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3 POLLUTION CONTROL HEARINGS BOARD

4 FOR THE STATE OF WASHINGTON

5 ROSEMERE NEIGHBORHOOD ASSOCIATION,) )  
6 COLUMBIA RIVERKEEPER, and NORTHWEST ) PCHB NO.  
7 ENVIRONMENTAL DEFENSE CENTER ) )  
8 Appellant, ) NOTICE OF APPEAL  
9 vs. ) )  
10 WASHINGTON STATE DEPARTMENT OF ) )  
11 ECOLOGY and CLARK COUNTY, ) )  
Respondents. ) )

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12 1. Identity of Appealing Parties and Representatives.

13 The appealing parties are:

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

17 Columbia Riverkeeper  
18 724 Oak Street  
19 Hood River, OR 97031  
(541) 965-0985  
(541) 387-3029 [FAX]

20 Northwest Environmental Defense Center  
21 10015 S.W. Terwilliger Boulevard  
22 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 the Washington State Department of Ecology Agreed Order #7273,  
16 issued on January 7, 2010. A copy of the Agreed Order is attached.

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

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

23 5. Statement of Facts.

24 Under the Phase I Clean Water Act municipal stormwater permit issued by Ecology in  
25 2007, all large cities and counties, including Clark County, must adopt controls that limit the  
26 stormwater runoff from new development and redevelopment. One element of this duty is to  
meet a specific hydrologic performance standard for “flow control,” i.e., the volume and rate of

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

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

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

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1 are listed under the federal Endangered Species Act (“ESA”), will continue to be adversely  
2 affected by Clark County’s runoff.

3 Ecology issued a notice of violation against Clark County for adopting this weaker  
4 standard in March of 2009. In response, Clark County proposed an alternative flow control  
5 approach in which it would retain its current inadequate and unlawful standard, but keep track of  
6 the flow control “deficit” between its standard and Ecology’s standard, and fund capital retrofit  
7 projects that would mitigate for this difference at some point in the future, effectively  
8 transferring a portion of the cost of meeting environmental compliance goals from private  
9 developers to County taxpayers. On January 6, 2010, Ecology and Clark County executed an  
10 “Agreed Order” adopting this alternative approach. No formal permit modification has yet been  
11 proposed or initiated.

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

22 Moreover, the Agreed Order allows up to three years from the time of the development  
23 before the mitigation has to be in place. The mitigation can also be anywhere within the same  
24

1 Watershed Resource Inventory Area (“WRIA”)—thereby allowing increasing harm to one  
2 waterbody in return for some possible future benefit to another waterbody. Relatedly, there  
3 appears to be no technical or scientific basis for the concept that one can track a flow control  
4 “deficit” and make it up in a different area with different physical conditions and soils.

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

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

16 Adequately funding for this program in the future is likely to outpace the actual available  
17 funding by millions of dollars per year. There are no “financial assurances” in the agreed order  
18 that the mitigation will actually come to pass. Similarly, there are no assurances, or even a  
19 requirement in the order, that the mitigation projects will be adequately monitored and  
20 maintained in perpetuity. There are also no assurances regarding measurement of the needed  
21 mitigation nor standards for how the mitigation will make up for and correct any damage from  
22 the initial failure to meet standards.

23 The Agreed Order significantly changes Clark County’s burden under the Phase I permit,  
24

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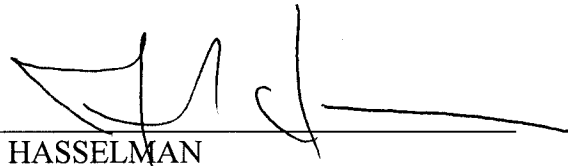
1 but it was not adopted pursuant to permit modification procedures, and no process was utilized to  
2 inform and hear from the public or other stakeholders (such as Tribes, other state government  
3 agencies, or federal environmental officials) prior to execution of the Agreed Order. Nor was the  
4 Agreed Order adopted pursuant to Ecology standards that govern the consideration and adoption  
5 of alternative permit requirements.

6 6. Relief Requested.

7 Appellants request that the Board order the Department of Ecology to rescind the Agreed  
8 Order and order Clark County to come into compliance with the 2007 Phase I municipal  
9 stormwater permit immediately. Pursuant to the language of the Agreed Order, Clark County  
10 should not be permitted to issue any approvals or permits for development or redevelopment  
11 projects that do not need the Phase I permit standards. The Board should further direct Ecology  
12 and Clark County to ensure that any building permits issued after August 2008 come into  
13 compliance with the appropriate Ecology standard, or their impacts effectively and adequately  
14 mitigated.

15 7. Copies of this notice were sent to the respondents certified mail, return receipt  
16 requested, on February 1, 2010.

1 Respectfully submitted this 1<sup>st</sup> day of February, 2010.

2  
3 

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13 *Attorneys for Appellants Rosemere Neighborhood*  
14 *Association, Columbia Riverkeeper, and Northwest*  
15 *Environmental Defense Center*

POLLUTION CONTROL HEARINGS BOARD  
FOR THE STATE OF WASHINGTON

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

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

- 1. Notice of Appeal (with attachment); and
- 2. Certificate of Service.

Department of Ecology  
Appeals Coordinator  
P.O. Box 47608  
Olympia, WA 98504-7608

- via facsimile
- via overnight courier
- via certified mail, return receipt requested
- via first-class U.S. mail
- via legal messenger
- via email



1 Bill Baron  
Clark County Administrator  
2 Board of Clark County Commissioners  
1300 Franklin, 6<sup>th</sup> Floor  
3 Vancouver, WA 98666-5000

- via facsimile
- via overnight courier
- via certified mail,  
return receipt requested
- via first-class U.S. mail
- via legal messenger
- via email

4  
5 Ronald L. Lavigne  
6 Senior Counsel  
Office of Attorney General  
7 Ecology Division  
P.O. Box 40117  
8 Olympia, WA 98504-0117  
**Street Address:**  
9 2425 Bristol Court S.W., 2<sup>nd</sup> Floor  
Olympia, WA 98502  
10 (360) 586-6770  
(360) 586-6760 [FAX]  
11 ronaldl@atg.wa.gov  
*Attorneys for Respondent Department of Ecology*

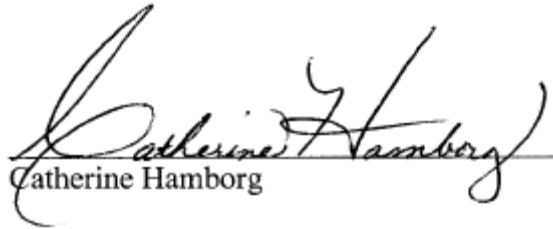
- via facsimile
- via overnight courier
- via certified mail
- via first-class U.S. mail
- via legal messenger
- via email

12  
13 E. Bronson Potter  
Senior Deputy Prosecuting Attorney  
Clark County Prosecuting Attorney's Office  
14 P.O. Box 5000  
Vancouver, WA 98666-5000  
15 **Street Address:**  
1013 Franklin Street  
16 Vancouver, WA 98660-3039  
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17 (360) 759-5946 [FAX]  
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- via certified mail
- via first-class U.S. mail
- via legal messenger
- via email

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1 I, Catherine Hamborg, declare under penalty of perjury that the foregoing is true and  
2 correct. Executed on this 1<sup>st</sup> day of February, 2010, at Seattle, Washington.

3  
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5   
6 Catherine Hamborg

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25 *Earthjustice*  
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**ATTACHMENT**

RECEIVED

DEC 31 2009

STATE OF WASHINGTON  
DEPARTMENT OF ECOLOGY

WA State Department  
of Ecology (SWRO)

IN THE MATTER OF )                    AGREED ORDER NO. 7273  
COMPLIANCE BY )  
Clark County )                    CL 09-122

To: Clark County Board of County Commissioners  
1300 Franklin Street  
Vancouver, WA 98666-5000

I. INTRODUCTION

This Agreed Order is entered into by the Washington State Department of Ecology (Ecology) and Clark County (County), hereinafter referred to collectively as "the Parties." The purpose of this Agreed Order is to establish the actions necessary to bring the County into compliance with Special Condition S5 of the National Pollutant Discharge Elimination System (NPDES) Phase I Municipal Stormwater Permit (Permit). The Permit is issued under the Water Pollution Control Act, Chapter 90.48 Revised Code of Washington (RCW), and Chapters 173-221 and 173-220 Washington Administrative Code (WAC). By signing this Agreed Order, the County agrees to comply with the compliance actions and schedule contained herein and to waive any appeal rights it may have with regards to the issuance of this Agreed Order.

Nothing in this Agreed Order shall in any way relieve the County of its obligations under the Permit.

II. RECOGNITION OF ECOLOGY'S JURISDICTION

Ecology's authority to enter into this Agreed Order includes but is not limited to the following:

RCW 90.48.030 provides that Ecology shall have the jurisdiction to control and prevent the pollution of streams, lakes, rivers, ponds, inland waters, salt waters, water courses, other surface and underground waters of the state of Washington.

RCW 90.48.120 authorizes Ecology to issue Administrative Orders requiring compliance whenever it determines that a person has violated or has created a substantial potential to violate any provision of Chapter 90.48 RCW or has failed to control the polluting content of waste to be discharged to waters of the state.

RCW 90.48.260 designates Ecology as the State Water Pollution Control Agency for all purposes of the Federal Clean Water Act and grants Ecology complete authority to administer the NPDES Permit Program.

The County agrees to not contest Ecology's jurisdiction and authority to administer this Agreed Order.

### III. BACKGROUND

Ecology's determination that a violation of the Permit has occurred is based on the following facts:

Clark County was issued coverage under the Permit on January 17, 2007. The Permit requires Clark County and other Phase I designated municipalities to initiate and implement a stormwater management program with specific milestones over the 5-year permit period.

Among these milestones is the requirement in permit condition S5.C.5.b.ii that Clark County adopt the Appendix I Minimum Requirements, Technical Thresholds, Definitions, and Adjustment and Variance Criteria for runoff controls from new development, redevelopment, and construction sites. The Permit includes both the Clean Water Act's requirement that municipal stormwater dischargers reduce pollutants to the maximum extent practicable and state requirements to prevent degradation of existing beneficial uses. One way the Permit meets state requirements to protect beneficial uses is by applying flow control BMPs to match duration of erosive flows caused by stormwater runoff from development and redevelopment. The purpose of this requirement is to reduce negative impacts on water quality, fish, other aquatic life, and streams caused by increased runoff from new development and redevelopment and to reduce impacts from existing development. These elements were to have been adopted by August 17, 2008.

On January 13, 2009, the Clark County Board of County Commissioners passed and adopted Ordinance No. 2009-01-01 repealing Clark County Code Chapter 40.380; adopting a new Chapter 40.385; amending Clark County Code section 40.450.040; and amending section 40.100.070. On January 26, 2009, Clark County submitted its adopted ordinances and manuals to Ecology.

Upon review, Ecology determined that in addition to being late, the County's ordinances and manual did not meet the criteria contained in Appendix I of the NPDES Phase I Municipal Stormwater Permit. Specifically, Clark County's adopted ordinance and manual did not comply with the standard flow control requirement, the 0.1 cubic foot per second flow threshold and other requirements in Appendix 1 of the Permit. Instead, Clark County adopted lesser standards and thresholds for control of runoff from new development and redevelopment which, unless otherwise mitigated, will not provide an equivalent amount of flow control as required by the Permit.

On March 17, 2009, Ecology issued Notice of Violation No. 6514 to the County describing the areas of non-compliance.

On April 8, 2009, the County responded to the Notice of Violation and proposed to enter into a compliance agreement with Ecology. The County proposes using a capital construction flow control mitigation program, in addition to other modifications to its codes and manual, to provide a level of flow control from new development and redevelopment projects equivalent to that required in S5.C.5 of the Permit. The County believes that the cumulative effects from existing development are much greater than incremental impacts attributable to new development as mitigated by the county code. The County believes that having the flexibility to select the most effective flow control locations to mitigate for existing development provides better protection of beneficial uses than applying the Ecology manual only to development project sites.

Ecology has reviewed the County's proposed flow control mitigation program, Ordinance No. 2009-01-01, and associated changes to the County's manual. Ecology believes that the County's proposed program for controlling runoff from new and redevelopment projects and construction sites will provide an equivalent level of flow control to that required in S5.C.5 of the Permit if implemented as described in this Agreed Order and attachment. This approach is consistent with the Permit wherein Permittees are allowed the option of proposing alternative methods of achieving the flow control standards. Alternative approaches are authorized through Ecology review and incorporation of alternative manuals into the Permit through a permit modification or reissuance.

The purpose of this Agreed Order is to identify the measures necessary to bring the County into compliance with the Permit and Appendix 1. The parties acknowledge that the County's stormwater program for controlling runoff from new and redevelopment projects and construction sites (manual, codes, and flow control mitigation program) must be incorporated into the Permit through a modification or reissuance. The Parties understand that any permit modification action is subject to public review, comment, and appeal. Based on Public comment on the proposed permit modifications, Ecology may make changes to the proposed permit conditions. Clark County reserves its right to appeal the permit modification if it does not agree with those changes. Once Clark County's program is incorporated as enforceable requirements under the Permit, this Agreed Order will be terminated.

#### IV. COMPLIANCE ACTIONS AND SCHEDULE

The County agrees to take the following actions to achieve compliance with the terms of the Permit:

1. Mitigate runoff from new development and redevelopment to the historic condition. To provide an equivalent level of flow control to that required in the Permit, the County will construct capital improvements that mitigate the impacts

of flow generated by new and redevelopment projects (mitigation obligation). The County will account for its stormwater mitigation obligation based on acreage impacted by new development and re-development projects that start construction and are vested after April 13, 2009.

An accounting system will be used to track development and re-development projects and the amount of acreage required for mitigation. The accounting system will identify each project and track the existing project land cover acreages that would be subject to the Permit-mandated standard flow control requirement. Three categories of existing land use cover (effective impervious area, pasture, and lawn/landscape) must be tracked at all new development and re-development sites. The County shall construct flow control facilities that, in total, serve an equal amount of these categories of existing land use cover. At mitigation sites, the historic condition to be matched shall be the duration of high flows as identified in Appendix 1 of the NPDES permit that are produced by an historic land cover as calculated by an approved continuous hydrologic model.

Clark County will not be permitted to accrue or share mitigation credits with other jurisdictions whose permits have not been modified for this approach.

The County will report the amount of the mitigation obligation incurred in each of the calendar years, beginning with 2009, as an attachment to the annual report required by the Permit. The County shall maintain funding sources adequate to comply with the requirements of this Agreed Order.

The County's flow control mitigation program is further described in Attachment A, *Clark County Development and Redevelopment Flow Control Mitigation Program*. Attachment A is incorporated herein and is a fully enforceable element of this Agreed Order. The County will implement the flow control mitigation program as described in Attachment A.

2. Changes to the County's codes and manual. The County will make the following changes to its codes and manual during the County's fall 2009 Biannual Code Review. These changes shall become effective no later than December 8, 2009.
  - a. Chapter 40.385 Stormwater and Erosion Control Code, Section 010.C.1.b. Exemptions. Remove the reference to agricultural/habitat protection plans as evidence of no stormwater discharge to the County's system.
  - b. Chapter 40.385 Stormwater and Erosion Control Code, Section 010.C2.f. Exemptions. Remove the exemption of infill and redevelopment projects from the 0.1 cfs flow increase threshold contained in Minimum Requirement 7.
  - c. Chapter 40.385 Stormwater and Erosion Control Code, Section 020.A.6.b. General Standards. In this section on applicability of the minimum requirements, change the valuation language in the section to use 50% of the tax assessment valuation of existing site improvements, rather than using 50% of the site tax valuation. In the interim, Clark County will

utilize the correct interpretations in Figure 2-2 of the County's stormwater manual that reads "Tax assessment valuation of the existing site improvements."

- d. Clark County Stormwater Manual, Section 3.3 Final Technical Information Report. Subsection E will be revised to require applicants to submit information explaining how the project will implement BMP T5.13, Soil Quality and depth.
3. Stipulated actions for failure to comply with Compliance Actions and Schedule. The County agrees that if it fails to timely meet any of the Compliance Actions and Schedule above it will, upon written notification from Ecology of non-compliance with this Agreed Order, immediately initiate amendment of its development regulations to require flow control equivalent to that required in S5.C.5 of the Permit and will thereafter not grant any approvals or permits for development or redevelopment projects which do not mitigate post-project runoff to the historical land cover in accordance with the Permit and which are submitted after April 13, 2009, until the County has brought itself into full compliance with the Compliance Actions and Schedule above. In the event of non-compliance with this Agreed Order, the County shall remain responsible for providing the entire mitigation obligation thus far incurred.

#### V. PROGRESS REPORTING

The County agrees to provide annual progress reports on implementation of the flow control mitigation program as an attachment to the Annual Report required by S9 of the Permit. These progress reports shall include the information identified in Attachment A.

In addition to the annual progress report above, the County will submit quarterly Tables 1, 2, and 3 from Attachment A for the first year (2010) of the Agreed Order. The tables will be submitted no later than 15 days following the end of the calendar quarter, starting April 2010.

In addition to the scheduled progress reporting above, the County agrees to immediately notify Ecology of any occurrence which is likely to result in noncompliance with the requirements of this Agreed Order. Such notification will state the nature of the potential noncompliance, the reason(s) for the occurrence, and the actions taken by the County to address the potential noncompliance.

#### VI. RECORD KEEPING

The County shall keep all records associated with this Agreed Order for at least five years and shall make records available to Ecology upon request.



#### VII. AMENDMENTS TO THE COMPLIANCE ACTIONS AND SCHEDULE

Amendments to the actions and schedule in Section IV may be requested for good cause. Extension of deadlines identified by this Agreed Order may be agreed to by the Parties only when requests for extensions are submitted in writing and in a timely fashion and where good cause exists for an extension. Good cause does not include the County's failure to plan, permit, or fund the actions identified in this order.

To be effective, all amendments must be signed by the person with signature authority for each Party and must be attached to this Agreed Order.

#### VIII. EFFECTIVE DATE

This Agreed Order is effective as of the date that it has been signed by both of the Parties.

#### IX. DISPUTE RESOLUTION

If a dispute arises between Ecology and the County regarding any term within this Agreed Order, the Parties shall attempt to resolve the dispute through informal resolution. A dispute shall be considered to have arisen when one Party notifies another, in writing, that there is a dispute. If the Parties cannot resolve the dispute informally within forty-five (45) days, the County shall serve on Ecology a written Statement of Position. Within thirty (30) days thereafter, Ecology shall provide the County with an administrative decision that may not be appealed. Violations of this Agreed Order may be addressed as provided in Section XI, Enforcement.

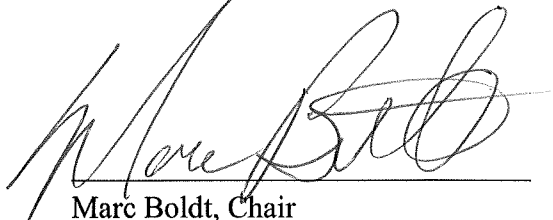
#### X. TERMINATION OF THE AGREED ORDER

This Agreed Order shall remain in effect until such time as the County's program for controlling runoff from new and redevelopment projects and construction sites, including the manual, codes, and flow control mitigation program, has been incorporated into the Permit through modification or reissuance. This Agreed Order will be terminated upon written notice from Ecology following the final termination of any appeal(s) of such Permit modification or reissuance.

#### XI. ENFORCEMENT

In addition to the stipulated actions for failure to comply with the compliance actions and schedule in paragraph IV.3 above, any failure to comply with this Agreed Order may result in the issuance of civil penalties of up to \$10,000 per day per violation or other actions, whether administrative or judicial, to enforce the terms of this Agreed Order.

Nothing in this Agreed Order shall in any way limit Ecology's authority to enforce the provisions of the Permit. However, Ecology will not take further enforcement actions for the violations identified in Notice of Violation No. 6514 as long as the County remains in compliance with the terms of this Agreed Order.

  
\_\_\_\_\_  
Marc Boldt, Chair  
Board of Clark County Commissioners


12-15-09  
\_\_\_\_\_  
Date

\_\_\_\_\_  
Steve Stuart  
Clark County Commissioner

\_\_\_\_\_  
Date

\_\_\_\_\_  
Tom Mielke  
Clark County Commissioner

\_\_\_\_\_  
Date

  
\_\_\_\_\_  
Garin Schrieve, P.E.  
Southwest Region Manager  
Water Quality Program

1-6-10  
\_\_\_\_\_  
Date

# Attachment A

## Clark County Development and Redevelopment Flow Control Mitigation Program

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## **Background**

Under the 2007 Western Washington phase I NPDES municipal stormwater permit (Permit), permittees, including Clark County, are required to control stormwater flows from development and redevelopment projects to levels that match historical pre-developed conditions. The standard flow control requirement is described in Appendix 1 of the Permit, and indicates that the pre-developed condition is forested land cover unless certain specified conditions are met. The methods to conduct this analysis are described in the state's 2005 Stormwater Management Manual for Western Washington (SWMMWW). The approach typically followed by permittees to meet the flow control objective is to require developers of development and redevelopment projects that exceed certain thresholds to construct flow control facilities designed to comply with the standard flow control requirement. The Washington Department of Ecology (Ecology) has acknowledged that there are other approaches that can provide an equivalent level of flow control for the protection of aquatic resources and that the Permit allows alternative planning efforts.

Clark County has elected to use an alternative method to provide the level of flow control required by the permit. The County has opted to implement a capital flow control mitigation program which, taken together with development and redevelopment regulations, will meet the Permit's standard flow control requirement as described in Appendix 1 of the Permit.

## **Purpose**

This document describes the framework and criteria for the County's flow control mitigation program. This document is incorporated into Agreed Order No. 7273, a compliance agreement between Ecology and the County, and is a fully enforceable element of the Agreed Order.

The County believes that this approach is the best mechanism for providing flow control benefits where they are most effective. By using this approach, the County believes it will be able to:

- Apply flow controls where they are most effective
- Spend scarce resources where they are most needed
- Provide the level of flow control required by the Permit
- Fix or reduce problems caused by incompletely controlled stormwater flows

## **Projects Triggering a Flow Control Mitigation Obligation**

Development and redevelopment projects that vested on or after April 13, 2009, and trigger minimum requirement #7 Flow Control under Chapter 40.385 Clark County Code will be reviewed to determine if they fail to fully mitigate to historical land cover. These projects will be tracked, and once construction commences on a project, it will cause the County to incur a mitigation obligation (Mitigation Obligation).

A Mitigation Obligation is incurred only for project sites that meet threshold requirements for flow control facilities in Appendix 1 of the Permit. Only the parts of the project site draining to the county MS4 or that include county storm sewer, including road right-of-way, are subject to the Mitigation Obligation.

A project's flow control Mitigation Obligation is for the project site as defined in Appendix 1 of the Permit and not to the entire parcel in cases where a project only develops or redevelops part of a parcel.

Project sites or parts of project sites that meet minimum requirement #7 through full dispersion or on-site stormwater retention for flows up to the 50-year developed peak flow do not incur a Mitigation Obligation.

A Mitigation Obligation accrues to the County when construction or land disturbing activity begins on a project. It is at this point that the county assigns a Development Inspection Number (or DIN) to each project.

### **Tracking Mitigation Obligation**

The County will track its Mitigation Obligation beginning when the stormwater code and manual became effective, April 13, 2009. Development and redevelopment projects vested after this date are subject to the flow control mitigation program if they proceed to construction.

The Mitigation Obligation of each development/redevelopment project is the difference between the flow control provided by the project to existing land cover and the amount of flow control required to meet minimum requirement #7 of Permit Appendix 1. The Mitigation Obligation shall be represented and tracked as acres of pre-project land cover for each of the following land cover categories:

- effective impervious area
- lawn/landscape
- pasture

Conversion of forest land does not create a Mitigation Obligation because County Code requires development projects to fully mitigate for the project's cleared forest.

The area of converted pre-project land cover will be reported by the project applicant as they modeled the site in the Western Washington Hydrology Model (WWHM) and will be verified by Clark County staff. Mitigation Obligation areas will be tracked to the nearest one-tenth acre. For example, a 5-acre development project that mitigates to existing land cover of 1.2 acres of Effective Impervious Area (EIA), 3.3 acres of pasture, and 0.5 acres of forest, would oblige the County to mitigate equal totals of the land cover. The obligation accounted for would be 1.2 acre of EIA and 3.3 acres of pasture; runoff from the forested area would already be fully mitigated by the development project under current county code

### **Mitigation Obligation for Projects Exceeding County Standards**

In cases where development and redevelopment projects provide flow control mitigation beyond that required by county code, the area mitigated to historic conditions would be determined by following methods described in the section on calculating mitigation project benefits. The result will be used to determine the County's Mitigation Obligation from the project.

### **Mitigation Obligation Table**

A table will be maintained for tracking the Mitigation Obligation for each development project by land cover (Table 1). This table will include the following information:

- *Project ID* is a unique ID attached to the project site polygon
- *Project Development Inspection Number (DIN)* is assigned to development projects as they proceed to construction
- *Project Name* is assigned to development projects as their applications are accepted
- *Project Vesting Year* provides the date when county regulations apply. This information provides a leading indicator of potential Mitigation Obligation. It is not a good indicator of when a project is likely to be built. The land cover is noted but not included in the actual Mitigation Obligation, which is counted at the point construction begins
- *Construction Start Year* is the date of the preconstruction conference held before construction work is allowed. It is the year in which the Development Inspection Number is assigned.
- *Construction Completed Year* is specified by Development Engineering as a completion of construction notice
- *Historical Land Cover (forest or prairie)* is the principal predevelopment site land cover determined by best available information. Generally, it is forest but there are historical maps from the mid-19th Century that map prairies in the Vancouver area.
- *Landscaped Area Mitigation Obligation (acres)* is the amount of landscaped area in a development project that must be mitigated
- *Effective Impervious Area Mitigation Obligation (acres)* is the amount of effective impervious area in a development project that must be mitigated
- *Pasture Mitigation Obligation (acres)* is the amount of pasture in a development project that must be mitigated

### **Allowable Capital Mitigation Projects**

In order to satisfy its Mitigation Obligation, the County may build several types of flow control facilities as capital improvement projects (Mitigation Projects).

Only Mitigation Projects that can be simulated in an approved model will be considered for meeting the Mitigation Obligation. The categories of acceptable flow control and reforestation projects under this agreement include:

- Detention
- Infiltration
- Detention with infiltration
- Full dispersion
- Existing facility retrofits or reconstruction
- Structural LID BMPs (Porous pavement and bio-retention basins)
- Reforestation of impervious area, lawn and pasture on land protected by covenant or easement.

Each of these categories except reforestation correlates to facilities with design criteria in Ecology's 2005 Stormwater Management Manual for Western Washington.

LID BMPs may be used to fully achieve the flow control requirement of the NPDES permit (as predicted by an approved continuous runoff model), or may be used to reduce the size of downstream flow control facilities.

Ecology may accept Mitigation Projects other than standard stormwater flow control practices and reforestation projects above if the County can demonstrate quantifiable runoff reduction or control that fully mitigates a defined amount of Mitigation Obligation. Such projects require approval from Ecology in writing before a credit is applied.

## **Calculating Area Mitigated by Capital Projects**

### **Stormwater Retention and Detention Facilities**

The Direct Method proposed by Ecology will be used to calculate the area mitigated by stormwater flow control capital improvement projects or Mitigation Projects. The Direct Method is an approach to estimate the area fully mitigated by a new pond or a retrofitted pond. It uses the WWHM to iteratively test the amount of impervious area, lawn or pasture that is fully mitigated to historical conditions by a specific proposed pond. Recognizing that a new facility may not fully mitigate the area draining to it, the area draining to a facility, as represented in the WWHM is gradually or iteratively reduced until the pond outflow meets the predeveloped duration standard in the WWHM. The method can also be used to aid design of a simple flow control structure. The step-by-step standard procedures are as follows:

A. **Direct Pond Sizing Method for Determining Mitigation Credits in Cases Where There is Not a Pre-existing Pond**

*Step 1:* Select pond dimensions based upon available space and available depth for water storage.

*Step 2:* Using WWHM, route the entire drainage basin into the pond. Use the appropriate historical land cover (forest or prairie) as the pre-developed condition for developing the target flow duration curve. Use the actual land cover and soils conditions for the post-developed condition of the drainage basin. Determine an appropriate discharge structure to meet the target flow duration curve.

*Step 3:* Case 1: If the pond is larger than what is necessary to meet the default flow duration standard, try reducing the pond size and adjusting orifices until just meeting the flow duration standard. The entire drainage area is the flow mitigation credit.

Case 2: If the pond cannot meet the flow duration curve, begin reducing the drainage area that was entered into the WWHM (preferably by first eliminating the lawn area, and then by reducing the impervious area). Continue reducing the drainage area until the available pond volume, in combination with specific orifice sizes that you have chosen, achieves full compliance. The preferred discharge structure design involves three orifices (or an orifice and a rectangular notch) in a standpipe which is open at the top to pass flows that overtop it. The identified drainage area is the first estimate of the mitigation credit.

*Step 4:* Assuming the pond design arrived at in Case 2 above, use the WWHM to route the entire actual drainage area into the pond. Determine whether the standpipe overflow can manage the most extreme flows so that the emergency overflow (i.e., the armored spillway in the dike) does not engage. If the standpipe is adequate, then no design changes are necessary, and the drainage area identified in Case 2 above is the mitigation credit. If the standpipe is not adequate, increase its diameter, while keeping the orifices at the same heights and circumferences, until the emergency spillway does not engage. Using the adjusted standpipe diameter, the same orifices, and the same pond dimensions, check to see whether the drainage from the area computed as the first estimate of the mitigation credit (in Case 2) can pass through the orifices and standpipe and still meet the flow duration standard. If not, reduce the drainage area until it does. This is the adjusted mitigation credit.

*Note 1:* In actual practice, all of the drainage area is routed into the pond

*Note 2:* Where the Clark County version of the WWHM is approved for use by Ecology, it substitutes for the WWHM in the above procedure.

B. Direct Pond Sizing Method for Determining Mitigation Credits in Cases Where There is a Pre-existing Pond that will be expanded.

*Step 1:* Determine a theoretical drainage basin which could be fully mitigated (i.e., meet the default flow control standard assuming the appropriate historical condition is forested) by the existing pond. The analysis involves changing the discharge structure design—orifice heights and diameters—but using the as-built pond dimensions.

*Step 2:* Determine a theoretical drainage basin which could be fully mitigated by the proposed, larger pond and a new discharge structure. Subtract the area for Step 1 from Step 2. This is the initial estimate of the mitigation credit represented by the expanded pond.

*Step 3:* Enter the characteristics (impervious areas, lawn/landscape areas) of the actual (entire) area draining to the expanded pond into the appropriate fields for the basin icon, and route the basin into the pond designed in Step 2. Note that the expanded pond is not mitigating for all of the area that is draining to it. Check to see if the discharge structure overflow (the top of the standpipe) is adequate to pass all of the predicted flows. If the discharge structure passes all flows without engaging the emergency overflow, it is finished. The initial estimate of credit in Step 2 is also the final estimate. If the discharge structure will not pass all flows, enlarge the overflow structure diameter, keeping the orifices at the same diameters and heights (or if using a vertical rectangular notch, the same width), until the discharge structure does pass all flows. Using that discharge structure, re-run the model to determine the acreage that can be fully mitigated by the expanded pond with the revised standpipe. Subtract the area for Step 3 (in the case where the standpipe was enlarged) from the area for Step 1. This is the final estimate of mitigation credit.



**Low Impact Development (LID) Retrofit Projects**

The LID projects must be structural BMPs (porous pavement or bio-retention basins) owned and maintained by the County. If the LID is a full infiltration BMP, the entire area draining to it is considered to be mitigated.

The facilities will be modeled following guidance the SWMMWW's Appendix C of Volume III.

There are three ways in which LID facilities may be used:

1. For situations in which solely using the LID facilities achieves compliance with the historical flow duration curve, the mitigation credit is the area draining to the LID facilities.
2. For a new retention or detention (R/D) pond where one does not currently exist, LID features may be used to help increase the mitigation credit acreage. By incorporating LID features into the drainage area served by the new R/D pond, more acreage can be completely mitigated by the R/D pond. Where the proposed pond cannot be built large enough to meet the flow duration standard for the entire drainage area, and a smaller, theoretical "credit" area is identified by the Clark County version of the WWHM, LID features in the actual drainage area must serve the same size and type of areas as represented in the theoretical credit area.
3. In existing facility retrofit projects, LID projects can assist in increasing the size of the estimated drainage area that would be fully mitigated by the expanded retention/detention facility. In all cases, the LID facilities must be represented in the model as serving the actual areas for which they are proposed.

**Land Cover Conversion to Historical Forest**

These are projects that directly convert effective impervious area, landscaped area or maintained pasture to native vegetation that will develop into a forest that is protected as a mitigation site with a conservation covenant or easement granted to the County in cases where the County does not own the land. In this case, the Mitigation Credit is the area of land cover converted to forest.

The mitigation site must meet the following criteria:

- Existing impervious, landscaped, and pasture areas that are intended for conversion back to native conditions must meet the soil quality and depth requirements of BMP T5.13 in Volume V of the Stormwater Management Manual for Western Washington. As allowed by that BMP, where the existing soils meet the ten percent organic quality and eight-inch depth requirements, the County may plant directly without amending and tilling the entire area.
- The new pervious area must be planted with native vegetation, including evergreen trees. For further guidelines, see the Washington State Department of Transportation (WSDOT) *Roadside Classification Plan* and the *WSDOT Roadside Manual*.
- The new pervious area must be designated as a stormwater management area in the Capital Planning database whether or not it receives runoff from adjacent areas.

- The new pervious area must be permanently protected from development. If the area is sited off County right-of-way, it must be protected with a conservation easement or some other legal covenant that allows it to remain in native vegetation.

### **Mitigation Project Development and Prioritization**

Clark County will use its current Stormwater Needs Assessment Program and Stormwater Capital Improvement Program to scope, prioritize, and plan flow control mitigation projects. The Stormwater Needs Assessment Program identifies potential detention and retention facility projects—projects to reconfigure existing facilities to increase flow control characteristics—and structural stormwater LID BMPs, such as rain gardens. The needs assessments may also identify properties where forest conversion is a viable option.

The County believes that one of the key benefits gained from this approach is the ability to place flow control mitigation where it is most effective in preserving and restoring beneficial uses. Past and current work by Clark County's Stormwater Needs Assessment Program includes hydrologic and hydraulic modeling of streams within urban growth area subwatersheds, assessing stream geomorphology and describing riparian conditions. This information will provide the basis for selecting the most suitable areas for flow control mitigation projects.

Specific mitigation project sites will be determined by priorities for flow control mitigation established under a project selection process that considers existing information describing channel conditions, channel hydrology, and subwatershed hydrology.

Within the group of projects deemed most suitable to watershed conditions, highest priority may be given to projects having the best cost/benefit ratios in terms of cost per unit of land cover mitigated.

### **Geographic Location of Mitigation Projects**

Mitigation Projects to address the Mitigation Obligation will be built within the same Water Resource Inventory Area, as mapped by the State of Washington, as the Mitigation Obligation incurred. Specific mitigation project sites will be determined by priorities for flow control mitigation established under a project selection process that considers existing information describing channel conditions, channel hydrology, and subwatershed hydrology.

To the extent feasible, the locations of Mitigation Projects should support identified needs and recommendations in existing resource management plans, and should also align with the County's policies on environmental mitigation. Projects should be prioritized by watershed and then Water Resource Inventory Area, in consideration of the distribution of the County's Mitigation Obligation.

### **Mitigation Project Timing**

Mitigation Obligations will be triggered by the start of construction of a development project and accrue by calendar year regardless of the day of the year when the development project starts construction during a given year.

The Mitigation Obligation must be met within two calendar years from the year that the development project being mitigated began construction. For example, a development project requiring mitigation that began construction in July 2009 must be mitigated by the end of calendar year 2011 and its mitigation reported in the 2011 Permit annual report.

Mitigation Credits from flow control mitigation projects completed after April 13, 2009, will count toward meeting the Mitigation Obligation. Mitigation projects shall be complete and functioning before associated Mitigation Credits can be applied to the Mitigation Obligation. The County will report the mitigation projects completed and the amount of Mitigation Credits generated during the year in the annual report to Ecology. The report will include a statement of whether or not the project timing requirements were met for the reporting year.

### **Mitigation Project Tracking**

Each acre of a specific land cover in the county's Mitigation Obligation database will be fully mitigated to historic land cover conditions. To account for the mitigation obligation met by specific stormwater projects, continuous runoff modeling will be used to define the amount of land cover controlled to the applicable historical conditions by each project.

As Mitigation Projects are built, acres of each land cover type mitigated to historical conditions will be subtracted from the Mitigation Obligation. The net Mitigation Obligation (positive or negative) will be carried over into the next year.

Clark County will track Mitigation Projects in a GIS database. Each Mitigation Project will have a point or polygon location for the project site.

The Capital Planning database will be used to create tables and reports. Clark County will create a table for tracking county Mitigation Projects. An example is included as Table 2 and will include the following information:

- *Project ID* is the county project identification number
- *Project Name* is the county project name
- *Project Status* is the status of the project as planned, designed, under construction or completed at the end of the reporting year
- *Estimated Project Cost* is the estimated cost for the county budget process
- *Actual Project Cost* is the final cost to plan, design and build the project
- *Soil Type* is the type at the Mitigation Project site based on the approved model
- *Historical Land Cover (Forest or Pasture)* is based on the predominant land cover in the area mitigated
- *EIA Mitigated to Historical land cover (acres)* is the amount of effective impervious area calculated to be fully mitigated to historical land cover by the project
- *Landscaped Mitigated to Historical land cover (acres)* is the amount of landscaped area calculated to be fully mitigated to historical land cover by the project
- *Pasture Mitigated to Historical land cover (acres)* is the amount of pasture calculated to be fully mitigated to historical land cover by the project

## Yearly Reporting

Clark County will report annually on the status of its Flow Control Mitigation Program in an attachment to the annual report required by the Permit. The report will include a narrative summarizing the program and include information from Table 1 and Table 2 by calendar year and totals to date under the Agreed Order.

Yearly Mitigation Program and financial reporting will be included in the format provided in Table 3. The table will summarize the Mitigation Obligation and Mitigation Projects completed by calendar year for each land cover type. It will also keep a running tally of the Mitigation Obligation. Definitions for the elements included in Table 3 are the following:

- *Year* is the reporting year
- *Beginning Mitigation Obligation Balance* is the Mitigation Obligation by land cover type at the beginning of the reporting year. It is the previous year's Year-End Net Mitigation Obligation Balance.
- *Mitigation Obligation Accrued From Two Years Prior* is the mitigation accrued by development projects that reported start of construction in the annual report two years earlier (taken from Table 1). For example, if the 2009 annual report stated that 35 acres of EIA Mitigation Obligation was incurred, that amount would become Mitigation Obligation Accrued in 2011.
- *Net Mitigation Obligation* is the amount of Mitigation Obligation required to be mitigated that year. It is the sum of Beginning Mitigation Obligation Balance and the Mitigation Obligation Accrued from Two Years Prior. For example if the Beginning Mitigation Obligation Balance is 2 acres and the Mitigation Obligation Accrued from Two Years prior is 12 acres, then the Net Mitigation Obligation is 14 acres.
- *Area Mitigated by Mitigation Projects* is the amount of land cover mitigated in the reporting year by county flow control mitigation projects. It includes only projects that have been completed and are operational. It is the annual total taken from Table 2.
- *Year-End Net Mitigation Obligation Balance* is the difference between the Net Mitigation Obligation land cover and the land cover mitigated by Mitigation Projects. If area mitigated by Mitigation Projects is greater than Net Mitigation Obligation, the Year-End Mitigation Balance is negative.

## Financial Reporting

Financial reporting for the program will be included in the annual report to Ecology. The report will also include a narrative describing the funding status of the Flow Control Mitigation Program. The report will clearly identify any anticipated shortfalls in funding that might jeopardize compliance with the terms of the Agreed Order or NPDES permit.

Table 4 provides an annual summary of program expenditures and capital fund balance.

- *Annual Program Cost* is the total capital expenditures for Mitigation Projects during the calendar year
- *Year End Capital Fund Balance* is the stormwater capital fund amount not expended for projects during the current year

## **Funding**

It is anticipated that the County's Clean Water Fund will be used to plan and construct mitigation projects. However, the County may use any allowable funds to pay for Mitigation Projects.

## **Limitations on WSDOT Projects**

Clark County will not incur a Mitigation Obligation for projects proposed by WSDOT, which is covered under its own NPDES Phase I Municipal Stormwater Permit.

## **Definitions**

*Fully-mitigated* means the land cover areas where a Mitigation Project has matched the flow duration curve of historical land cover for discharges of one-half of the 2-year peak flow to the 50-year peak flow.

*Effective impervious area* is defined in Volume I of the 2005 SWMMWW as impervious surfaces connected via sheet flow or discrete conveyance to a drainage system.

For the purpose of this agreement, existing impervious surfaces are considered *ineffective* if runoff from them is fully dispersed in accordance with the "full dispersion" guidance in the 2005 SWMMWW. If impervious area is ineffective due to full dispersion through native vegetation, it is defined as fully mitigated.

**Table 1. Table for tracking Mitigation Obligation areas by development project**

Project ID	Project Number (DIN)	Project Name	Project Vesting Year	Project Start Year	Project Completed Year	Historical Land Cover	EIA Mitigation Obligation (acres)	Lawn/landscape Mitigation Obligation (acres)	Pasture mitigation Obligation (acres)
							0	0	0
							0	0	
<b>2009 Totals</b>									
<b>Total after April 13, 2009</b>									

Area measured to nearest 1/10 of an acre (4,356 square feet) as done in WSDOT Manual.

**Table 2. Table for tracking areas mitigated to historic land cover by county projects**

Project ID	Project Name	Project Status	Estimated Project Cost	Actual Project Cost	Soil Type	Historical Land Cover	EIA Mitigated to Historic (acres)	Lawn/Landscaped Mitigated to Historic (acres)	Pasture Mitigated to Historic (acres)
<b>2009 Totals</b>									
<b>2010 Totals</b>									
<b>To Date Totals</b>									

**Table 3. Annual Mitigation Program summary**

<b>Effective Impervious Area Mitigation Summary</b>						
Year	Beginning Mitigation Obligation Balance	Mitigation Obligation Accrued 2-Yr Prior	Net Mitigation Obligation	Area Mitigated by County Projects	Year-End Mitigation Obligation Balance	
2009	0	0	0			
2010						
2011						
2012						
<b>Totals</b>						
<b>Lawn/Landscaped Area Mitigation Summary</b>						
Year	Beginning Mitigation Obligation Balance	Mitigation Obligation Accrued 2-Yr Prior	Net Mitigation Obligation	Area Mitigated by County Projects	Year-End Mitigation Obligation Balance	
2009	0	0	0			
2010						
2011						
2012						
<b>Totals</b>						
<b>Pasture Mitigation Summary</b>						
Year	Beginning Mitigation Obligation Balance	Mitigation Obligation Accrued 2-Yr Prior	Net Mitigation Obligation	Area Mitigated by County Projects	Year-End Mitigation Obligation Balance	
2009	0	0	0	0	0	
2010						
2011						
2012						

Totals						
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**Table 4. Financial summary**

Reporting Year	Annual Program Expenses	Year-End Capital Fund Balance
2009		
2010		
2011		
2012		