreed Order because of a number of flaws in that mitigation alternative. The parties have conducted extensive discovery and are preparing for a hearing beginning on September 28, 2010. The Board has also ruled on a summary judgment motion filed by

1 Rosemere related to the Agreed Order.

2 In issuing the Agreed Order, Ecology recognized that it was required by law to formally
3 adopt its terms through an appealable permit modification process. Agreed Order, at 3. It
4 initiated that process in April of 2010, and issued the final formal permit modification today,
5 September 1, 2010. The permit modification adopts the terms of Clark County's mitigation plan
6 in the identical manner as the Agreed Order. The Agreed Order expires once any appeals of the
7 permit modification are concluded. Id. at 6.

8 Rosemere is filing herewith an appeal of the permit modification. The appeal raises the
9 identical set of issues as Rosemere's appeal of the Agreed Order, except one.¹ There is no other
10 substantive difference between the two appeals.

11 No interest is served by litigating the Agreed Order and permit modification separately.
12 Accordingly, Rosemere requests that the Board consolidate the two appeals and proceed to
13 hearing on September 28. Rosemere is fully prepared to litigate all issues at that time. However,
14 if the Board is concerned about hearing Rosemere's appeal of the permit modification on the
15 current schedule, Rosemere proposes that the Board deny the motion to consolidate and proceed
16 to hearing on the Agreed Order.

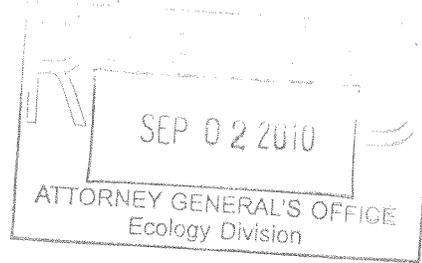
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23 ¹ That issue—Ecology's failure to formally adopt the terms of the Agreed Order as a permit
24 modification—is now moot and will be withdrawn. See Consolidated List of Legal Issues,
appellants issue no. 6.

1 Respectfully submitted this 1st day of September, 2010.

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ROSEMERE NEIGHBORHOOD ASSOCIATION,)	
COLUMBIA RIVERKEEPER, and NORTHWEST)	PCHB NO.
ENVIRONMENTAL DEFENSE CENTER,)	
)
Appellants,)	CERTIFICATE OF SERVICE
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vs.)	
)
WASHINGTON STATE DEPARTMENT OF)	
ECOLOGY and CLARK COUNTY,)	
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Respondents.)	
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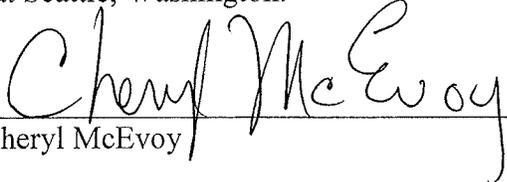
I am a citizen of the United States and a resident of the State of Washington. I am over 18 years of age and not a party to this action. My business address is 705 Second Avenue, Suite 203, Seattle, Washington.

On September 1, 2010, I served a true and correct copy of the following documents on the parties listed below:

1. Notice of Appeal-Clark County Permit Modification;
2. Motion to Consolidate; and
2. Certificate of Service.

1 I, Cheryl McEvoy, declare under penalty of perjury that the foregoing is true and correct.

2 Executed on this 1st day of September, 2010, at Seattle, Washington.

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4 Cheryl McEvoy

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