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FINAL CODE INTERPRETATION
L12CI004

Background

By letter dated June 27, 2012, Mr. Brian Sleight, on behalf of the Water and Lands Resource Division (WLRD) of the King County Department of Natural Resources and Parks (DNRP), requested an interpretation of K.C.C. 21A.06.037, which defines the term "agricultural drainage" for purposes of the King County Zoning Code, K.C.C. Title 21A. Maintenance of "agricultural drainage" does not require a clearing and grading permit if the maintenance meets certain conditions set forth in the clearing and grading code, K.C.C. Chapter 16.82.

WLRD is responsible for managing the Agricultural Drainage Assistance Program (ADAP) which provides assistance to King County farmers in maintaining agricultural drainage systems. WLRD, working with the Department of Permitting and Environmental Review (Permitting), the Washington Department of Fish and Wildlife, the King Conservation District, and the agricultural community, has developed an extensive set of best management practices for the maintenance of water bodies that are used to drain agricultural fields.

King County's Critical Areas Ordinance (CAO) establishes maintenance of agricultural drainage as an allowed alteration to an aquatic area, subject to certain conditions. K.C.C. 21A.24.045. If the conditions are met, a clearing and grading permit is not required. In addition, maintenance of agricultural drainage that is used by salmonids does not require a clearing and grading permit if the maintenance is covered by a farm management plan and the work is inspected by the county, the Washington Department of Fish and Wildlife, or the King Conservation District. A clearing and grading permit is required for in-stream maintenance in aquatic areas that are not agricultural drainage. The proposed in-stream work must also be performed in accordance with the regional road maintenance guidelines or as part of a habitat restoration project.

K.C.C. 21A.06.037 defines "agricultural drainage" to be "any stream, ditch, tile system, pipe or culvert primarily used to drain fields for horticultural or livestock activities." Mr. Sleight states that ADAP has interpreted this to mean that any "waterway that convey[s] surface water off or through agricultural lands [are] considered to be agricultural drainage." Mr. Sleight reports that Permitting staff have stated that, in order to meet the requirement that the water body be "primarily used" to drain agricultural lands, more than fifty percent of the area drained by a water body must be agricultural lands.

Discussion
WLRD has asked how the term "agricultural drainage" is interpreted by Permitting. This interpretation requires consideration of both current and historical definitions of related terms "stream" and "aquatic area."

Prior to the adoption of the CAO in 2004, "stream" was the term used to refer to channelized water bodies, such as rivers, streams, and ditches. "Stream" was defined as

> those areas in King County where surface waters produce a defined channel or bed, not including irrigation ditches, canals, storm or surface water run-off devices or other entirely artificial watercourses, unless they are used by salmonids or are used to convey streams naturally occurring prior to construction in such watercourses. For the purpose of this definition, a defined channel or bed is an area which demonstrates clear evidence of the passage of water and includes, but is not limited to, bedrock channels, gravel beds, sand and silt beds and defined-channel swales. The channel or bed need not contain water year-round.

Ordinance 10870, Sec. 288 (1993). Former K.C.C. 21A.06.1240.

The CAO simplified the definition of a stream to be:

> an aquatic area where surface water produces a channel, not including a wholly artificial channel, unless it is:
> A. Used by salmonids; or
> B. Used to convey a stream that occurred naturally before construction of the artificial channel.

K.C.C. 21A.06.1240 (effective January 1, 2005).

The CAO added a new term, "aquatic area," that includes three distinct water types: channelized water bodies, lakes, and marine waters. Aquatic areas were defined as:

> any nonwetland water feature including all shorelines of the state, rivers, streams, marine waters, inland bodies of open water including lakes and ponds, reservoirs and conveyance systems and impoundments of these features if any portion of the feature is formed from a stream or wetland and if any stream or wetland contributing flows is not created solely as a consequence of stormwater pond construction. "Aquatic area" does not include water features that are entirely artificially collected or conveyed storm or wastewater systems or entirely artificial channels, ponds, pools or other similar constructed water features.

Ordinance 15051, Sec. 7 (2004). This definition was revised in 2011 and now reads as follows:

> Aquatic area:

A. Any nonwetland water feature including:

1. All shorelines of the state, rivers, streams, marine waters and bodies of open water, such as lakes, ponds and reservoirs;

2. Conveyance systems, such as a ditch, if any portion of the contributing water is from an aquatic area listed in subsection A.1. of this section;

3. Impoundments, such as a reservoir or pond, if any portion of the contributing water is from an aquatic area listed in subsection A.1. of this section.

B. "Aquatic area" does not include water features where the source of contributing water is entirely artificial, including, but not limited to, a ground water well.

Ordinance 17191, Sec. 19 (2011); codified as K.C.C. 21A.06.072C.

What is apparent from each of these definitions is that, except for entirely artificial channels, a channelized water body has been consistently regulated under K.C.C. Chapter 21A.24 since the adoption of the Sensitive Areas Ordinance in the early 1990s. Naturally occurring channels were regulated, and even artificial channelized water bodies were regulated if they were used by salmonids. The 2011 amendment to the definition of aquatic area clarified an ambiguity in the earlier definition and clearly recognizes that a ditch is considered an aquatic area if any portion of the contributing water is from a naturally occurring source. K.C.C. 21A.06.072C(B).

Prior to the adoption of the CAO, K.C.C. Chapter 21A.24 did not regulate or establish standards for agricultural drainage. The CAO in 2004 added the definition of "agricultural drainage," codified at K.C.C. 21A.06.037. "Agricultural drainage" is "any stream, ditch, tile system, pipe or culvert primarily used to drain fields for horticultural or livestock activities." [emphasis added] The definition does not alter the definition of aquatic area. Rather, "agricultural drainage" is one type of aquatic area.

Of critical importance to the question posed by Mr. Sleight is the requirement that the agricultural drainage be "primarily used to drain fields." Mr. Sleight says the understanding of the ADAP program since its inception in 1998 was that waterways "that convey surface water off or through agricultural lands were … agricultural drainage." As noted above, the definition of "agricultural drainage" was not added until the 2004 CAO. Prior to that, the definition of a "stream" applied to all channelized water bodies, whether naturally occurring or artificial, that were used by salmonids. There was no exception or special treatment for "agricultural drainage."

Applying Mr. Sleight's interpretation of the definition of "agricultural drainage" would mean that no matter the size of a stream, if it flows through agricultural land, it is agricultural drainage. Adopting such an interpretation would essentially read out the word "primarily" in the definition of "agricultural drainage." A rule of statutory construction is that every part of a statute be presumed to have some effect, and not be treated as meaningless unless absolutely necessary. Mr. Sleight's interpretation would violate this rule by making the word "primarily" meaningless.

The word "primarily" in the context of this definition has the meaning of "chiefly" or "principally". American Heritage Dictionary of the English Language (1981). "Chiefly" is

defined as "mostly" or "mainly." This suggests that, to be considered "agricultural drainage," at least fifty percent of the area drained by the channelized water body must be agricultural lands.

Decision

"Agricultural drainage," as defined in K.C.C. 21A.06.037, includes water bodies that are primarily used to drain agricultural fields. Mr. Sleight asks that the definition be read to mean that any aquatic area that drains an agricultural field should be considered to be agricultural drainage. Mr. Sleight's proposed interpretation would effectively eliminate the element of the definition that agricultural drainage primarily drain agricultural lands. Such an interpretation would be contrary to the rules of statutory construction. The Department of Permitting and Environmental Review interpretation that, in order to qualify as agricultural drainage, more than fifty percent of the area drained by the water body must be agricultural land is consistent with the definition.

Finality of Code Interpretations

The Director determines that this code interpretation does not relate to a permit application or code enforcement case. Under K.C.C. 2.100.040, a code interpretation that does not relate to a permit application or a code enforcement action is final when the Director of the Department of Permitting and Environmental Review issues the code interpretation.

John Starbard
Director
Permitting and Environmental Review

Date 11/20/2012