lib.

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

CITY OF TACOMA, Appellant, v. State of Washington DEPARTMENT OF ECOLOGY, Respondent.	)	PCHB No. 90-150 FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On July 31, 1990, the City of Tacoma filed an appeal with the Pollution Control Hearings Board, contesting the Department of Ecology's issuance of National Pollution Discharge Elminiation System waste discharge permit (NPDES) No. WA-003721-4. The permit governs the City of Tacoma's Northend Treatment Plant's discharges to the waters of the state.

Parts of the appeal were consolidated with other NPDES appeals, and were resolved with a partial settlement and the Board's issuance of an Order of Dismissal on December 23, 1991. In the unresolved portions of the appeal, the city contests the requirements for: 85% removal of BOD (Biological Oxygen Demand) from the influent, and monthly average mass BOD discharge limitation of 1328 pounds per day. The city is requesting alternative BOD limitations under WAC 173-221-050.

The parties' last filing in the matter was on December 18, 1991. The hearing on the merits was held on October 7-9, 1991. Present for the Board were Attorney Member Judith A. Bendor, presiding, and Chairman Harold S. Zimmerman. Representing Appellant City of Tacoma (City) were Attorneys Timothy H. Butler and Tad H. Shimazu (Heller, Ehrman, White & McAuliffe; Seattle). Representing

respondent Department of Ecology (Ecology) was Assistant Attorney General Ronald L. Lavigne. Court reporters with Gene S. Barker & Associates (Olympia) took the proceedings.

On the first day of hearing, respondent Ecology made an oral motion for and dismissal. Appellant City objected to the motion, in part, on procedural grounds claiming lack of sufficient notice and prejudice. Argument was heard. The Board, having considered the procedural objections, found prejudice and concluded the motion would not be considered that day, and the hearing on the merits would proceed. The Board directed written memorandum on the motion be filed. The parties requested these filings be made after the hearing transcript was prepared. The Board concurred and directed that specific citations to the record be made. Ecology's memorandum was filed on November 27, 1991, with the City's response transmitted on Decemeber 11, 1991, and Ecology's reply filed December 18, 1991.

Written closing argument on the hearing on the merits was filed on November 27, 1991.

The Board reviewed the parties' memorandum for Summary Judgment, and their citation to the record. The Board on February 27, 1992 announced an oral decision granting Ecology's motion. This decision conforms to that ruling.

FINDINGS OF FACT

I

In June 1985, Ecology issued the Northend Plant NPDES waste discharge permit No. WA-003721-4, with a BOD effluent limit of 30 mg/l (milligrams per liter) and 85% removal, whichever is more stringent. Ecology also issued Order NO. DE 85-429, however, with less stringent BOD limits. The Order established a schedule for

bringing the plant into compliance with the secondary treatment requirements, with construction to be completed by February 1, 1991. EPA agreed to this six-year compliance schedule.

There is no evidence either this permit or the Order was appealed.

II

In June 1988, Ecology director Gregoire wrote Tacoma Mayor Sutherland, stating in part:

> **PERFORMANCE REQUIREMENTS**
> [. . .]
> In addition, unless the proposed treatment process can achieve 85% BOD removal for all monthly average influent conditions, Tacoma will be required to develop and implement a sewer rehabilitation/replacement program in the North End system. The goal of the rehabilitation/replacement program must be to achieve 85% removal within five years for all projected monthly average flow conditions.
> [. . .]
> **Commentary for Attachment B**
>
> Because Tacoma exceeds the USEPA screening criteria for infiltration and inflow, it must do an SSES and cost effective analysis per federal rules. This is necessary: 1) if Tacoma wants to retain the possibility of federal grant funding, because it is a grant requirement; and 2) because it is a federal prerequisite to qualifying for a lesser percent removal requirement, i.e., Tacoma must demonstrate through an SSES that it does not have excessive I/I. [infiltration/inflow].
>
> If the North End system does have excessive I/I, Tacoma must remove the excessive amount by February 1991, in order to comply with Ecology's administrative order for secondary treatment.
>
> If the North End system does not have excessive I/I, Ecology can still require Tacoma to implement a sewer rehabilitation/replacement program based upon comparing the last 3 1/2 years of flow date to USEPA criteria. Tacoma would have to accept such a program if they want a temporary lower percent removal requirement during those months when their influent strength falls below 167

> mg/l. We cannot grant Tacoma relief from the 85% removal requirement when the influent sewage strength meets or exceeds 167 mg/l.
> [. . .]
> Exh. R-4

III

At about the same time in 1988, Ecology staff met with Robert Sparling, the City's Assistant Director for Public Works, to explain what was needed before relief under the weak influent exception could be granted. Ecology explained that the City was over the EPA screening level. The City had to do a study to determine whether it was cost effective to remove excessive infiltration and inflow, or to have the excessive flow instead be treated at the plant. If the study showed it was not cost effective to remove the infiltration/inflow, Ecology stated the City would get immediate relief from the 85% BOD removal requirement. In order to get that relief, the City would still have to agree to do a sewer rehabilitation program to achieve infiltration/inflow levels consistent with the EPA screening level. Transcript, Day III, at pp. 97-104.

IV

On July 12, 1989, the City's engineering firm, Parametrix, submitted to Ecology the revised Engineering report for the Northend plant. On July 14 the firm sent a letter to Ecology with specific written responses to earlier Ecology review comments. The letter stated in part, regarding the infiltration and inflow analysis:

> The City of Tacoma has no response to these items. It is the intent of the City not to pursue a waiver from the 85% BOD5 removal requirement at this time. Exh. R-6.

The City acknowledged that it was not consistently meeting BOD concentration or percent removal requirements. Increased performance was predicted after sedimentation tank improvements and the construction of a chemical feed building, and the City would monitor the results. The letter discussed three BOD removal options.

One would be selected after six months of operation, on about January 1990.

V

In 1990, when Tacoma's Director of Public Works provided an update on the Northend Plant, (letter dated June 29, 1990), he stated:

> Specifically, we will address the issues of selection of an additional BOD removal process and our proposed scheduled to comply with the February 1, 1991, secondary treatment deadline for the NEWTP [North End Wastewater Treatment Plant]. Exh. R-10

The letter then describes three options for removing BOD.

> Of the three options, only the biological filter would require more than a few week to construct the necessary improvements. For this reason, we have begun preparation of plans and specifications for the filter, and we will proceed with the constructior [sic]. according to the attached schedule if we cannot consistently achieve secondary treatment with other options. [. . .]
>
> The City is fully committed to meeting all NDPES permit requirements for the NEWTP by February 1, 1991. We will implement any and all additional step(s) necessary to insure full compliance. We are confident that the physical/chemical process represents the best alternative, both environmentally and economically, for secondary treatment at the NEWTP. Exh. R-10; Emphasis added.

The City's attached schedule showed the biological filter would be constructed, and tested by January 1, 1991.

VI

On June 29, 1990, Ecology issued NPDES waste discharge permit No. WA-003721-4 for the plant, requiring 85% average BOD removal by February 1, 1991.

On July 31, 1990, the City appealed the permit to this Board, contesting in part the BOD limits.

VII

During the hearing on the merits in October 1991, Mr. David Hufford testified. He had the responsibility for operations of the City's wastewater treatment plants for about 10 years, with the title of Operations Division Manager for the past two years. He testified it was the City's belief they would have to rehabilitate:

> the whole entire sewer system to remove all the I/I, [infiltration/inflow] and we just couldn't afford to do that. Transcript, Day 1, p. 254.

The Board finds, however, that Ecology did not require the City to rehabilitate the entire sewer system to remove all infiltration/inflow.

We also find that prior to the filing of an appeal, permittee City of Tacoma has not requested Ecology to waive the 85% BOD requirement.

We find, at a minimum, that the City of Tacoma has not provided Ecology with an infiltration/inflow cost effectiveness study or an analysis of whether seasonal alternative effluent limits are more appropriate than year-round ones.

VII

Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.

From these Findings of Fact, the Board issues these:

CONCLUSIONS OF LAW

I

The City of Tacoma, relying on WAC 173-221-050(4) and (5) for less concentrated influent wastewater, requests this Board hold that an alternative BOD limit for the Northend Plant should be granted.

In its motion, Ecology contends the appeal should be dismissed because the City has failed to first "request and submit supporting documentation" to Ecology pursuant to WAC 173-221-050(4). Ecology contends this failure deprives this Board of jurisdiction to hear the appeal, and would be essentially a declaratory ruling on the regulations. Ecology also contends the City has failed to exhaust its administrative remedies before Ecology, and has not proven it would be futile to do so.

II

The City of Tacoma contends the Pollution Control Hearings Board has jurisdiction because this is a timely appeal of Tacoma's NPDES permit. RCW 43.21B.110(1)(c). Appellant further contends the City made a specific request for an alternative limitation based on the weak influent exception, which Ecology either explicitly denied, or denied it *de facto* by the misinterpretation and misapplication of the regulations so as to impose a requirement that was financially and technically impossible, [i.e. futility]. Lastly, the City contends the Board has the authority to issued a declaratory ruling on the application of regulations under RCW 34.05.240 and WAC 371-08-240.

III

The United State Environmental Protection Agency (EPA) has delegated to the State of Washingotn (Department of Ecology) the authority to issue NPDES permits for discharges to the nation's waters.

The Federal Water Pollution Control Act (Clean Water Act) establishes a national goal of eliminating all pollutant discharges into the nation's waters by 1985. Clean Water Act, Sec. 101. In furtherance of this goal, the Act requires all publicly owned treatment plants to meet "secondary treatment standards" by July 1,

1977. Clean Water Act, Sec. 301(b)(1)(B). The United States Environmental Protection Agency ("EPA") has established minimum secondary treatment standards for publicly owned treatment works required that "[t]he 30-day average percent removal shall not be less than 85 percent for BOD. 40 C.F.R. Sec. 133.102(a)(3). (See Ecology Closing Memorandum at pp. 1-2.) State regulations require this same removal level. See WAC 173-221-040(1).

IV

The State regulations do provide for alternative BOD effluent limits for domestic wastewater facilities if there is less concentrated influent. ("weak influent"). WAC 173-221-050(4)(a). For facilities received such weak influent:

> [. . .]
> permittees can request and submit supporting documentation, [including] [. . .]
> (iii) The less concentrated influent is not the result of excessive infiltration and/or inflow. The department [of Ecology] will use federal regulations and guidance in defining excessive infiltration and inflow; [. . .]. Id.

WAC 173-221-050(5) provides:

> Subject to the department's approval, a request for alternative effluent limitations pursuant to subsections (1) through (4) of this section must meet all of the following conditions:
>
> [. . .]
>
> (e) the permittee must complete an analysis of whether seasonal alternative effluent limits are more appropriate than year-round;

V

The Pollution Control Hearings Board has jurisdiction to hear appeals of NPDES waste discharge permit conditions. RCW 43.21B.110(1)(c). In essence, movant Ecology contends that WAC 173-221-050(4) and (5) are jurisdictional

requirements. Neither party has fully briefed the issue of whether regulations can somehow divest this Board of statutory jurisdiction. Regardless, we decide this motion on different grounds.

Even if jurisdiction were to exist at this stage, the Pollution Control Hearings Board, in an act of informed discretion, declines to exercise its jurisdiction because the City of Tacoma has failed to exhaust important administrative remedies with Ecology. See SEC v. G.C. George Securities, Inc., 637 F.2d 685, 687 (9th Cir., 1981).

VI

Under the statutes and regulations, secondary treatment with 85% removal of BOD, is the requirement. If a permittee wants a less stringent limitation, the permittee has an affirmative duty to apply to the Department of Ecology for a "waiver" and provide specific information. WAC 173-221-050(4) and (5). The regulations are unambiguous in this regard.

The reason for this requirement is clear. Ecology is the State of Washington regulatory agency with expertise and front-line responsibility, under the delegated NPDES waste discharge permit program, to issue any waivers from requirements. To make an informed decision, Ecology has to have the necessary factual background. See, Estate of Friedman v. Pierce County, 112 Wn.2d 68, 77-78, 768 P.2d 462 (1989); Orion Corp. v. State of Washington, 103 Wn.2d 441, 693 P.2d 1369 (1985); South Hollywood Hills Citizens Ass'n v. King County, 101 Wn.2d 68, 73, 667 P.2d 114 (1984). By requiring exhaustion, the agency will be afforded the opportunity to use its expertise to analyze the information provided. See, Id. If Ecology has made any errors, it will have the opportunity to correct them. See, Id.

In contrast, the Pollution Control Hearings Board is akin to a court of law,

providing an arena for deciding contested matters, affording procedural due process. The Board is not, however, an administrative agency and does not properly provide, in the first instance, review and evaluation of technical matters.

VII

Exhaustion of administrative remedies is not an absolute requirement, however if pursuing legally available remedies would be futile. Orion, supra, at 457. The party asserting futility has a substantial burden of proof. Citizens for Clean Air v. Spokane, 114 Wn.2d 20, 30 (1990). In determining whether pursing a legal remedy would be futile, the facts are assessed.

We conclude the City has not proven futility. The City's position is based in substantial measure on an erroneous assumption that Ecology would require the City's entire sewer system to be rehabilitated.

We also see no basis to assume that Ecology's review of necessary information would be other than fair.

Once appellant provides the necessary information, we trust that Ecology will expeditiously review it.

VIII

City of Tacoma, in the alternative, requests the Board to decide this matter by Declaratory Judgment. Even if the Board were to have such authority, we would decline to exercise it for the same reasons provided for requiring exhaustion of administrative remedies.

Ecology's Motion for Dismissal should be granted. We therefore do not reach

the merits of this appeal.

IX

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such.

From the foregoing, the Board issues this:

ORDER

The Department of Ecology's Motion for Dismissal is GRANTED.

DONE this 28th day of February, 1992.

POLLUTION CONTROL HEARINGS BOARD

JUDITH A. BENDOR, Presiding

HAROLD S. ZIMMERMAN, Chairman