

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CONFEDERATED TRIBES OF THE
GRAND RONDE COMMUNITY OF
OREGON,

Plaintiff,

v.

JEWELL, *et al.*,

Defendants,

- and -

COWLITZ INDIAN TRIBE

Defendant-Intervenor.

Case No. 13-cv-00849-BJR

Consolidated with:
Case No. 13-cv-00850-BJR

FEDERAL DEFENDANTS' RESPONSE TO NOVEMBER 12, 2014, MINUTE ORDER

The Court has requested additional briefing from Defendants on the *Clark County* Plaintiffs' argument that a supplemental environmental impact statement is necessary to address changes in Clark County's stormwater management code. *See* Minute Order (Nov. 12, 2014). Supplemental National Environmental Policy Act (NEPA) analysis is unnecessary for at least three reasons:

1. Plaintiffs' supplementation argument is not relevant because the EIS referenced the County Code as a mitigation measure, not as a regulatory requirement.

Changes to Clark County Code 40.385.010 are largely irrelevant to the question of whether the Department of the Interior took the requisite "hard look" under NEPA. Plaintiffs incorrectly posture the local code changes as changes to the project or its resulting impacts. Neither is accurate. Indeed, Clark County's code would not even directly apply to the project.

The land, if accepted into trust, would be subject to federal and tribal (rather than state and local) environmental laws. *See* AR140491. The County's stormwater code is only mentioned because the Cowlitz Tribe, in accordance with its agreement with Clark County, used 2004 County requirements as guidelines in designing the project's stormwater management system.

AR075860; AR082808–09 (Tribal ordinance). Thus, instead of a regulatory requirement, the EIS correctly references the County's then-present stormwater code as providing the structure for a mitigation measure. *See* AR075860–62; AR076080. NEPA requires only “a reasonably complete discussion of possible mitigation measures.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989). Interior met NEPA's mitigation requirements here. *See* AR076391–92; [Fed. Defs.'] Mem. in Opp'n to Pls.' Mot. for Summ. J. & Cross-Mot. in Support of Summ. J. at 60–62 (ECF No. 36).

2. Interior did address 2009 changes in Clark County's stormwater code, and the later changes that Plaintiffs now reference post-date the April 2013 Record of Decision.

In any event, Interior did address changes in Clark County's local stormwater law. In June 2008 comments, Plaintiffs identified then-forthcoming amendments (finalized in January 2009) to the Clark County Code. *See* AR065790–91. Interior responded to those comments, noting that: (1) if the land is accepted into trust, the U.S. Environmental Protection Agency, not the County, would regulate stormwater; and (2) the project, as designed, would adequately address stormwater runoff. AR064851. Interior's response perhaps explains why Clark County did not raise the issue again in its April 15, 2013, comments. *See* AR138879–84.

Plaintiffs' present concern, however, is not even with the 2009 amendments. Instead, they reference changes requiring “newly developed sites [to] drain as slowly as what would have occurred on historic, forested land cover unless reasonable historic information is provided that indicates the site was prairie prior to settlement.” *See* [Clark County Pls.'] Mem. in Support of

Summ. J. at 45 (ECF No. 29).¹ But the code's legislative history shows that those changes occurred in June 2013, two months after Interior signed the current ROD. *See* Clark Cnty. Ordinance 2013-06-16 (June 18, 2013), *available at* <http://www.clark.wa.gov/thegrid/> (attached for the Court's convenience). The changes could not have led Interior to supplement its NEPA analysis because they had not yet occurred.

3. The changes would not have required a supplemental EIS because they would not have painted a picture of potential environmental impacts any different than that which the EIS had already analyzed.

Even assuming Interior could have considered the post-decisional code changes in its decision-making, the changes would not have been the sort that required a supplemental EIS. NEPA's implementing regulations require supplementation, when, among other scenarios, some major federal action remains and there are "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1)(ii). But even then, supplementation is only necessary where the "new information provides a seriously different picture of the environmental landscape" than that analyzed in the original NEPA documents. *City of Olmsted Falls v. FAA*, 292 F.3d 261, 274 (D.C. Cir. 2002) (internal quotes omitted).

The supplementation standard is not met here. For one, there was no change "bearing on the proposed action or its impacts." Clark County's regulatory requirements will not be directly applicable if the land is accepted into trust. AR064851. That was the case before and after the present changes to the County Code. Further, the changes did not alter the environmental landscape that Interior already analyzed. "[T]he analysis of impacts within the EIS was based on the Tribe's commitment to comply with specific 2004 Clark County Ordinances and not the

¹ The *Clark County* Plaintiffs filed a "corrected" opening summary judgment, replacing the brief that had been filed at ECF No. 24.

currently adopted ordinances of the local jurisdiction. Strict compliance with local policies and regulations is not a NEPA threshold determination of the significance of environmental impacts.” AR140412. As far as Interior knows, the Tribe’s commitments—as well as its conceptual project design and any potential stormwater runoff therefrom—remain the same. Plaintiffs’ argument that the post-decisional amendments to the Clark County Code required a supplemental EIS has no basis in law or fact. Summary judgment should be entered in favor of Defendants.

Respectfully submitted this 18th day of November, 2014.

SAM HIRSCH
Acting Assistant Attorney General

s/ Kristofor R. Swanson

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CERTIFICATE OF SERVICE

I hereby certify that on November 18, 2014, I electronically filed the foregoing document and its attachment using the Court's CM/ECF system, which will send notice to all parties. In addition, I caused a PDF of the above pleading and its attachment to be sent via e-mail to:

Chris Horne
Chief Civil Deputy Prosecuting Attorney
Clark County, Washington
chris.horne@clark.wa.gov

s/ Kristofor R. Swanson
KRISTOFOR R. SWANSON
Trial Attorney

Attachment to
Federal Defendants' Response to November 12, 2014, Minute Order

ORDINANCE No. 2013-06-16

An interim ordinance relating to stormwater regulation and land use; amending Chapter 40.385 of the Clark County Code; amending the Clark County Stormwater Manual to conform to the newly-amended code; and providing for an effective date.

WHEREAS, the federal district court ruled on June 6, 2013 that, although Clark County is currently operating in compliance with its municipal stormwater permit (Permit), a portion of the County's stormwater ordinance is not consistent with the flow control standard of the Permit; and

WHEREAS, the County has requested the Washington Department of Ecology for guidance concerning its stormwater ordinance, but has not received an answer; and

WHEREAS, the Board of County Commissioners desires to take immediate action to comply with the order of the federal court and the stormwater Permit; and

WHEREAS, a stormwater code amendment would bring the County ordinance in line with its practice of applying the flow control standard set forth in the Permit to development approvals, permits and authorizations that trigger that standard; and

WHEREAS, the Clark County Stormwater Manual must also be amended to make the County's regulatory documents fully consistent with the Permit standard; and

WHEREAS, RCW 35.63.200 and RCW 36.70A.390 provide that the County may adopt an interim zoning ordinance without holding a public hearing; and

WHEREAS, the Board of County Commissioners has determined that the adoption of the stormwater ordinance amendment as an interim ordinance, and the adoption of the Stormwater Manual amendment, are within the best public interest for the health, safety and welfare of the citizens of Clark County; now, therefore,

BE IT ORDERED, RESOLVED AND DECREED BY THE BOARD OF COUNTY COMMISSIONERS OF CLARK COUNTY, STATE OF WASHINGTON, AS FOLLOWS:

Section 1. Amendatory. That portion of Section 2, Exhibit 1 of Ordinance 2009-01-01, as most recently amended by Section 2, Part 22 of Attachment A, and codified as CCC 40.385.010.D, are each hereby amended as follows:

40.385.010 INTRODUCTION

D. Definitions.

For the purposes of this chapter, the following definitions shall apply. Additional definitions can be found in the SWMMWW.



Stormwater Manual	"Stormwater Manual" means the November 2009 <u>June 2013</u> stormwater manual maintained by Clark County Public Works Environmental Services.
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Section 2. Amendatory. That portion of Section 2, Exhibit 1 of Ordinance 2009-01-01, and codified as CCC 40.385.020.C.2, are each hereby amended, as follows:

40.385.020 STANDARDS – STORMWATER CONTROL

C. Quantity Control.

2. Pre-development Land Cover Requirements.

- a. The pre-developed condition to be matched shall be ~~the land cover condition existing at the time of the development application~~ historic, forested land cover unless reasonable, historic information is provided that indicates the site was prairie prior to settlement.
- b. Where an approved basin plan exists, the land cover condition to be matched shall be commensurate with achieving a target flow regime identified in the study. If no land cover condition or target flow regime is identified, land cover condition to be matched shall be as required above.
- c. This requirement is not applicable to project sites designed to retain all stormwater runoff on-site.

Section 3. Amendatory. The Clark County Stormwater Manual is hereby amended as follows:

Part A. Manual Cover and Cover Page

The date shown on manual cover and cover page is changed from November 2009 to June 2013.

Part B. Manual Page 5-6

Pre-Development Land Cover The section titled "Pre-Development Land Cover" on Clark County Stormwater Manual Pages 5-6 is amended to read as follows:

The pre-developed condition for modeling flow control facilities shall be historic, forested land cover unless reasonable, historic information is provided that indicates the site was prairie prior to settlement. ~~The pre-developed condition for modeling flow control facilities shall be the land cover condition existing at the time of the development application.~~ Where an approved watershed study exists, the land cover condition to be matched shall be commensurate with achieving a target flow regime identified in the study. If no land cover condition or target flow regime is identified, land cover condition to be matched shall be as required above.

Section 4. Effective Date. This Ordinance shall take effect immediately upon its signing by the Chair of the Board of County Commissioners.

Section 5. Instructions to Clerk. The Clerk of the Board shall:

1. Transmit a copy of this Ordinance to the Washington State Department of Commerce within 10 days of its adoption, pursuant to RCW 36.70A.106;
2. Record a copy of this Ordinance with the Clark County Auditor;
3. Cause notice of the adoption of this Ordinance to be published forthwith, pursuant to RCW 36.70A.290;
4. Transmit a copy of the adopted amendments to CCC 40.385.010 and 40.385.020 to Code Publishing Inc. forthwith, to update the electronic version of the Clark County Code; and
5. Schedule a duly noticed public hearing by the Board of County Commissioners on this Ordinance for a date no later than 60 days after its adoption.

ADOPTED this 18 day of June, 2013

Attest:

BOARD OF COUNTY COMMISSIONERS
FOR CLARK COUNTY, WASHINGTON

Jana Redline
Deputy Clerk to the Board

By [Signature]
Steve Stuart, Chair

Approved as to Form Only
ANTHONY F. GOLIK
Prosecuting Attorney

By _____
Tom Mielke, Commissioner

By [Signature]
Christine Cook
Deputy Prosecuting Attorney

By _____
David Madore, Commissioner