



February 18, 2010

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(Via Certified Mail, Return Receipt Requested)

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(Via Certified Mail, Return Receipt Requested)

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(Via Certified Mail, Return Receipt Requested)

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Clark County Prosecuting Attorney's Office
P.O. Box 5000
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(Via First Class U.S. Mail)

Re: Notice of Intent to File Suit Under Clean Water Act, 33 U.S.C. § 1365
Clark County NPDES Municipal Stormwater Permit, WAR04-4001

Dear Sir/Madam:

This Notice of Intent to file a citizen suit against Clark County, Washington pursuant to Section 505 of the Clean Water Act ("CWA"), 33 U.S.C. § 1365 is provided on behalf of the Rosemere Neighborhood Association, Columbia Riverkeeper, and the Northwest Environmental Defense Center (the "Citizen Organizations"). As described more fully below, Clark County is in violation of its Phase I Municipal Stormwater National Pollutant Discharge Elimination System permit, WAR04-4001 (the "Phase I Permit"), due to its failure to adopt and/or implement

standards and practices for stormwater control from new development and redevelopment that are at least as stringent as those required under the terms of the Phase I Permit.

BACKGROUND

Stormwater—runoff of rain and snow from roads, structures, and hard or compact surfaces—is the number one threat to water quality in Western Washington. Stormwater carries heavy loads of pollutants like metals, pesticides, bacteria, and toxics that degrade water quality and stream habitat and that impair beneficial uses of the state’s waters. Some of these pollutants can impair survival of aquatic species at extremely low levels, while in other places pollutant loads are so high that returning adult salmon die within minutes of entering a stream. Stormwater also has insidious hydrologic impacts on water quality and beneficial uses when stormwater flows alter the natural hydrograph of streams, causing it to become more extreme. As watersheds are converted from native vegetation to roads, rooftops, and parking lots, increased stormwater flows scour out streams, destroying habitat and polluting water with sediment, while decreased dry weather flows desiccate them. Moreover, increased stormwater runoff simultaneously decreases groundwater recharge that supports dry weather flow (base flow) in surface waters causing further degradation during the dry season.

In response to repeated delays by the U.S. Environmental Protection Agency (“EPA”) in addressing the stormwater problem, Congress passed the Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7 (1987), providing for a phased approach to issuing stormwater regulations, starting with the largest city and county jurisdictions. 33 U.S.C. § 1342(p)(2). Regulations governing stormwater discharges from large and medium counties and cities (the “Phase I” rules) were to be issued by early 1989 and 1991, and permits were to be issued shortly thereafter, with compliance with permit terms required “as expeditiously as practicable, but in no event later than 3 years after the date of issuance of” the permit. *Id.* § 1342(p)(4)(A). With respect to the content of the permits, Congress directed that these permits require “controls to reduce the discharge of pollutants to the maximum extent practicable.” *Id.* § 1342(p)(3)(B). EPA issued its first set of regulations for large municipalities almost two years after the deadline. 55 Fed. Reg. 47990 (Nov. 16, 1990). Washington permits are issued by the Department of Ecology (“Ecology”). Ecology issued the first Phase I permits, covering Seattle, Tacoma, King, Pierce, and Snohomish counties in 1995, and issued a permit for Clark County a few years later. With respect to new and redevelopment, the initial Phase I permit mandated ordinances with requirements and Best Management Practices (“BMPs”) “equivalent” to those found in Ecology’s stormwater management manual. The 1995 permits expired in 2000, but remained in force pending issuance of the current Phase I permit in 2007.

Numerous waters in Clark County are on the list of impaired waters¹ required by 33 U.S.C. § 1313(d) and many are listed for pollutants and conditions associated with stormwater runoff. Those waters include, but are not limited to: the Columbia River, Lacamas Lake, Vancouver Lake, Lake Merwin, Burnt Bridge Creek, China Ditch, Curtin Creek, East Fork of the Lewis River, Fifth Plain Creek, Gee Creek, Jenny Creek, Kalama River, Lacamas Creek, Lake River, Matney Creek, Mill Creek, Rock Creek, Salmon Creek, Shanghai Creek, Washougal River, Weaver (Woodin) Creek, and Whipple Creek.²

THE PHASE I STORMWATER PERMIT REQUIREMENTS

One of the most significant components of Clark County's Phase I Permit is the requirement that the County implement a program to control stormwater runoff from new and redevelopment. Phase I Permit S.5.C.5. In order to do this, Clark County must develop a stormwater management plan ("SWMP") designed to reduce stormwater runoff and pollutants to the maximum extent practicable ("MEP"), and adopt the "minimum requirements, thresholds, and definitions" of the 2005 Ecology Stormwater Manual for Western Washington ("Manual") or their equivalent. These requirements shall be included in ordinances or other enforceable documents. Id. One of the Manual's most important and consequential requirements, flow control, is intended to address the changes in hydrology (and attendant water quality problems) that occur with development. Under the flow control standard, post-development discharges above certain thresholds must match the durations of pre-development flows. Permit, App. 1 § 4.7. The most common means of meeting this standard is the construction of a stormwater detention pond. In a recent case, the state Pollution Control Hearings Board concluded that the flow control standard currently required by the Phase I Permit does not represent control of stormwater to the maximum extent practicable, and remanded the Phase I Permit to Ecology. Puget Soundkeeper Alliance v. Department of Ecology, 2008 WL 5510413 (Wash. PCHB August 7, 2008). Ecology is currently engaged in a process to revise the Phase I Permit to strengthen the flow control standards, but the existing standard remains in place until that process is complete. Therefore, compliance with the Phase I Permit as currently written is the absolute minimum necessary to address stormwater runoff and its negative effects on the environment.

The Phase I Permit allows Permittees to adopt criteria that are different than those that are specifically laid out in the permit. Under the Phase I Permit, "certain requirements may be tailored to local circumstances through the use of basin plans or other similar water quality

¹ Impaired waters are waters that so polluted they fail to meet one or more water quality standards.

² See Department of Ecology § 303(d) maps of impaired waters in WRIAs 28 and 27: <http://www.ecy.wa.gov/services/gis/maps/wria/303d/w28-303d.pdf> and <http://www.ecy.wa.gov/services/gis/maps/wria/303d/w27-303d.pdf>.

planning efforts. Such local requirements and thresholds shall provide equal or similar protection of receiving waters and equal or similar levels of pollutant control as compared” to the specifics in the Phase I Permit. Id. S.5.C.5.b.i. (emphasis added).

Clark County was required by the Phase I Permit to adopt its plan, ordinances, and other authorities, no later than August 16, 2008. Permit, § S.5.C.5.b(iv).

Clark County’s Phase I Permit also requires the County to notify Ecology of any stormwater discharge that is causing or contributing to a known or likely violation of water quality standards in any receiving water. Id. § S.4.F. The Phase I Permit imposes an obligation on Clark County to propose, schedule, and implement BMPs, additional to those required by the 2005 Manual, necessary to address any such discharges. Id.

Finally, under the Phase I Permit, Clark County is required to adopt a program to “construct stormwater controls to prevent or reduce impacts to waters of the state caused by discharges from the” municipal system. Permit, § S.5.C.6.a. The Permit requires Clark County, by February of 2008, to have developed a retrofit program and begin implementing it six months later. Clark County is required to submit to Ecology a list of retrofit projects along with other documentation in their annual report. Id. § S.5.C.6.b.

**PERMIT VIOLATION: FAILURE TO ADOPT ORDINANCES TO CONTROL
RUNOFF FROM NEW DEVELOPMENT AND REDEVELOPMENT
(PERMIT CONDITION S.5.C) AND APPROVAL AND ISSUANCE
OF NONCONFORMING PLANS AND PERMITS**

Clark County has violated, is currently violating, and will continue to violate the CWA, 33 U.S.C. §§ 1311 and 1342, and its Phase I Permit. Clark County has failed to adopt ordinances that are designed to reduce stormwater runoff from development sites consistent with the requirements of its Phase I Permit. Instead, in January of 2009 (five months late), Clark County adopted a weaker flow control standard than that required by its Phase I Permit. This violation was identified by the Department of Ecology in a March 17, 2009 Notice of Violation.

As a result of these violations, Clark County has approved and issued, and continues to approve and to issue, various authorizations and permits, including but not limited to subdivision plats and building permits, that allow the discharge of stormwater runoff into Clark County’s municipal stormwater system in a manner that is inconsistent with the requirements of the Phase I Permit. All plans and permits approved and/or issued by Clark County since August 17, 2008, including development vested previous to August 17, 2008, are in violation of Clark County’s Phase I Permit and are causing and continue to cause stormwater discharges in excess of allowable permit amounts. Clark County’s violations and its approval of plans and issuance of subdivision and building permits has caused and will continue to cause direct and immediate harm to the environment and has and will continue to degrade water quality in Clark County.

The discharges and waterbodies affected by these violations are all surface waters in the Salmon-Washougal Water Resource Inventory Area (“WRIA”) No. 28 and to the Lewis River WRIA No. 27 in Clark County that receive discharges from Clark County’s stormwater outfalls or that receive runoff from new and redevelopment approved or authorized by Clark County after August 17, 2008.

On or about March 17, 2009, Ecology issued Notice of Violation No. 6514 to Clark County, notifying the County that it had violated its Phase I Permit by adopting a flow control policy and ordinance that does not provide equal or similar protection to receiving waters as set forth in Ecology’s 2005 Stormwater Manual, and by adopting an exemption for infill and redevelopment projects that fails to conform to the flow increase thresholds in Ecology’s 2005 Stormwater Manual.

While Ecology has agreed to a settlement under which Clark County may retain its existing inadequate stormwater ordinance and procedures, it has not modified the Phase I Permit and, accordingly, Clark County remains in violation of the Phase I Permit. Further, Clark County continues to review and approve plans and permits according to its existing inadequate stormwater ordinance and procedures. The above-named organizations have filed an appeal of the settlement agreement between Clark County and Ecology and have asked the Pollution Control Hearings Board to set it aside as unlawful.

**PERMIT VIOLATION: FAILURE TO ADOPT EQUIVALENT LEVEL
OF CONTROL OF RUNOFF FROM NEW DEVELOPMENT
AND REDEVELOPMENT SITES (PERMIT CONDITION S.5.C.5.B(I))**

While the Phase I Permit authorizes permittees to adopt standards for new development and redevelopment that vary from the specific requirements of the Phase I Permit, it can only do so where they provide “equal or similar” levels of protection to the standards adopted in the Phase I Permit. The approach that has been adopted by Clark County—authorizing a significantly weaker standard for new and redevelopment and “mitigating” the impacts via structural retrofit projects—is not equal or similar to the Phase I Permit for several reasons, including but not limited to the following:

- a) The structural retrofit program is already required under the § S.5.C.6 of the Phase I Permit. Clark County is not proposing any new funding or additional work than that which it has already identified as required for compliance with this program, therefore, there is no actual mitigation of the new damage that will occur from the failure of Clark County to require proper flow control from new and redevelopment.
- b) Clark County will allow any structural retrofit project completed after April 13, 2009 to “count” towards the mitigation requirement, even though such

mitigation projects would have been initiated long before the mitigation obligations arose with the likely result that new and redevelopment will, in effect, not be mitigated at all.

c) Clark County will not require any mitigation for new construction that fails to meet the Ecology permit standards as long as the permit application for the construction was submitted prior to April 13, 2009, regardless of when the construction and resulting environmental damage actually occurs.

d) Clark County will authorize development that fails to meet the Permit standards based on mitigation that occurs in a completely different location, even a different watershed, from the location of the development. First, this makes an assumption that is not scientifically supported. There is no evidence that allowing environmental damage in one watershed can be “mitigated” in another watershed such that the damage is “offset.” Second, even if it is accepted that harm to one watershed could potentially be mitigated by work in another, such sites may have completely different soil and site conditions that make it impossible to assess whether the water quality benefits of the mitigation are comparable to the harm imposed by the new development.

e) Clark County will authorize development that fails to meet Phase I Permit requirements based on mitigation that can take up to three years to occur, allowing up to three years of unmitigated, often cumulative, damage to the environment.

f) Clark County will require mitigation based only on an acreage measure of disturbed land as opposed to an assessment of the actual, often cumulative, damage to the environment from the failure to impose proper flow control on new and redevelopment.

g) As of the date of this Notice, Clark County lacks the budget to fund the mitigation program for more than a few years, and no new funds have been proposed. There are no financial assurances in the program that the mitigation will be constructed, and there is no requirement in the program that mitigation facilities be adequately maintained.

**PERMIT VIOLATION: FAILURE TO COMPLY
WITH STANDARDS (PERMIT CONDITION S.4)**

Clark County’s Phase I Permit contains stand-alone requirements, in addition to those outlined above, requiring it to ensure that it is not authorizing discharges that cause or contribute to any violation of water quality standards and that it shall reduce the discharge of pollutants to the maximum extent practicable. See Permit, § S.4.B-C. Clark County’s program of inadequate development standards and flawed and incomplete “mitigation” violate this provision. Discharges from new development and redevelopment consistent with Clark County standards

are not controlled to the maximum extent practicable because substantially more protection can be achieved for water bodies with minimal additional costs. They also will cause or contribute to violations of water quality standards, particularly where discharging to streams that are already listed as impaired under the Clean Water Act.

IDENTITY AND ADDRESSES OF CITIZEN ORGANIZATIONS

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Columbia Riverkeeper
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Counsel for Citizen Organizations:
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Earthjustice
705 Second Avenue, Suite 203
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(206) 343-7340

PRELITIGATION NOTICE UNDER THE CLEAN WATER ACT CITIZEN SUIT PROVISIONS

The Citizen Organizations provide this Notice for the violations outlined above, as well as all ongoing and continuing violations, including those committed subsequent to the date of this Notice. This Notice is given pursuant to 33 U.S.C. § 1365 and 40 C.F.R. § 135.3(a). Under the CWA, 33 U.S.C. § 1319(d) and 40 C.F.R. § 19.4, each of the violations described herein occurring on or after January 2009 is subject to a penalty of up to \$37,500 per day per violation, and each of the violations occurring between August 16, 2008 and December 31, 2008 is subject to a penalty of up to \$32,500 per day per violation. Clark County is also potentially subject to

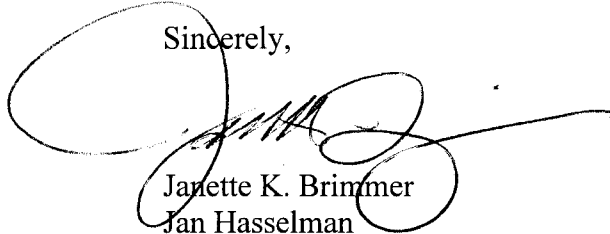
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injunctive relief, for example, restoring or mitigating for the stormwater impacts of all projects permitted or built after August 16, 2008. Moreover, under 33 U.S.C. § 1365, prevailing parties may recover costs of litigation, including attorneys' fees.

The undersigned organizations and counsel send this notice only after numerous unsuccessful attempts to persuade the County to take a different path from the one it ultimately adopted. The Citizen Organizations continue to believe that this issue should be resolved without the initiation of litigation and without devoting resources to court proceedings and potentially very significant civil penalties. We stand ready to work with you in good faith to resolve Clark County's CWA violations.

Please contact the undersigned should you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to be a cursive combination of 'JKB' and 'JH', is written over the typed names. The signature is fluid and extends to the right.

Janette K. Brimmer
Jan Hasselman

cc: Rosemere Neighborhood Association
Columbia Riverkeeper
Northwest Environmental Defense Center