

POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

ROSEMERE NEIGHBORHOOD  
ASSOCIATION; COLUMBIA  
RIVERKEEPER; and NORTHWEST  
ENVIRONMENTAL DEFENSE CENTER,

Appellants,

v.

WASHINGTON STATE DEPARTMENT  
OF ECOLOGY, and CLARK COUNTY,

Respondents,

BUILDING INDUSTRY ASSOCIATION  
OF CLARK COUNTY,

Intervenor-Respondent.

**PCHB NO. 10-013**

**CONCURRENCE AND DISSENT**

I write separately because, while agreeing with my colleagues on many aspects of the majority decision, I respectfully disagree with certain other of its fundamental conclusions. I concur with the majority to the extent it finds flaws with the Agreed Order in the following respects: the delayed effective date of Clark County's mitigation program relative to the Phase I Permit's deadline to begin implementing the more stringent flow control standard; inadequate protection in the Agreed Order against the shifting of existing projects and funding from the structural retrofit program into projects counted toward the County's mitigation obligation; and the failure of the Agreed Order to clearly require the County to comply with the Phase I Permit's Low Impact Development (LID) requirements imposed as a result of this Board's prior decision.

**PCHB NO. 10-013**  
**CONCURRENCE AND DISSENT**

1 I depart from my colleagues where they conclude the Agreed Order is inadequate because  
2 it does not utilize basin planning or require additional site-specific analysis in the selection and  
3 evaluation of individual flow control projects. I further disagree with their conclusions that the  
4 acreage metric is inadequate to serve the intended purposes of the program and that Clark  
5 County's program gives inadequate attention to beneficial uses of receiving waters. Finally, I  
6 disagree that the Agreed Order's approach to selecting mitigation sites amounts to impermissible  
7 self regulation.

8 When evaluating the equivalency question at issue in this appeal, the majority has elected  
9 not to afford what I believe is proper deference to Ecology's technical expertise and professional  
10 judgments regarding the purpose and intent behind the default flow control requirement  
11 embodied in the Phase I Permit. In exercising its *de novo* review of an ambiguous permit  
12 condition, as this Board has previously found Condition S5.C.5.b to be, the agency charged with  
13 the administration and enforcement of that permit should be accorded great weight in  
14 determining the intent and meaning of the underlying permit condition. *Puget Soundkeeper*  
15 *Alliance et al. v. Ecology, et al.*, PCHB Nos. 07-021, 07-026 through 030, 07-037 (Phase I  
16 Municipal Stormwater Permit Order on Dispositive Motions, April 8, 2008) (where a permit  
17 condition is not specifically governed by statute or regulation, but instead represents an exercise  
18 of the agency's discretion based on professional judgment, the Board gives due deference to the  
19 specialized knowledge and expertise of Ecology, while acknowledging that such deference does  
20 not extend to action that is "manifestly unreasonable or exercised on untenable grounds" or that  
21 is "willful and unreasoning actions in disregard of facts and circumstances." citations omitted.)

1 See also, *Fulton v. Ecology*, PCHB No. 06-081 (2008) (giving deference to Ecology's  
2 interpretation of specific terms and meanings of an adjudicated water right certificate, citing *Port*  
3 *of Seattle v. Pollution Control Hearings Board*, 151 Wn.2d 568, 593, 90 P.3d 659 (2004)). This  
4 is particularly true where the questions involve complex scientific issues and areas within  
5 Ecology's specialized knowledge and expertise. *Puget Soundkeeper Alliance, et al. v. Ecology,*  
6 *& City of Seattle, et al.*, PCHB Nos. 07-021, -026 through -030, & -037 (2008) ("*Phase I*  
7 *Decision*"), at 51; *Hubbard v. Ecology*, PCHB Nos. 93-73 & 93-103 (1995) (The Board, in its *de*  
8 *novo* review, gives due deference to Ecology's specialized knowledge and expertise regarding  
9 hydrology).

#### 10 ***The Phase I Permit and Default Flow Control Standard***

11 The Board has previously found that, unlike traditional NPDES permits, the Phase I  
12 Permit is a "programmatic permit," meaning it requires municipal permittees to implement area-  
13 wide stormwater management programs rather than establishing benchmarks or other numeric or  
14 narrative effluent limits for stormwater discharges from individual outfalls. *Phase I Decision* at  
15 FOF 6. The Board further found that the programmatic approach provides the flexibility to  
16 address water quality issues within the context of a general permit and accounts for the numerous  
17 differing conditions faced by the many different Phase I permittees. *Puget Soundkeeper*  
18 *Alliance, et al. v. Ecology, & City of Seattle, et al.*, PCHB Nos. 07-021, -026 through -030, & -  
19 037 (Phase I) and PCHB Nos. 07-022, -023 (Phase II) (2008) ("*Condition S4 Decision*") at FOF  
20 5. Ultimately, the Board concluded that Ecology's Phase I Permit, as a programmatic permit  
21 with multiple elements to be implemented throughout the permit cycle, collectively represented

1 the MEP and AKART standards. Despite finding and addressing particular deficiencies in  
2 certain aspects of the permit, the Board affirmed Ecology's programmatic approach, recognizing  
3 that it was all of the stormwater management program elements, in the aggregate, that represent  
4 MEP and AKART, even though it might be possible for a permittee to do more in a specific  
5 program element or at a specific outfall if the individual permit requirements were evaluated in  
6 isolation from the rest of the program requirements.

7 In developing the Phase I Permit, including the flow control requirements in Condition  
8 S5.C.5.b.ii, Ecology recognized that these efforts alone could not prevent all stormwater impacts  
9 or preserve natural resources and their associated beneficial uses. *Ex. J-15* at 31-32. This is due,  
10 in part, to the fact that the flow control standard is a blunt instrument designed to mitigate for  
11 only the worst of the high flows, not to solve all the stream hydrology, habitat, or other  
12 biological problems in a watershed. *O'Brien Testimony*.

13 In the Phase I Permit decision, the Board found that Ecology's Stormwater Management  
14 Manual (SWMM) itself recognizes the shortcomings of even the newer, more stringent flow  
15 control standards, wherein it states:

16 [These techniques, of engineered stormwater conveyance, treatment and  
17 detention] can reduce the impacts of development to water quality and hydrology.  
18 But they cannot replicate the natural hydrologic functions of the natural watershed  
19 that existed before development, nor can they remove sufficient pollutants to  
20 replicate the water quality of pre-development conditions.

19 The Board further found that the primary focus of detention standards is on mitigating the  
20 worst impacts of large storm events, which occur only a small percentage of the time (1%), and  
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1 that they provide only residual control to runoff the remainder of the time. *Phase I Merits*  
2 *Decision* at FOF 39.

3 Despite its limitations, the default flow control standard in the Phase I Permit  
4 encompasses multiple distinct components within the one standard: first and foremost, the  
5 transition from the previous “peak flow” to a “flow duration” approach; second, the thresholds  
6 that trigger the flow control requirement in the first instance; third, the application of flow  
7 control to address runoff caused by new and redevelopment relative to existing land cover  
8 conditions; and finally, the application of flow control to address runoff attributable to existing  
9 land cover conditions relative to historic land cover conditions. *O’Brien Testimony*.

10 During the Phase I Permit development process, Ecology considered a publicly funded  
11 approach to mitigating for this last component (historic impacts) as an alternative to requiring  
12 municipalities to impose the obligation only on those developers applying for new or  
13 redevelopment projects. *Schrieve Testimony, O’Brien Testimony*. Ecology considered this to be  
14 a reasonable approach as a matter of public policy since the harms being addressed were caused  
15 by historic development patterns and practices rather than the actions of the current developers.<sup>1</sup>

16 In previous decisions related to the Phase I and Phase II Permits, the Board has analyzed  
17 various aspects of the default flow control standard, including the permits’ requirement to

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18 <sup>1</sup> In Clark County, for example, much of the currently developed and developing areas were deforested and put into  
19 agriculture by the late 1800’s and early 1900’s, which is much earlier than many other areas in Puget Sound. More  
20 recently, large areas within unincorporated Clark County converted from agricultural or pasture land cover to more  
21 urban development during the 1980’s and 1990’s. This was during a time period when the detention systems were  
designed to earlier standards that have been shown to be ineffective in controlling streambank erosion due to the  
increased duration of peak discharges. *Kraft Testimony*. As a result, the increase in erosive flows from existing land  
cover conditions relative to historic land cover conditions in Clark County occurred in many, if not most, cases ten  
to one hundred years ago. *Beyerlein Testimony*.

1 mitigate for pre-existing impacts that are not a direct result of the proposed new or  
2 redevelopment project. The Board rejected summary judgment claims that such a requirement  
3 was unlawful or unreasonable as a matter of law for several reasons. Notable in this context was  
4 the reasoning that the permits “‘ authorize’ local governments to require developers to construct  
5 the necessary stormwater controls to meet the flow control requirements but do not ‘require’  
6 local governments to impose such requirements. Local governments have options and choices to  
7 meet the permit’s flow control requirements.” *Puget Soundkeeper Alliance, et al, v. Ecology, &*  
8 *Washington Department of Transportation*, PCHB Nos. 07-022, -023, Order on Summary  
9 Judgment (Phase II Municipal Stormwater Permit), September 28, 2008 (“*Phase II SJ Order*”) at  
10 10.

11 The Western Washington Stormwater Management Manual contemplates that treatment  
12 and flow control requirements may be achieved through the construction of regional facilities.  
13 *Ex. J-19* at 2-11 through 2-13. Regarding the flow control standard, the Board also found that  
14 municipal permittees have “considerable flexibility as to how they will regulate the development  
15 or use of private property in order to comply with the federally required MEP and state-driven  
16 AKART standards for controlling the discharge of pollutants to the waters of the state.” *Phase II*  
17 *SJ Order* at 11. The Board accepted Ecology’s arguments that this flexibility included, for  
18 example, that municipalities may choose to construct necessary regional stormwater control  
19 facilities and allow developers to use those facilities to ensure discharges meet the flow control  
20 requirements. *Phase II SJ Order* at 9.

1           Within this larger context, which is embodied in the programmatic nature of the permits  
2 and which will involve tens of billions of dollars in various types of stormwater control  
3 investments over many years, Ecology has determined that the specific location of the “historic  
4 land conversion mitigation” is not the critical issue associated with the Phase I Permit’s flow  
5 control requirements. *O’Brien Testimony*. Ecology was applying this fundamental assumption  
6 when it later determined that the relative benefits of Clark County’s approach to implementing  
7 flow control are sufficiently comparable to the Phase I Permit in moving toward the overall goal  
8 of municipal stormwater control, particularly the landscape-scale goal of restoring from  
9 “existing” conditions to the more natural flows associated with “historic, pre-developed”  
10 conditions.

#### 11 ***The Agreed Order***

12           In the Agreed Order, Ecology identified the purpose of Condition S5.C.5.b.ii as being “to  
13 reduce negative impacts on water quality, fish, other aquatic life, and streams caused by  
14 increased runoff from new development and redevelopment and to reduce impacts from existing  
15 development.” *Ex. J-1*. For the reasons stated above, Ecology never expected this permit  
16 condition, or the Agreed Order, to restore aquatic habitat or eliminate all harm from erosion at  
17 the specific development location. The goal was to make progress toward lessening the negative  
18 impacts of high flows. *O’Brien Testimony*. Because Ecology views a publicly funded approach  
19 to addressing stormwater impacts caused by historic land conversion activities as an equivalent  
20 way of achieving the same goals as the default flow control standard, it did not view Clark  
21 County’s program as either a “pilot project” or an “exception/variance” from the standard, but

1 rather as an alternative means of achieving the same ends. *Schriever Testimony, O'Brien*  
2 *Testimony.*

3 Appellants have identified nothing in the Phase I Permit, or the Clean Water Act, that  
4 requires this final “improvement” or “restoration” aspect of the flow control standard to be  
5 achieved at the same location as where the new or redevelopment is occurring. Clark County’s  
6 flow control program meets the Permit’s objectives because developers will be required to match  
7 post-development flows with pre-development flows at the development site. Where existing  
8 land cover at a site is the same as historic land cover, there is no absolutely difference between  
9 Clark County’s flow control program and the flow control requirement in the Phase I Permit.  
10 Where the existing land cover is not the same as historic land cover, the developer will be  
11 required to match post-development flows with pre-development flows at the site, and Clark  
12 County will be required to implement additional flow control projects sufficient to control the  
13 difference between post-development flows and historic flows. These projects need not be  
14 located at the development site but must be located within the same Water Resource Inventory  
15 Area (WRIA). *Ex. J-1, Attachment A, at p. 8.*

16 Under either of these scenarios, the exact same thresholds apply in determining which  
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2 projects trigger flow control requirements,<sup>2</sup> and the exact same flow duration standard applies in  
3 determining how much flow control must be provided.<sup>3</sup> In this regard, Clark County has not  
4 altered the default flow control standard in the Phase I Permit. What Clark County has done is  
5 elected to implement the same standard in a manner that is different from how other Phase I  
6 Permittees have chosen to implement it, in order to achieve the same goals.

7 Clark County's flow control program requires all project-related stormwater impacts to  
8 be addressed on-site, thus accomplishing the flow control standard's site-level objectives.  
9 Additionally, legacy stormwater impacts related to historic land conversions (but unrelated to a  
10 particular new or redevelopment project) are addressed at a WRIA level, thus accomplishing the  
11 flow control standard's landscape-level objectives. In the end, project-related impacts are  
12 addressed in Clark County the same way as in other Phase I jurisdictions, and the same amount  
13 of developed land area within a WRIA will be provided with flow control to the historic  
14 conditions as would occur under the default approach to flow control contained in the Phase I  
15 Permit.

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17 <sup>2</sup> Under both scenarios, flow control facilities are required for projects in which the total of effective impervious  
18 surfaces is 10,000 square feet or more in a threshold discharge area; projects that convert ¼ acres or more of native  
19 vegetation to lawn or landscape, or convert 2.5 acres or more of native vegetation to pasture in a threshold discharge  
20 area, and from which there is a surface discharge in a natural or man-made conveyance system from the site; and  
21 projects that through a combination of effective impervious surfaces and converted pervious surfaces cause a 0.1  
cubic feet per second increase in the 100-year flow frequency from a threshold discharge area as estimated using the  
Western Washington Hydrology Model or other approved model.

<sup>3</sup> Discharges must match developed discharge durations to pre-developed durations for the range of pre-developed  
discharge rates from 50% of the 2-year peak flow up to the full 50-year flow.

1 Clark County has not proposed to change the flow control standard. It is still obligated to  
2 control flows to same standard as the Phase I Permit requires. The County's program is not  
3 implementing the standard in ways that were not previously contemplated by Ecology during the  
4 development and adoption of the flow control standard in the SWMM and the Phase I Permit.  
5 As a result, I am persuaded that Clark County's approach accomplishes Ecology's identified  
6 objectives for the flow control standard: ensuring that new or redevelopment does not make  
7 matters worse, and restoring flows to more natural conditions.

8 The majority holds Clark County's program to higher standard than the Phase I Permit's  
9 flow control standard itself. The Phase I Permit's default flow control standard requires no  
10 analysis of existing beneficial uses or conditions at the location of the development; no statement  
11 of expected outcomes of the flow control facilities employed at the development site; and no  
12 monitoring of the flow control facilities implemented to meet the permit requirement.<sup>4</sup>

13 To the extent the Appellants, their experts, and the majority are demanding more from  
14 Clark County's program, their concerns can be traced back to the limitations of the default flow  
15 control standard itself. This was apparent in the testimony of Dr. Booth, who in the previous  
16 appeal of the Phase I Permit specifically criticized the new flow control standard for its inability  
17 to meet the ultimate goals of protecting water quality, beneficial uses, and the streams and rivers  
18 of western Washington. *Ex. R-94 (Booth Pre-Filed Direct Testimony in Phase I appeal*: "The  
19 flow duration standard, which is the chief performance standard of the Permit related to

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20 <sup>4</sup> Interestingly though, part of Clark County's rationale for the alternative approach in the Agreed Order was its  
21 experience with the better success rate of public mitigation projects versus private mitigation projects. In Clark  
County, public sector projects tend to have better long-term success than private ones because of the typically better  
design, construction, and maintenance. *Gray Testimony*.

1 hydrology, does not sufficiently replicate natural hydrology and allows significant damage to the  
2 physical, chemical and biological health of rivers and streams.”)

3 This was also true of Mr. Rhodes’ testimony, who conceded that in urbanized areas such  
4 as much of Clark County, it is too late to avoid impacts from existing land cover conditions. As  
5 such, even the default flow control standard in the Phase I Permit will not prevent harm to fish or  
6 result in marked improvements in fish conditions within Clark County. Mr. Rhodes also  
7 acknowledged that requiring new or redevelopment projects to control stormwater relative to  
8 existing conditions will prevent any new or additional degradation attributable to the new or  
9 redevelopment. *Rhodes Testimony*.

10 The inherent limitations of the flow control standard were also highlighted in the  
11 conclusions and recommendations of the Independent Science Panel after its review of the flow  
12 control standard contained in the Stormwater Management Manual for Western Washington.

13 The panel wrote:

14 We identified areas for improvement, especially where stormwater issues intersect  
15 with other mandates for beneficial uses of water and streams. For example: The  
16 project area approach [to flow control] presented in the manual is a necessary first  
17 step in dealing with potential downstream channel stability and water quality  
18 problems at the source. Ultimately, however, a larger watershed-scale perspective  
19 is also needed to assure that desired goals are met in concert with all of the other  
20 land uses and downstream water issues, including salmon. *Ex. R-77*.

18 In short, it is a verity that the salmonid populations in the Lower Columbia basin will  
19 continue to be in great peril whether or not *any* new or redevelopment takes place in Clark  
20 County under *any* regulatory scheme. And they will continue to be in great peril under either the  
21 Phase I Permit’s or the Agreed Order’s approach to flow control. Neither regulates the

1 considerable amount of stormwater discharges that enter directly into receiving waters without  
2 flowing through Clark County's municipal storm sewer system (MS4). Neither directly  
3 regulates stormwater runoff from new or redevelopment projects that are below the thresholds in  
4 the Phase I Permit, even if they discharge through the County's MS4 system (although other  
5 parts of the Phase I Permit address these discharges). Neither addresses the myriad other  
6 contributing factors that also bear on the ultimate survival and recovery of Lower Columbia  
7 salmonids. Both the Phase I Permit and the Agreed Order will allow conditions to continue that  
8 can scour redds within stream channels, cause severe siltation of redds, increase temperature that  
9 stresses and kills fish and their offspring, elevate sediment supply and suspended sediment,  
10 degrade natal habitat by changing stream channels, and deplete the food web upon which  
11 salmonids depend.

12         However, granting even minimal deference to Ecology's expertise in this area, I would  
13 hold that the Agreed Order's approach to separately addressing project-related impacts versus  
14 non-project, historic watershed impacts provides, on a programmatic basis, equal or similar  
15 protection to receiving waters as the Phase I Permit does. The Agreed Order reflects a  
16 reasonable exercise of Ecology's discretion, and there is no legal or factual basis upon which to  
17 conclude this approach is invalid. Accordingly, I respectfully dissent from those portions of the  
18 majority that substitute Ecology's technical determinations and professional judgments regarding  
19 the intent and goals of the flow control standard with the opinions of experts who, while  
20 certainly well qualified in their fields, offer limited value in determining the goals and intent of

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1 the Phase I Permit's flow control requirement within the context of municipal stormwater  
2 management programs.

3 *The Acreage Metric*

4 Like its concern about the lack of basin planning, the majority's criticism of the acreage  
5 metric for tracking the County's mitigation obligation again reflects primarily a concern with the  
6 limitations of the flow control standard itself.

7 In developing the Agreed Order, Ecology considered an approach similar to that  
8 advanced by Appellants, where the County would be required to "match" a development site and  
9 the mitigation site based on multiple factors such as soil conditions and slope, in addition to  
10 acreage of certain types of land cover. Ecology rejected such an approach based on a technical  
11 assessment of its usefulness, the economic burden it would place on developers and the County,  
12 and the complexity of such a regime. Ecology ultimately concluded that it would be too  
13 complex an undertaking for the limited additional potential benefits. *O'Brien Testimony*.

14 Douglas Beyerlein, the engineer and hydrologist who developed the Western Washington  
15 Hydrology Manual for Ecology, testified that the metric by which Clark County's mitigation  
16 obligation and mitigation credits are measured under the Agreed Order is scientifically and  
17 technically sound.<sup>5</sup> This is because the single most significant factor in determining the impacts  
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19 <sup>5</sup>Douglas Beyerlein is a registered professional engineer and a certified professional hydrologist who led the  
20 contracting team that developed the Western Washington Hydrology Model (WVHM) for Ecology to accurately  
21 measure land development impacts and size stormwater facilities. More recently, he created a calibrated version of  
the Ecology WVHM for stormwater facility design in Clark County that Ecology has approved for use. The  
WVHM models hydrology that is site-specific in terms of calculating the amount of runoff generated by a  
particular property, but it does not dictate where or how that runoff must be controlled.  
*Beyerlein Pre-Filed Testimony* at Attachment 1.

1 caused by historic development patterns is the nature of the historic land cover in relation to  
2 existing land cover conditions. Land cover is also the single most important factor in controlling  
3 erosive flows at both development project sites and at flow control mitigation project sites.

4 While it is true that both soil type and slope bear some relationship to the nature and extent of  
5 stormwater impacts experienced at a particular location, they are not a significant factor in  
6 quantifying the overall impact caused by historic land conversion activities on a broader scale.

7 *Beyerlein Pre-Filed Testimony* at Attachment 4.

8 Mr. Beyerlein's opinion is supported by the following information, which was not  
9 disputed by Appellants. Soil groups can be divided into two major categories: well draining soils  
10 where full infiltration of stormwater runoff is usually required and poor draining soils where  
11 surface discharges must be managed based on matching flow durations. *Beyerlein Testimony*.

12 Most of Clark County contains soils that either do not infiltrate or where infiltration is very slow.

13 *Golemo Testimony*. For purposes of Clark County's calibrated WWHM, which is used to  
14 calculate the quantity of stormwater runoff from a particular site, all poor draining soils are  
15 modeled with the same soil characteristics and runoff producing potential, which means it would  
16 make little if any difference to analyze the soil type of sites subject to the provisions of the  
17 Agreed Order. *Beyerlein Testimony*. For this reason, Ecology determined that while it would be  
18 possible to add soil condition as another metric for calculating and tracking Clark County's  
19 mitigation obligations, it would make the program more difficult to administer without providing  
20 any meaningful amount of additional environmental benefit. *O'Brien Testimony*.

1 Land slope, or topography, also influences the amount and timing of stormwater runoff,  
2 where steeper slopes produce more runoff faster than flatter slopes. Generally speaking, steeper  
3 slopes have less area available for flow control facilities than flatter slope areas. WWHM  
4 simulations have confirmed that, for poor-draining soils, steep slope sites can use smaller  
5 stormwater flow control mitigation facilities than flat slope sites, and can release more  
6 stormwater from the pond before erosive flows occur. This is because a steep slope site has  
7 higher pre-development peak flows than a flat slope site. Mr. Beyerlein assumes that, while  
8 private development projects will likely be built on a range of land slopes from flat to steep, the  
9 County will likely prefer to select its flow control mitigation projects on sites with relatively  
10 flatter areas, where the largest amount of stormwater storage is available. This flatter slope  
11 preference for flow control mitigation projects will result in more storage availability than the  
12 on-site flow control storage on moderate or steep slope sites. The result is that the County will  
13 end up with at least equal, if not greater, stormwater flow control storage under the Agreed  
14 Order's approach to mitigation than it would if the County had to try and match mitigation sites  
15 based on finding a mitigation site with a slope similar to the original private development site.  
16 *Beyerlein Pre-Filed Testimony* at Attachment 4, pp. 7-8.

17 The end result of using WWHM's flow duration matching methodology is that all  
18 stormwater flow control mitigation facilities designed using WWHM over-mitigate for erosive  
19 flows. This means that, under the Agreed Order, where the new or redevelopment site is not  
20 allowed to increase the occurrence of erosive flows above existing site runoff levels, the on-site  
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1 stormwater flow control facilities sized using WWHM will actually decrease erosive flows  
2 relative to existing land cover conditions. *Beyerlein Pre-Filed Testimony* at Attachment 4.

### 3 ***Self Regulation***

4 Appellants' challenge, and the majority opinion, appears to be based largely on mistrust  
5 of the County's intentions or abilities to remain vigilant in meeting its on-going permit  
6 obligations. While this suspicion may not be entirely misplaced, given some of the unfortunate  
7 statements made by individual County representatives (*Ex. R-1*), I do not find it a compelling  
8 basis for invalidating the Agreed Order. To the extent this mistrust underlies the majority's "self  
9 regulation" analysis, I do not agree that the facts support a conclusion that the Agreed Order  
10 results in impermissible self regulation.

11 Appellants are concerned that nothing in the Agreed Order prevents harm from occurring  
12 in the most ecologically valuable subwatersheds in exchange for cheaper/easier mitigation that is  
13 located in the least ecologically important areas. The possibility of this happening, they suggest,  
14 equates to an impermissible self regulatory scheme. What this argument overlooks, however, is  
15 that nothing in the Agreed Order prevents Clark County from maximizing mitigation benefits in  
16 the most ecologically valuable subwatersheds, even when the new or redevelopment is occurring  
17 in the least ecologically important areas (*i.e.*, infill in the most degraded, highly developed, far  
18 downstream areas, etc). In fact, this is a primary advantage of this alternative approach—it  
19 allows for targeted improvements to the landscape-level impacts caused by historic land  
20 conversions rather than being limited to the more "random" site locations associated with new or  
21 redevelopment projects. It allows the County to combine and leverage its flow control projects,



1 and place them higher or lower in a stream or watershed, where greater environmental benefits  
2 can be achieved than if all the permit's required flow control were implemented at the site of the  
3 new or redevelopment. *Gray Testimony; Wierenga Testimony; Kraft Testimony; O'Brien*  
4 *Testimony.*

5 The Appellants' criticism of the Agreed Order also undervalues both the County's  
6 Stormwater Needs Assessment Program (SNAP) and its Stormwater Capital Improvement  
7 Project (SCIP) prioritization and selection process. Contrary to the assumption suggested by the  
8 majority that Clark County will select only the cheapest options for mitigation, without regard  
9 for beneficial uses or the environmental consequences of its choices, the Agreed Order requires  
10 the county to place mitigation according to selection criteria and the information developed  
11 through its SNAP. *Ex. J-1* at 8. The Agreed Order recognizes that past and current work by  
12 SNAP includes: "hydrologic and hydraulic modeling of streams within urban growth area  
13 watersheds, assessing stream geomorphology and describing riparian conditions." *Id.; See Exs.*  
14 *R-27; R-40 through R-71.* The goals of the SNAP assessments, in turn, are to:

- 15 • Analyze and recommend the best and most cost effective mix of improvement  
16 actions *to protect existing beneficial uses, and to improve or allow for the*  
17 *improvement of lost or impaired beneficial uses* consistent with NPDES  
18 objectives and improvement goals identified by the state GMA, ESA recovery  
19 plan implementation, TMDLs, WRIA planning, flood plain management, and  
20 other local or regional planning efforts. *Ex. R-27, at 1-3m (emphasis added).*

18 While these assessment reports do not purport to be basin plans, they are focused on beneficial  
19 uses of the receiving waters, and the information contained within them will provide the basis for  
20 selecting the most suitable areas for flow control mitigation projects. The Agreed Order directs  
21 that "Specific mitigation sites will be determined by priorities for flow control mitigation

1 established under a project selection process that considers existing information describing  
2 channel conditions, channel hydrology and subwatershed hydrology.” *Ex. J-1* at 8. It is from this  
3 universe of suitable and targeted projects that the cost/benefit ratios, in terms of cost per unit of  
4 land cover mitigated, may be considered in prioritizing projects. *Id.*

5         The County will do this by utilizing its SCIP prioritization and selection process, which  
6 will then be incorporated into the County’s Stormwater Management Plan (SWMP). *Ex. A-72,*  
7 *Wierenga Testimony.* This SCIP process contains a detailed list of criteria, in addition to the  
8 potential amount of flow control, relating to such things as hydrological need, water quality, fish  
9 importance, and habitat enhancement, and will provide the weighting to be given to each, in  
10 objectively evaluating potential projects. *Id.* While the Board of County Commissioners  
11 (BOCC) provides overall budget authority for the County’s stormwater program, and approves  
12 individual contracts, the BOCC does not make the selection of the projects in the SWMP. *Id.* No  
13 evidence was provided that the County’s use of these processes will allow it to ignore these other  
14 considerations; rather the testimony was that this process, unlike the default in the Phase I  
15 Permit, allows the County to consider these other benefits in selecting where to locate the flow  
16 control relative to a development or redevelopment project that triggers the flow control  
17 requirement.

18         Taking these processes together with the Agreed Order’s required annual reporting  
19 requirements to Ecology (*Ex. J-1* at Attachment A, p. 10), I would conclude that both Ecology  
20 and the public will have the information necessary to review Clark County’s implementation of  
21 the Agreed Order’s mitigation program and determine compliance with its requirements.

1 In sum, I concur with the majority that the Agreed Order is flawed with respect to its  
2 effective date, and its inability to ensure an adequate maintenance of efforts and compliance with  
3 the Phase I Permit's LID requirements. I also dissent, however, and would sustain Ecology's  
4 decision to approve the Agreed Order's fundamental approach to implementing flow control  
5 mitigation for impacts associated with historic land conversions. I do not find the approach  
6 manifestly unreasonable and cannot conclude that Ecology approved it in willful or unreasoning  
7 disregard for the facts and circumstances attendant to this case.

8 DATED this 5<sup>th</sup> day of January, 2011.

9 **POLLUTION CONTROL HEARINGS BOARD**

10 *Andrea M. Doyle*  
11 \_\_\_\_\_  
12 ANDREA MCNAMARA DOYLE, Presiding