POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

PUGET SOUNDKEEPER ALLIANCE; WASTE ACTION PROJECT; WASHINGTON PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY; RESOURCES FOR SUSTAINABLE COMMUNITIES; CITIZENS FOR A HEALTY BAY; and WASHINGTON ENVIRONMENTAL BALANCE, INC.;	)	PCHB 02-162
and	)	Consolidated with
THE BOEING COMPANY,	)	PCHB 02-163
and	)	and
SNOHOMISH COUNTY,	)	PCHB 02-164
Appellants,	)	ORDER GRANTING PARTIAL SUMMARY JUDGMENT
THE ASSOCIATION OF WASHINGTON BUSINESS,	)	
Intervenor,	)	
v.	)	
STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY;	)	
Respondent.	)	

Puget Soundkeeper Alliance, Waste Action Project, Washington Public Employees for Environmental Responsibility, Resources for Sustainable Communities, Citizens for a Healthy

Bay and Washington Environmental Balance, Inc. ("Environmental Groups") filed with the Pollution Control Hearings Board ("Board") a motion for summary judgment on March 31, 2003. The motion requests the Board to decide issues five, six and eight from the Pre-Hearing Order.

The appeal of the Environmental Groups challenges the Department of Ecology's ("Ecology") renewal of the Industrial Stormwater General NPDES Permit. The issues raised in the motion concern the permit's establishment of: 1) a compliance schedule for applicants proposing to discharge in state listed waters under Section 303(d) of the Clean Water Act, 2) a standard mixing zone for applicants, and 3) authority for Ecology to modify or waive the terms of the permit, at the agency's discretion.

Richard A. Smith, of Smith & Lowney represents the Environmental Groups. Peter E. Hapke represents the Boeing Company ("Boeing"). Robert Davis, Jr. and Mark J. Asplund, of Lane Powell Spears Lubersky, represent the Intervenor, the Association of Washington Business ("AWB"). Ronald L. Lavigne, Assistant Attorney General, represents Ecology.

The Board, comprised of Robert V. Jensen, presiding; Kaleen Cottingham and William H. Lynch, considered the motion on the record. The pleadings filed with this motion were:

1. Appellants' Puget Soundkeeper Alliance, et al's Motion for Summary Judgment, including Declaration from Mark A. "Mac" Kaufman Supporting Motion for Summary Judgment, with Exhibit 1; Exhibits A through L; two federal cases; and Declaration of Richard A. Smith;

2. Proposed Order Granting Appellants' Puget Soundkeeper Alliance, et al's Motion for Summary Judgment;

3. AWB's and the Boeing Company's Memorandum in Opposition to Appellants' Puget Soundkeeper Alliance, et al's Motion for Summary Judgment, including declaration of Mark Asplund in Support of Memorandum in Opposition to Appellants' Puget Soundkeeper Alliance, et al's Motion for Summary Judgment, with Exhibits A through T;

4. Respondent, Department of Ecology's Response in Opposition to Appellants' Puget Soundkeeper Alliance, et al's Motion for Summary Judgment, and

5. Reply Supporting Appellants' Puget Soundkeeper Alliance, et al's Motion for Summary Judgment, including Exhibits M through S; one federal case; and Declaration of Richard A. Smith Re: Reply Supporting Motion for Summary Judgment.

In addition, the presiding officer received the following procedural pleadings from the parties:

1. AWB's and the Boeing Company's Motion to Strike the Declaration of Richard A. Smith;

2. Appellants' Puget Soundkeeper Alliance, et al's Motion to Strike Exhibit T to AWB's and the Boeing Company's Memorandum Opposing Summary Judgment;

3. Proposed Order Granting Appellants' Puget Soundkeeper Alliance, et al's Motion to Strike Exhibit T to AWB's and the Boeing Company's Memorandum Opposing Summary Judgment; and

4. Appellants' Puget Soundkeeper Alliance, et al's Response to AWB's and the Boeing Company's Motion to Strike the Declaration of Richard A. Smith.

The presiding officer affirms his oral ruling granting the AWB's and Boeing's motion to strike the declaration of Richard A. Smith. This declaration goes beyond the normal procedural declaration of an attorney identifying documents attached to the pleadings, and describes the attorney's method of selecting reports of industrial stormwater inspections by Ecology. This is irrelevant to the proceedings. Mr. Smith argues AWB's and Boeing's motion should be denied

because the makers of the motion failed to file a proposed order, under WAC 371-08-450. This requirement is for the Board's benefit. Here there is no prejudice to the parties, because the Board has full authority to render its own order, regardless of whether a party supplies a proposed order.

The presiding officer denies the Environmental Groups' motion to exclude Exhibit T, attached to AWB's and Boeing's opposition memorandum. Exhibit T is a copy of the AWB's memorandum to the Board in a predecessor case to this one. The Environmental Groups argue this attachment must be included as part of the opposition memorandum. As such, it exceeds the 25-page limit for briefs, set in the Pre-Hearing Order. Secondarily, they argue the brief contains substantial hearsay. Neither argument is persuasive. The Board does not consider attachments to a brief, as part of a brief, for the purpose of the page limitation. If they did, both parties would be in violation of the Board's page limit. Moreover, the brief is a part of a prior Board proceeding, which may be officially noticed by the Board under its regulations. WAC 371-08-510(1)(a). The fact the pleading contains hearsay goes to the weight of the document, because the Board is not precluded from receiving hearsay testimony. RCW 34.05.4(1); WAC 371-08-500(1). In any event, the brief does not prejudice the Environmental Groups, because the Board has not relied in rendering its decision, upon any alleged hearsay statements made in the brief.

DISCUSSION

Ecology issued the fourth renewal of the Industrial Stormwater General Permit ("General Permit") on August 21, 2002, with an effective date of September 20, 2002. This permit provides coverage for 1,297 industrial facilities across Washington, where precipitation or runoff

may contact industrial activities or materials and result in the discharge of stormwater. The following parties appealed the permit: Boeing, Snohomish County and the Environmental Groups. AWB was granted intervenor status by the Board. The presiding officer held a pre-hearing conference with all the parties. As a result of the conference, he issued a Pre-Hearing Order, which lists 11 issues for the hearing. The Environmental Groups' motion asks for summary judgment and remand to Ecology on the following issues:

5. Is it consistent with the applicable legal requirements for Ecology to authorize a compliance schedule for discharges, which would violate applicable water quality standards into an impaired water body?

6. Is the standard mixing zone authorized in the permit unlawful?

8. Is it lawful for Ecology to include language in the permit, which authorizes Ecology to modify or waive permit requirements in writing?

The Board grants partial summary judgment to the Environmental Groups on these issues.

FACTUAL BACKGROUND

I

Ecology first issued its baseline stormwater general permit on November 18, 1992. That permit covered both industrial and construction activities. Ecology, when it reissued the permit on February 4, 1995, removed the construction activities to a separate permit. Ecology reissued the 1995 permit on October 4, 2000. That permit had an expiration date of November 18, 2005. It was appealed to this Board. As a result of the Board's proceedings, the permit was revoked and reissued on August 21, 2002, with an effective date of September 20, 2002.

II

Provision S7 of the General Permit requires:

> Permittees must comply with Washington State surface water quality standards (Chapter 173-201A WAC), sediment management standards (Chapter 173-204 WAC), ground water quality standards (Chapter 173-200 WAC), and human health-based criteria in the national Toxics Rule (Federal Register, Vol. 57, No. 246, Dec. 12, 1992, pages 60848-60923). Compliance with standards applies to all discharges, except for the implementation time provided to existing facilities with first time coverage as identified in S2.B.
>
> Compliance with water quality standards means that stormwater discharges by a facility with coverage will not cause or contribute to a violation of the water quality standards in the receiving water.

III

Ecology has found many facilities under permit coverage are not in compliance with permit provisions. The stormwater pollution prevention plan ("SWPPP") is a critical permit requirement, which identifies how stormwater will be managed to prevent stormwater pollution. This is especially important because the permit relies primarily on the use of best management practices ("BMP's") to achieve compliance with water quality standards. However, the agency estimates, as recently as August 2001, only about half of the facilities with permit coverage could locate their SWPPP during an Ecology inspection. Even fewer had a current SWPPP, which was fully implemented. About 60 to 70% of the facilities could identify one or more BMP's to manage stormwater, but no more than 25% could be considered in full compliance with the BMP requirements. Ecology estimates at least 10 to 15% of the permitted facilities are likely causing a measurable environmental problem. Subsequent to August 2001 someone at Ecology asked every permittee for its SWPPP. Ecology estimates, as a result of that request, a

much higher rate of permittees now have their SWPPP. There is no indication, however, of any substantial change in the rate of compliance with BMP requirements, as of the date Ecology issued this permit in August 2002.

IV

This permit contains several new provisions. These include: 1) monitoring, and analysis and reporting of these analyses and sampling results to Ecology; 2) objective requirements to meet narrative water quality standards and numeric criteria, for certain discharges to 303(d) listed waters (referred to hereafter as "impaired waters"); 3) a compliance schedule for those permittees who are unable to meet the numeric effluent standards for 303(d) listed water bodies; 4) allowances for standard and expanded mixing zones for discharges to non-303(d) listed waters; 5) "benchmarks" for the purposes of water quality monitoring; 6) a provision for a "no exposure" exclusion from permit coverage; and 7) several provisions authorizing Ecology to modify or waive permit provisions, at the agency's discretion.

V

The Environmental Groups are challenging three aspects of the new General Permit: 1) new provisions regarding compliance schedules, 2) standard mixing zones[1], and 3) authorizations to modify or waive permit conditions, at the agency's discretion, outside of the established modification procedures set forth in the permit.

[1] They do not challenge the provisions relating to the authorization of "expanded mixing zones."

ANALYSIS

VI

Summary judgment may be granted only where there are no genuine issues of material fact, and the law supports the motion. WAC 371-08-300(2); Civil Rules for Superior Court ("CR") 56(c). The Board may grant relief to the non-moving party. *Impecoven v. Dept. of Revenue*, 120 Wn.2d 357, 365, 841 P.2d 752 (1992). There are no genuine issues of material fact.

VII

Ecology, AWB and Boeing argue the standard of review for challenges to the new General Permit should, by analogy, be the same as the standard of review applied to a facial constitutional challenge of a law or regulation. They, however, fail to supply any legal authority for this proposition. We have previously rejected this contention in *Puget Soundkeeper Alliance v. Ecology*, PCHB 00-173, Order on Motion for Summary Judgment, n.2 (Aug. 29, 2001); *Puget Soundkeeper Alliance v. Ecology*, PCHB 00-174, Order on Summary Judgment, n.2 (Aug. 29, 2001). There we wrote:

> Ecology and AWB argue for a standard of review similar to a rule challenge or constitutional challenge. They would require a showing that there is no set of circumstances in which the permit could be constitutionally applied. There is no legal support for extending such a standard to this type of case. The Board is persuaded that the proper legal standard of review is based upon whether the permit is consistent with the applicable legal requirements.

Ecology's brief is virtually verbatim on this issue in this case, from what it was in those former cases. The brief of the AWB and Boeing in this case, adds nothing in the way of legal authority to Ecology's brief.

VIII

The Board is guided by its own regulations, as to the standard of review regarding NPDES permits. Those regulations direct the Board to remand to Ecology any NPDES permit the Board finds invalid in any respect. WAC 173-08-540(2). The proposed standard of review advocated by Ecology, the AWB and Boeing is also inconsistent with the enforcement provisions authorized under the Clean Water Act. This suggested approach is especially suspect here, where Ecology admits, in advance of issuing this permit, there was substantial non-compliance with the control measures, in the form of BMP's selected by the dischargers, required under the prior permit. This suggests the self-enforcing standards in that permit are not working as intended. The standard of review argued for by Ecology would require a reviewing body to ignore this important information. The very premise of both the Clean Water Act and this state's Water Pollution Control Act is no pollution is allowed, unless it is permitted by the regulating agency. The agency's authority to permit pollution is constrained both by the express purposes of the acts, and the water quality standards under those acts.

IX

"One of the most fundamental changes brought by the passage of the CWA [Clean Water Act] was the explicit reversal of the 1948 FWPCA's (Federal Water Pollution Control Act)

premise that the ability to discharge polluted waste streams was a legitimate use of the nation's waters." Gershon Eliezer Cohen, *Mixing Zones: Diluting Pollution Under the Clean Water Act*, 14 TUL. ENVTL. L.J., 1, 11 (2000). The Act went so far as to announce a national goal of completely eliminating the discharge of pollutants into the nation's waters by 1985. 33 U.S.C. § 1251(a)(1).

X

The state Water Pollution Control Act contains an equally rigorous policy statement.

> It is declared to be the public policy of the state of Washington to maintain the highest possible standards to insure the purity of all water of the state consistent with public health and public enjoyment thereof, the propagation and protection of wild life, birds, game, fish and other aquatic life, and the industrial development of the state, and to that end require the use of all known available and reasonable methods by industries and others to prevent and control the pollution of the waters of the state of Washington. Consistent with this policy, the state of Washington will exercise its powers, as fully and as effectively as possible, to retain and secure high quality for all waters of the state. The state of Washington in recognition of the federal government's interest in the quality of the navigable waters of the United States, of which certain portions thereof are within the jurisdictional limits of this state, proclaims a public policy of working cooperatively with the federal government in a joint effort to extinguish the sources of water quality degradation, while at the same time preserving and vigorously exercising state powers to insure that present and future standards of water quality within the state shall be determined by the citizenry, through and by the efforts of state government, of the state of Washington.

XI

We weigh the recently renewed General Permit's goals of providing flexibility to deal with an intermittent pollutant source in a cost-effective manner, against the goals and requirements of Washington's water quality laws, in evaluating the challenges raised by the

Environmental Groups. Those challenges are to the compliance schedules, the mixing zones, and informal modifications or waivers to the General Permit.

COMPLIANCE SCHEDULE

XII

In the permit, permittees must comply with the state's water quality standard for each pollutant named as causing a violation of water quality standards at the location named on the state's 303(d) list, when 303(d) listings are based upon numeric water quality criteria. This requirement does not apply for listings of temperature or for most instances of listings for fecal coliform. The permit requires new facilities discharging into impaired waters to comply with the state's water quality standards for the named pollutants at the point of discharge. Facilities having a significant process change, must either comply with the state's water quality standards applicable to the pollutant constituents identified as exceeding water quality standards in impaired waters at the point of discharge, or demonstrate no increase in loading from the entire facility as a result of the process change. New facilities and facilities having a significant process change must comply with any applicable total maximum daily load ("TMDL") determination. Section S3.D.1.

XIII

Existing facilities, which are those in existence before September 20, 2002, the effective date of the renewed General Permit, are required to meet the applicable water quality standards at the point of discharge into impaired waters. "Existing facilities" includes facilities which were not previously permitted so long as they were in existence before the effective date of the

renewed General Permit. Existing facilities subject to a TMDL determination must be in compliance with the conditions of the determination and detailed implementation plan. However, if such permittee fails to comply with the effluent limits for impaired waters, it then must follow a compliance schedule until it comes into conformance with those water quality standards; or if a TMDL determination is made, with that TMDL determination. The General Permit considers this compliance schedule as the interim effluent limitations until that time. S3.D2.

XIV

The compliance schedule consists of a series of six progressive steps of defining and implementing BMP's. The permittee must demonstrate attainment of the applicable water quality standards by evidencing eight consecutive quarterly samples not exceeding the applicable standards for the listed pollutants in the impaired water body. If the permittee's discharge does not attain that level of compliance after going through the six steps, the cycle is repeated until the permittee successfully demonstrates attainment of the water quality standards.

XV

The schedule, as designed, allows the permittee nine years to complete all six steps. If the permittee fails to comply within those nine years, there is no warning it will be subject to enforcement action by Ecology, rather it may simply start through the process again until it achieves the water quality standards. Ecology does not set any date in the permit when the TMDL process must be completed for any water body segment in Washington. Although Ecology has a schedule for submittal of TMDL's to EPA, there is no nexus in this permit to

make this schedule binding. The present schedule indicates compliance will not be complete until the end of 2013, more than 10 years after the General Permit was issued. Even if Ecology were to fulfill this schedule, would the agency enforce against any permittees who were not in compliance, prior to approval of the EPA? The permit does not address this issue.

XVI

There is no requirement for Ecology to approve any reports the permittee is required to submit to the agency over the course of this compliance schedule. Nor is there any requirement for Ecology to approve the BMP's a permittee selects in order to achieve compliance with the water quality standards. Although some flexibility should be afforded permittees in choosing BMP's to address their own unique situations, Step 1 of the S3.D.2 compliance schedule only requires the selection of nonstructural source control options. Similarly, Step 3 of this compliance schedule only requires the selection of structural source control options. Treatment BMP's are not required until a permittee reaches Step 5 in the compliance schedule, which may be years from when the permittee first began discharging pollutants into impaired waters at a level in excess of compliance levels. Ecology has many years of experience in reviewing the effectiveness of different BMP's under different circumstances. Ecology may well know that a treatment BMP is the only reliable method for addressing a particular situation, but years may pass before treatment BMP's are even considered by a permittee under those circumstances. This may be an abdication of its responsibility to determine whether a permittee applies all known, available and reasonable treatment ("AKART") before discharge. The fact the permittee must comply with Ecology's stormwater manuals does not satisfy Ecology's responsibility for

regulatory oversight, because the compliance schedule does not require the selection of any particular BMP's from the manual. Rather, it leaves the choice of the appropriate BMP's entirely up to the permittee. If the permittee makes the wrong choice, Ecology has no responsibility, under this scheme to rectify the situation in a timely manner. It can, under this program, respond to a charge of failure to enforce, by saying the primary responsibility for achieving water quality standards rests upon the permittee. We conclude this compliance schedule, with its lack of regulatory oversight is similar to the type of self-enforcing regulatory program recently invalidated by the Ninth Circuit in *Environmental Defense Center v. Environmental Protection Agency*, at U.S. App. LEXIS 497, at *57-62.[2] (9th Cir., Jan. 14, 2003).

XVII

We next turn to the Environmental Groups' argument the compliance schedule is inconsistent with Ecology's regulation governing compliance schedules. These regulations are WAC 173-201A-160(4) and WAC 173-226-180. These regulations do not allow the application of compliance schedules to new discharges. WAC 173-201A-160(4). "Such schedules of compliance shall be developed to ensure final compliance with all water quality-based effluents in the shortest practicable time"; and in the "shortest reasonable time necessary to achieve compliance, consistent with the guidelines and requirements of the FWPCA." *Id*.; WAC 173-226-180(2).

[2] We note the General Permit program under review there involved municipal sewer systems, which are under a requirement under the Clean Water Act to reduce stormwater pollution to the maximum extent practicable, which is less than the standard applicable to industrial dischargers, which is to meet all the applicable effluent and water quality standards. 33 U.S.C. § 1311(b)(1)(c); 1313(a); 1342(a) & (p)(3)(A) & (B); RCW 90.48.080; WAC 173-201A-160(3)(a); 173-226-180(1); *Defenders of Wildlife v. Browner*, 191 F.2d 1159, 1164-65.

XVIII

The schedule set forth in the General Permit allows up to nine years for completion; however if the permittee fails to comply within that time period, it may continue the cycle until a TMDL is completed for the receiving water body. WAC 173-201A-160(4)(c), provides "[s]chedules of compliance may in no case exceed ten years, and generally not exceed the term of any permit." (Emphasis added.) WAC 173-226-180 does not contain a deadline, but generally says such schedules should not exceed one year, unless there are interim requirements and dates. WAC 173-226-180(3). The General Permit, as all NPDES permits, has a term of five years. The compliance schedule provided in the General Permit allows up to more than 10 years for compliance and definitely exceeds the term of the permit. We conclude WAC 173-201A-160(4), is the more specific regulation as to the ultimate length of a compliance schedule, because it contains a finite deadline; whereas the General Permit regulation contains none. Therefore, it controls the ultimate length of a compliance schedule. In addition, the term "any permit," contained in WAC 173-201A-160(4)(c), fails to contain any exception for general discharge permits. Therefore, the General Permit is inconsistent with this regulation.

XIX

WAC 173-226-180(4) requires: "Either before or up to fourteen days following each interim date and the final date of compliance, the permittee shall provide the department with written notice of the permittee's compliance or noncompliance with each or interim or final requirement." This requirement is especially critical here, where Ecology is not directly involved in approving either a permittee's SWPPP, or in assuring the permittee's selection of

BMP's is appropriate to the circumstances. The reporting required by the permittee under the permit, as structured does not comply with this regulation.[3] That reporting, as described in the permit does not clearly require the permittee to give timely written notice of the permittee's compliance with each interim or final requirement.

XX

Next, we consider whether the compliance schedule is consistent with the Clean Water Act ("CWA"). That act explicitly limits compliance schedules: It mandates for industrial discharges:

> Not later than 2 years after February 4, 1987, the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraphs (2)(B) and (2)(C). Applications for permits for such discharges shall be filed no later than 3 years after February 4, 1987. Not later than 4 years after February 4, 1987, the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit. (Emphasis added.).

33 U.S.C. § 1342(p)(4)(A).

[3] The EPA has a comparable regulation, which allows the permittee to provide this statement within 14 days, or if there is an interim compliance schedule, to supply progress reports. 40 C.F.R § 122.47(a)(4). WAC 173-226-180(3) allows for interim compliance schedules, but notably the state regulations, do not allow the permittee to supply progress reports, in lieu of compliance statements. This may be due to the fact the federal regulations do not allow compliance schedules to extend beyond the statutory deadlines. 40 C.F.R. § 122.47(a)(1). As we note below, the compliance schedule provided in this General Permit, extends compliance beyond the statutory deadlines of the Clean Water Act.

XXI

Compliance, as referred to in the last sentence quoted, means compliance with the permit requirement contained in 33 U.S.C. § 1342(p)(3)(A). That section requires strict compliance with water quality standards, which under the General Permit are implemented by numeric effluent standards contained in Section S3.D.2. The statute plainly requires the compliance by February 4, 1995, which is three years after Ecology issued its initial industrial stormwater general permit. EPA interprets the CWA three-year requirement to apply solely to the initial permits. 40 CFR 122.42(d). Under that interpretation, existing dischargers, for whom this is their initial permit, are entitled to a compliance schedule of no more than three years. Existing industrial dischargers who have been covered by a prior version of the General Permit are not entitled to any compliance schedule.

XXII

Even, however, if the statute could be read to mean any permit, this General Permit is not in compliance, because Section S3.D.2. does not ensure compliance within three years of the effective date of the permit, which is September 20, 2002.

STANDARD MIXING ZONES

XXIII

The General Permit allows standard mixing zones for those industrial dischargers who do not discharge into impaired water bodies. Nowhere in the CWA is the concept of incorporating mixing zones into state water quality standards mentioned. However, the Act has been utilized to consider the effects of dilution when determining whether any discharge causes or contributes

to a violation of the water quality standards. Dilution or mixing zones have been rationalized by the EPA on the theory the Clean Water Act's goals, objectives and prohibitions do not apply to the whole waterbody, but rather to the "waterbody-as-a-whole." *See, EPA, Policy and Guidance on Mixing Zones*, 63 Fed. Reg. 36, 788 (July 7, 1998). A recent article by a legal commentator concluded the following about mixing zones:

> Despite the layers of legal support for mixing zones established in federal and state regulations, when viewed directly against the context and purposes of the CWA, the application of mixing zones appears extremely problematic. Taken at face value, the Act's goals, objectives, and prohibitions seem to prohibit the authorization of mixing zones as currently implemented. Mixing zones, especially for pollutants that persist in the environment or bioaccumulate, do not maintain or improve the quality of the public's waters; they provide a legal mechanism for its degradation. Mixing zones do not lead to the elimination of polluted discharges into public waters; they sanction the discharge of pollutants at levels that exceed otherwise applicable water quality standards and federal criteria. In so doing, mixing zones preclude the use of portions of public waters for drinking, fish harvesting, recreation, aesthetic and cultural needs, and other less damaging economic purposes. Mixing zones do not comply with the CWA's prohibition against creating toxic conditions; they expressly allow the discharge of toxic substances in toxic amounts. In sum, mixing zones appear fundamentally incongruous with the principles by which Congress intended to reform the nation's management of water pollution.
>
> The Act was drafted and amended with the understanding that the country was not yet ready for the imposition of a zero-discharge law. However, accepting the inevitability of some mixing of wastestreams and receiving waters did not have to necessarily lead to a policy that circumvents other principles of the CWA. The problem with mixing zones vis-à-vis the Act is not that they permit a lowering of water quality; it is the degree to which they permit waters to be polluted.
>
> . . .
>
> The widespread and indiscriminant use of mixing zones clearly has the potential to thwart the greater goals of the CWA. A fundamental purpose of the Act's NPDES permitting mechanism is to insure that as more efficient, less waste-producing technologies are developed, they become incorporated into revisions of the national effluent guidelines. These improved standards, applied category-wide under the best conventional and best

> available technology stipulations in section 306, are intended to reduce the magnitude and frequency of polluted discharges and bring the nation closer to the zero-discharge goal. Yet virtually automatic renewals of mixing zones without a compelling demonstration of need or impacts to the public's resources assure the availability *ad infinitum* of public waters for dilution and removes the major incentive to design and implement technologies that will improve performance. Put bluntly, the routine application of mixing zones directly undermines the mechanisms by which the zero-discharge goal of the CWA might otherwise be met.

Gershon Eliezer Cohen, *Mixing Zones: Diluting Pollution Under the Clean Water Act*, 14 TUL. ENVTL. L.J., 81, 91 (2000).

XXIV

The Fact Sheet prepared for the new General Permit discusses the impact of stormwater discharges on receiving water. It states: "Typically the discharge will either directly or indirectly enter waters classified as Class AA or Class A with beneficial uses that include water supply, fish/shellfish, wildlife habitat, and recreation. . . . [T]he potential impact of stormwater is significant."

Fact Sheet for Industrial Stormwater General Permit, page 24.

XXV

Washington has provided for mixing zones in its surface water quality standards. WAC 173-201A-100. This regulation consists of a fairly rigorous array of procedures and substantive provisions to ensure these zones are not used excessively to thwart the goals and policies of the Clean Water Act and the State Water Pollution Control Act. These regulations contain several protections against the excessive use of these zones. The first is they may not be applied prior to

Ecology making a determination the discharger has satisfied AKART. WAC 173-201A-100(2).[4] Second, the mixing zone must consider critical discharge conditions. Third, no mixing zone shall be granted unless the supporting information "clearly indicates the mixing zone would not have a reasonable potential to cause a loss of sensitive or important habitat, substantially interfere with the existing characteristic uses of the water body, result in damage to the ecosystem, or adversely affect public health as determined by the Department. WAC 173-201A0100(4). Fourth, the mixing zones for stormwater must be based on a volume of runoff corresponding to a design storm approved by Ecology. Fifth, the regulations require the size and concentrations of pollutants in such zones be "minimized." WAC 173-201A-100(6). Finally, the overlapping of mixing zones is not to "create a barrier to the migration or translocation of indigenous organisms to a degree that has the potential to cause damage to the ecosystem." WAC 173-201A-100(9)(a)(ii).

XXVI

The regulations allow a potential discharge of stormwater to be exempt from the maximum size and overlap criteria of the regulation. WAC 173-201A-100(10)(b). However, to obtain this exemption, the stormwater discharge must demonstrate it has met certain criteria. We construe exemptions from the water quality standards narrowly. *See, R.D. Merrill, Co. v.*

[4] Although WAC 173-201A-100(10)(b)(i) uses the terms "all appropriate best management practices established for storm water pollutant control have been applied to the discharge," Ecology's standard form for the General Permit requires the applicant to certify, under penalty of law it has implemented AKART. Thus we conclude the requirements of WAC 173-201A-100(10(b)(i) require AKART. If not the regulation is inconsistent with WAC 173-201A-100(2), which applies to all permits, including General Permits, and with 90.48.010.

Pollution Bd., 137 Wn. 2d 118, 140, 969 P.2d 458 (1999) (holding the exceptions to the relinquishment statute in the water code are to be narrowly construed).

XXVII

The General Permit mixing zone criteria are contained Condition S3.E. They consist first of a requirement the applicant certify as follows:

> I certify the following is true:
>
> 3. I have implemented all known available and reasonable methods of prevention, control and treatment (AKART) as identified below:
>
> i. the facility has prepared and implemented a stormwater pollution prevention plan consistent with permit requirements.
> ii. All appropriate best management practices established for stormwater pollution control associated with their industry as identified by Ecology's stormwater management manual have been applied to the discharge.
>
> 4. The mixing zone does not have a reasonable potential to result in a loss of sensitive or important habitat, substantially interfere with the existing or characteristic uses of the waterbody, result in damage to the ecosystem, or adversely affect public health as determined by Ecology; and
>
> 5. The mixing zone does not create a barrier to the migration or translocation of indigenous organisms to a degree that has the potential to cause damage to the ecosystem.

XXVIII

Secondly they contain brief size criteria borrowed in part, but not wholly from WAC 173-201-100(7)(a)-(e).

XXIX

Ecology, AWB and Boeing assert these criteria satisfy the agency's regulations governing mixing zones. We disagree. A certification by an applicant, absent review by

Ecology, does not satisfy the requirements of the regulation. The regulations presume Ecology is reviewing and approving of these mixing zones. For example, WAC 173-201a-100(4) begins:

> No mixing zone shall be granted unless the supporting information clearly indicates the mixing zone would not have a reasonable potential to cause a loss of sensitive or important habitat, substantially interfere with the existing characteristic uses of the water body, result in damage to the ecosystem, or adversely affect the public health as determined by the department.

XXX

An applicant's statement he is complying with the regulations does not satisfy this regulation. The statement fails to detail what best management practices the applicant proposes to use, identify the water body characteristics, including seasonal flows, depth, width, or sensitive organisms and fish species occupying the water body, so Ecology could reasonably rely on the statement as a basis for granting the zone.

XXXI

Because Ecology's General Permit has selected some, but not other of the size criteria of the regulations, it appears the agency has granted an advance exemption from those criteria, under WAC 173-201A-100(10)(b). We conclude this granting of an exemption is improper for two reasons. First, the regulation requires the applicant to <u>demonstrate</u> to Ecology it satisfies the criteria for obtaining the exemption. This logically requires Ecology to decide whether the demonstration is adequate, so it can approve the exemption. Ecology's reliance upon an applicant's certification it is complying with a regulation, does not equate to Ecology's approval of the activity. It merely means Ecology takes the applicant's word for it, without any specific investigation whatsoever. Our interpretation is bolstered by our duty to construe the exemption

narrowly, to be consistent with the overall purpose of the Clean Water Act, which is to achieve zero discharges into the public waters, and the duty of Ecology, under the Water Pollution Control Act, to "exercise its powers fully and effectively as possible to retain and secure high quality for all the waters of the state." Furthermore, in *American Wildlands v. Browner*, 260 F.3d 1192, 1195-96 (10th Cir. 2001), the mixing zones challenged in Montana were upheld largely on the basis Montana law required mixing zones to be the smallest practicable size, the mixing zone may not "threaten or impair existing beneficial uses[,]" and the mixing zone itself was regulated to prohibit discharge from blocking passage of aquatic organisms or causing the death of organisms passing through the mixing zone. The result may have been different if Montana had proposed utilizing a standard mixing zone as contained in the new General Permit.

XXXII

Ecology's reliance upon statements of applicants, as a substitute for regulation, is misplaced as illustrated by Ecology's own statement in the Fact Sheet of the General Permit, where the agency candidly admits:

> [I]t is estimated that as recently as August 2001, only about half of the facilities with permit coverage could locate their SWPPP during an Ecology inspection. Even fewer had a SWPPP that was kept up-to-date and fully implemented. Best management practices (BMP's) are required by the permit to prevent stormwater pollution. Based on site inspections, about 60% to 70% of the facilities could identify one or more BMP's that were maintained to manage stormwater, but no more that 25% would be considered in full compliance with permit BMP requirements. It is estimated that at least 10% to 15% of the permitted facilities have a stormwater discharge that is likely to be causing a measurable environmental problem. (Emphasis added.)

In the face of this admitted noncompliance, Ecology proposes to compound the problem by allowing the regulated community to essentially determine whether or not it is in compliance

with the rigorous requirements of the state's water quality standards. This lack of regulatory oversight is an improper delegation of Ecology's regulatory responsibility to "exercise its powers as fully and effectively as possible to retain and secure high quality for all waters of the state." RCW 90.48.020. As with the compliance schedule, we conclude the mixing zone is an impermissible self-regulatory system, inconsistent with the recent federal decision of *Environmental Defense Center v. EPA*, No. 00-70014, U.S. App. LEXIS 497, at *57-62 (9th Cir. Jan. 14, 2003)

XXXIII

The Board also notes its determination regarding mixing zones is supported by EPA's General Policies regarding mixing zones. EPA recommends mixing zone characteristics be defined on a case-by-case basis. In addition, it states the need to limit the size of the area affected by mixing zones in order not to cause lethality to passing organisms, or cause significant human health risks. Exhibit J, attached to Declaration of Mark Asplund in Support of Memorandum in Opposition to Appellant Puget Soundkeeper. Chapter 5, General Policies, (9/15/93).

PERMIT CONDITION MODIFICATIONS

XXXIV

The General Permit authorizes Ecology to change several of the permit requirements, as applied to permittees without any notice to the public. The Environmental Groups point to the following instances:

1.Municipal Previously Exempt Facilities: "[u]nless otherwise authorized by Ecology in writing, the Stormwater Pollution Prevention Plan (SWPPP) must be completed and submitted to Ecology by March 10, 2003." Section S2.C.2.a.

2.For this same class of permittees: "[u]nless otherwise authorized by Ecology in writing, implementation of non-capital best management practices (BMP's) must be completed by May 10, 2003. BMP's that require a capital investment must be completed by November 10, 2003, unless otherwise authorized by Ecology in writing." Section S2.C.2.b.

3.For existing facilities not previously permitted: "[u]nless otherwise authorized by Ecology in writing, the Stormwater Pollution Prevention Plan (SWPPP) must be completed and submitted to Ecology within 30 days of receiving coverage." Section S2.C.3.a.

4.For this same class of permittees: "[u]nless otherwise authorized by Ecology in writing, implementation of non-capital best management practices (BMP's) must be completed within 90 days of receiving coverage. BMP's that require a capital investment must be implemented within nine (9) months of receiving coverage unless otherwise authorized by Ecology in writing." Section S2.C.3.b.

5.For inactive and unstaffed permittee facilities: "[v]isual monitoring can only be suspended if authorized in writing by Ecology." Section S4.B.1.

6.For all permittees regarding visual monitoring: "[t]he permittee shall eliminate the illicit discharge within 30 days unless additional time is authorized in writing by Ecology." Section S4.C.1.

7.For all permittees: "Analytical methods used to meet the monitoring requirements specified in this permit shall conform to the latest revision of the *Guidelines Establishing Test Procedures for the Analysis of Pollutants* contained in 40 C.F.R. Part 136 or to the latest revision of *Standard Methods for Examination of Water and Wastewater* (APHA), unless otherwise specified in this permit or approved in writing by the Department of Ecology (Ecology). Section S4.H.

XXXV

Ecology's general permit regulation requires: "All discharges authorized by the general permit shall be consistent with the terms and conditions of the permit." WAC 173-226-080(1)(a). Ecology, AWB and Boeing contend the above waiver language is part of the general

permit; therefore it complies with the terms and conditions of the permit. This reasoning is circular and begs the question of whether this approach is authorized under the law. We believe it is not. It deprives the public of any notice to comment upon fundamental changes to the permit requirements. WAC 173-226-200(3)(f)(i), requires an applicant for coverage under the General Permit to certify it has complied with the notice requirements of WAC 173-226-130(5). That provision requires, at a minimum, the applicant publish notice twice in a newspaper of general circulation, in the county in which the discharge is proposed. WAC 173-226-130(5)(a)(i). The Ninth Circuit has ruled Notices of Intent, which are notices for coverage under a general permit, are functionally equivalent to permit applications. *Environmental Defense Fund*, at *69. We believe proposed changes to fundamental deadlines and substantive requirements of the General Permit are similar in effect

XXXVI

Additionally, the provisions are inconsistent with EPA's regulation governing permit modification. All changes to NPDES permits, except those characterized as "minor modifications," under 40 C.F.R. § 122.63, must follow the procedures set forth in 40 C.F.R § 122.62 and 124.5. Minor modifications are defined in 40 C.F.R § 122.63 as:

> Minor modifications may only:
> (a) Correct typographical errors;
>
> (b) Require more frequent monitoring or reporting by the permittee;
>
> (c) Change an interim compliance date in a schedule of compliance, provided the new date is not more than 120 days after the date specified in the existing permit and does not interfere with attainment of the final compliance date requirement; or

> (d) Allow for a change in ownership or operational control of a facility where the Director determines that no other change in the permit is necessary, provided that a written agreement containing a specific date for transfer of permit responsibility, coverage, and liability between the current and new permittees has been submitted to the Director.
>
> (e)(1) Change the construction schedule for a discharger which is a new source. No such change shall affect a discharger's obligation to have all pollution control equipment installed and in operation prior to discharge under Sec. 122.29.
>
> (2) Delete a point source outfall when the discharge from that outfall is terminated and does not result in discharge of pollutants from other outfalls except in accordance with permit limits.
>
> . . .
>
> (g) Incorporate conditions of a POTW pretreatment program that has been approved in accordance with the procedures in 40 CFR 403.11 (or a modification thereto that has been approved in accordance with the procedures in 40 CFR 403.18) as enforceable conditions of the POTW's permits.

None of these seven provisions concern changes, which can fairly be characterized as a minor modification. Therefore, Ecology must comply with the procedures contained in § 122.62 and § 124.5. These include procedural safeguards, such as issuance of a draft permit, public notice, and opportunity for public comment and appeal.

XXXVII

Ecology already has available appropriate tools for modifying deadlines and regulatory requirements, which allows for an appeal and due process. If Ecology believes the deadlines or requirements are too short, they may propose changing them through the appropriate public modification procedures. If, however, they expect them to be met, in all but rare cases, they may

exercise their regulatory authority to require an applicant to make the appropriate demonstration for the change, through an appealable regulatory order.

XXXVIII

Ecology's informal modification process allows the agency to weaken the controls provided under the General Permit. Because these changes can affect many dischargers at one time, the effect is greater than it would be in an individual permit. RCW 90.48.170 requires applications for dischargers to increase the waste, or the character of the waste, over what they previously have been permitted, to publish notice in a newspaper of general circulation. We believe this requirement applies here, where Ecology proposes to have the authority, without public notice, to weaken the controls in the General Permit, which generally will result in more pollution going into the state's waters. Similarly the Clean Water Act, at 33 U.S.C. § 1342 (a)(1), requires public notice and the opportunity to be heard before a ruling on each NPDES permit. The Ninth Circuit has applied this section to applications for coverage under a general permit. *Environmental Defense Fund,* at *69. We believe these laws and the public policy of both the Clean Water Act and the State Water Pollution Control compel the conclusion Ecology may not authorize these major changes to its permit requirements without following the full public process.

XXXVIII

Based on the foregoing, the Board issues the following:

ORDER

1. The Board grants summary judgment to the Environmental Groups on issues five, six and eight of the Pre-Hearing Order.

2. The Board concludes the compliance schedule provisions, found at Section S3.D.2 of the Industrial General NPDES Permit, which was renewed effective September 20, 2002, are invalid. We remand them to Ecology for reconsideration.

3. The Board concludes the standard mixing zone provisions, available through Section S3.E.2 to dischargers proposing to discharge into public waters, other than impaired water are invalid. We remand them to Ecology for reconsideration.

4. The Board concludes Sections S2.C.2.a and b, S2.C.3.a and b, S4.B.1, S4.C.1, and S4.H are invalid. We remand them to Ecology for reconsideration.

5. The remaining issues from the Pre-Hearing Order remain for hearing.

DONE this 6th day of June 2003.

POLLUTION CONTROL HEARINGS BOARD

ROBERT V. JENSEN, presiding

KALEEN COTTINGHAM, Member

WILLIAM H. LYNCH, Member

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