

OFFICE OF THE PROSECUTING ATTORNEY
KING COUNTY, WASHINGTON
CIVIL DIVISION
Natural Resources

Norm Maleng
Prosecuting Attorney

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February 21, 2007

RECEIVED

FEB 21 2007

Judy Greear, Clerk
Environmental Hearings Office
Washington State Pollution Control Hearings Board
4224 Sixth Ave. SE, Rowe Six, Bldg. 2
Lacey, WA 98504-0903

DEPARTMENT OF ECOLOGY
OFFICE OF DIRECTOR

Re: Phase I Municipal Stormwater Permit, PCHB case: Pierce County Department of Public Works and Utilities, Appellant v. Department of Ecology, # 07-026

To the Clerk of the Board:

On behalf of King County, we are enclosing for consideration by the Board the original and one copy of the following:

1. King County's Petition to Intervene
2. Declaration of Curt Crawford in support of King County's Petition to Intervene
3. Declaration of Service

King County is one of six identified Permittees under the Phase I Municipal Stormwater Permit that is on appeal. King County requests that this Petition be filed in the above captioned appeal. King County requests that the Petition to Intervene be decided on the County's written submissions, unless the matter is contested. If contested, the County reserves the right to request that oral argument occur during the Prehearing Conference (if the matters are consolidated) or in each Prehearing Conference (if the matters are not consolidated).

I have contacted the parties to this appeal and they have indicated that they do not oppose intervention by King County so long as King County does not seek to raise new legal grounds for appeal that were not raised in the six notices of appeal that have been filed in PCHB Nos. 07-021, 07-026, 07-027, 07-028, 07-029, and 07-030. King County concurs with this condition.

cc: Enf. Database Coord.
 Rev/Rec - Cool Recovery

File - Feas. ATG
 ATG Book
to Ann Ludlow
mc 2/21/07

Prosecuting Attorney
King County

Judy Greear, Clerk
February 21, 2007
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I can be reached directly at 206-296-0421 for any questions. Thank you for your assistance.

Sincerely,

For NORM MALENG
King County Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Joseph B. Rochelle". The signature is fluid and cursive, with a long horizontal stroke at the end.

Joseph B. Rochelle
Senior Deputy Prosecuting Attorney

Cc: Tad Shimazu/Timothy Jones
Phil Prettyman
Mary Sue Wilson/Ronald Lavigne (all with enclosures)

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BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

PIERCE COUNTY DEPARTMENT OF PUBLIC)
WORKS AND UTILITIES;)

No. P 07-026

Appellant,)

KING COUNTY'S)
PETITION TO INTERVENE)

v.)

THE WASHINGTON STATE)
DEPARTMENT OF ECOLOGY,)

Respondent.)

I. PETITION

King County petitions the Pollution Control Hearings Board (Board) for an order allowing it intervention in the caption-referenced appeal with regard to the issuance of the State of Washington Department of Ecology's Phase I Municipal Stormwater Permit on January 17, 2007. Appellant Pierce County Department of Public Works and Utilities has been contacted and does not oppose this Petition for Intervention by King County. Respondent Department of Ecology has also been contacted and does not oppose this Petition, so long as King County does not seek to raise new legal grounds for appeal that were not raised in the five notices of appeal that have been filed in PCHB Nos. 07-021, 00-027, 07-028, 07-029 and 07-030, and the above

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1 captioned appeal. King County concurs with this condition. This petition is made pursuant to
2 WAC 371-08-420 and WAC 371-08-450.

3 II. INTERVENOR

4 King County is a political subdivision of the State of Washington, organized as a home
5 rule charter county under Article XI, Section 4 of the Washington State Constitution. This
6 petition is brought by and through the Office of the King County Prosecuting Attorney. King
7 County's contact information is:

8 King County Water and Land Resources Division
9 Stormwater Services Section
10 201 S Jackson St., Suite 600
Seattle, Washington 98104-3855

11 Counsel for King County is:

12 Joseph B. Rochelle
13 Senior Deputy Prosecuting Attorney
14 500 Fourth Avenue, Suite 900
Seattle, Washington 98104-2316
Ph: 206-296-0421; fax 206-296-0415
joe.rochelle@metrokc.gov

15 III. STATEMENT OF FACTS

16 The Department of Ecology (Ecology) has issued a Phase I Municipal Stormwater Permit
17 on January 17, 2007, with an effective date of February 16, 2007 (Permit), that regulates
18 municipal stormwater discharges of the Permittees identified in the Permit, including the City of
19 Tacoma, the City of Seattle, Clark County, King County, Pierce County and Snohomish County,
20 and Secondary Permittees identified in the Permit as the Port of Seattle and the Port of Tacoma.
21 The Pierce County Department of Public Works and Utilities has filed an appeal of the Permit on
22 various grounds and has named the Department of Ecology as Respondent in the appeal. The
23 appeal generally asserts that certain provisions in the Permit contain conditions or standards that

1 are unreasonable, unlawful, unattainable, and are impracticable and/or inappropriate for
2 municipal stormwater.

3 IV. ANALYSIS

4 King County seeks to intervene in the above appeal for all purposes.

5 Intervention before the Pollution Control Hearing Board is governed by WA 371-08-420:

- 6 (1) The presiding officer may grant a petition for intervention at any time, upon
7 determining that the petitioner qualifies as an intervenor pursuant to civil rule 24,
8 that the intervention will serve the interests of justice and that the prompt and
9 orderly conduct of the appeal will not be impaired.
- (2) The presiding officer may impose conditions upon the intervenor's participation
on the proceedings.

10 In ruling on a petition to intervene, the presiding officer analyzes the submission under
11 CR 24, which provides for two types of intervention:

- 12 (a) Intervention of Right. Upon timely application anyone shall be permitted to
13 intervene in an action: (1) when a statute confers an unconditional right to
14 intervene; or (2) when the applicant claims an interest relating to the property or
15 transaction which is the subject of the action and he is so situated that the
16 disposition of the action may as a practical matter impair or impede his ability to
17 protect that interest, unless the applicant's interest is adequately represented by
18 existing parties.
- (b) Permissive Intervention. Upon timely application, anyone may be permitted to
19 intervene in an action: (1) When a statute confers a conditional right to intervene;
20 or (2) When an applicant's claim or defense and the main action have a question
21 of law or fact in common. When a party to an action relies for ground of claim or
22 defense upon any statute or executive order administered by a federal or state
23 governmental officer or agency or upon any regulation, order, requirements, or
agreement issued or made pursuant to the statute or executive order, the officer or
agency upon timely application may be permitted to intervene in the action. In
exercising its discretion the court shall consider whether the intervention will
unduly delay or prejudice the adjudication of the rights of the original parties.

In analyzing intervention of right, the Washington courts have recognized the inquiry
must be specific to the case in question. "Rather, it is for the court in each instance to analyze

1 and balance the relative concerns, not only of the absentee in having his interest protected, but
2 also of the parties to the main action in controlling their own lawsuit, and of the public in the
3 efficient resolution of controversies.” *American Discount Corporation v Saratoga West, Inc.*,
4 81 Wn.2d 34, 42, 499 P.2d 869 (1972).

5 The decisions in *Westerman v. Carey*, 125 Wn.2d 277, 303, 892 P.2d 1067 (1994)
6 described a four-part test for intervention as a matter of right:

7 This rule thus imposes four requirements that must be satisfied before intervention must
8 be granted: (1) timely application for intervention; (2) an applicant claims an interest
9 which is the subject of the action; (3) the applicant is so situated that the disposition will
10 impair or impede the applicant’s ability to protect the interest; and (4) the applicant’s
11 interest is not adequately represented by the existing parties.

12 Timeliness. This petition to intervene is timely and, if granted, will not cause any
13 delay in the proceedings, as the pre-hearing conference in which the issues will be further
14 specified and formulated and the timeline for the proceedings established, has not been
15 held. King County’s petition to intervene is thus timely.

16 King County’s Interest. King County is identified in the Permit as a Permittee in
17 its own right, and as a Co-Permittee with the City of Seattle for discharges from outfalls
18 King County owns or operates within the City of Seattle. The appeal has raised broad
19 issues about the legality of many provisions in the Permit. Any decisions that the Board
20 makes regarding the interpretation, application, implementation or revision of the Permit
21 will have direct consequences for King County as an entity subject to the Permit, and will
22 have direct impacts on King County’s stormwater program and the county’s management
23 and control of stormwater within its jurisdictional area. King County’s interest here is
clearly significant and sufficient for the purposes of intervention in this matter.

1 Impairment of the County's Interest. The outcome of the Board's decisions with
2 regard to interpretation, application and implementation of the Permit will directly affect
3 King County's obligations under the Permit, the means it uses to manage stormwater
4 within the county, and the nature, scope and priorities of its stormwater program. If King
5 County were to be denied participation in this appeal, then it would be forced to operate
6 under a permit whose provisions were decided upon as a result of briefings, hearings and
7 other proceedings in which the county had no part. Without participation in this appeal,
8 King County's interests in managing its stormwater under the obligations of the Permit
9 will be impeded and impaired.

10 King County's Interests are Inadequately Represented by the Existing Parties. No
11 other party can adequately represent King County's interests. As demonstrated in the
12 Declaration of Curt Crawford, filed with this petition, King County has its own set of
13 authorities establishing and governing its surface water management program. (Crawford
14 Decl. ¶ 7). Further, King County's approach to addressing compliance under the Permit
15 will differ from that of the other parties, as King County's surface water management
16 programs have features that are different from those of the other parties (Crawford Decl.
17 ¶ 8). King County has geographic and physical characteristics that differ from those of
18 the other parties and that will affect its stormwater management practices under the
19 Permit (Crawford Decl. ¶ 9). Although King County is in agreement with the
20 Department of Ecology's approach in many aspects of the Permit, the Department of
21 Ecology's role as regulator inherently distinguishes it from the other parties to the appeal.
22 (Crawford Decl. ¶ 10). King County is the proper entity to represent King County's
23 interests in the Permit that has been appealed.

1 V. CONCLUSION

2 King County states that it has met the required demonstration for intervention as a
3 matter of right and should be allowed to intervene in the referenced appeal. King County
4 respectfully requests that its Petition for Intervention be granted and that no conditions be
5 placed on King County's participation in the appeal before the Board, except as specified
6 below Appellant Pierce County Department of Public Works and Utilities has been
7 contacted and does not oppose this Petition for Intervention by King County. Respondent
8 Department of Ecology has also been contacted and does not oppose this Petition, so long
9 as King County does not seek to raise new legal grounds for appeal that were not raised
10 in the five notices of appeal that have been filed in PCHB Nos. 07-021, 00-027, 07-028,
11 07-029 and 07-030, and the above captioned appeal. King County concurs with this
12 condition. King County requests that King County's Petition to Intervene be decided on
13 the County's written submission, unless the Petition is contested, in which case King
14 County requests oral argument. If the Board so requests, King County will provide a
15 proposed form of order.

16 Dated this 21st day of February, 2007.

17 NORM MALENG
18 KING COUNTY PROSECUTING ATTORNEY

19 By: 
20 Joseph B. Rochelle, WSBA # 26978
21 Senior Deputy Prosecuting Attorney
22 Attorney for King County
23

1 Shoreline Community College and a Bachelor of Science Degree in Civil Engineering from the
2 University of Washington. I have 28 years of work experience in the field of stormwater
3 management and have had extensive training and exposure to published information related to
4 stormwater management. I am currently a member of the American Water Resources
5 Association and the American Public Works Association.

6 4. The Stormwater Services Section that I currently manage is responsible for the
7 general municipal stormwater permits issued to King County under the federal Clean Water Act
8 and the Washington Water Pollution Control Act. The section is also responsible for many of
9 the stormwater management programs required by the permits, including investigation of
10 reported drainage and water quality problems, identification and construction of capital
11 improvement projects to fix these problems, correction of drainage and water quality code
12 violations through enforcement actions, inspection and maintenance of stormwater facilities that
13 control and treat runoff from developed sites, and updating the stormwater facility design
14 standards applied to new development and redevelopment projects.

15 5. I am familiar with and have reviewed the Phase I Municipal Stormwater Permit
16 issued by the State of Washington Department of Ecology on January 17, 2007 (Permit). The
17 Permit constitutes the National Pollutant Discharge Elimination System and State Waste
18 Discharge General Permit for discharges from Large and Medium Separate Storm Sewer
19 Systems under state and federal authorities. The Permit identifies the cities of Seattle and
20 Tacoma and the counties of Clark, King, Pierce and Snohomish as Permittees under its coverage.

21 6. It is my understanding that Pierce County Public Works and Utilities Department
22 has filed an appeal with the Pollution Control Hearings Board in regard to a number of
23 provisions in the Permit issued by Respondent Department of Ecology, including the application

1 of specified standards to the discharges of stormwater into waters of the state. King County's
2 interest will not be adequately represented by the existing parties to this appeal due to a number
3 of circumstances or characteristics that are particular to King County.

4 7. First, King County has its own set of authorities establishing and governing its
5 surface water management program. These include:

6 a) A stormwater management manual approved by the King County Council for
7 regulating the design of stormwater control facilities required on new development and
8 redevelopment projects in King County, i.e., the 2005 King County Surface Water Design
9 Manual;

10 b) A water quality source control manual for reducing or preventing stormwater pollution
11 caused by business and residential activities, i.e., the 2005 King County Stormwater Pollution
12 Prevention Manual;

13 c) An adopted set of land use regulations for preserving and protecting streams, wetlands,
14 and other designated critical areas from development impacts; these regulations are codified in
15 the King County Code Title 21A; and

16 d) An adopted set of clearing regulations that include required soil amendments in all
17 cleared areas to mimic natural retention of stormwater and that contain limitations of 35% to
18 50% on removal of forest cover on rural area residential lots to minimize stormwater impacts;
19 these regulations are codified in the King County Code Title 16.

20 8. Second, King County's approach to addressing compliance under the Permit will
21 differ in some manner from that of the other parties as King County has:

22 a) A set of programs, staffing, and funding levels for addressing the various
23 programmatic requirements of the Permit, including stormwater capital improvements, facilities

1 maintenance, public education, basin stewards, development review, water quality compliance,
2 etc., all tailored to the demands, needs, and physical characteristics of King County;

3 b) A water quality monitoring program tailored specifically to King County's
4 waterbodies, activities, projects, facilities, and pollutants of concern; and

5 c) A set of programs, policies, procedures, and expertise in promoting compliance with
6 stormwater best management practices in King County.

7 9. Third, King County has geographic and physical characteristics that differ from
8 the appellant that will affect its stormwater management practices under the Permit. Examples
9 include:

10 a) King County is more populated and has more separate municipalities with stormwater
11 management programs it must interface with than any other county in the state;

12 b) King County has a higher proportion of designated urban areas than other counties in
13 the state;

14 c) Because of its larger proportion of older development, King County has a higher
15 diversity of land development types, including older urban, older and more recent suburban,
16 rural, and agricultural lands that require a blend of stormwater best management practices in
17 coordination with land development regulations; and

18 10. Finally, the Department of Ecology, as issuer of the Permit, and as a regulator, has
19 interests that are inherently different and distinct from King County's interests as a Permittee
20 regulated under the Permit.

21
22 I swear under penalty of perjury under the laws of Washington that the foregoing is true
23 and correct to the best of my knowledge.

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Dated this 21st day of February, 2007 at Seattle, Washington.


Curt W. Crawford, P.E.

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BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

PIERCE COUNTY PUBLIC WORKS AND)
UTILITIES DEPARTMENT;)
)
Appellant,)
)
v)
)
WASHINGTON STATE DEPARTMENT OF)
ECOLOGY,)
Respondent.)

No. P 07-026

CERTIFICATE OF SERVICE
AND MAILING

I, Mary A. Livermore, certify that on February 21, 2007, I caused to be served via ABC Legal Messenger, one copy of a Letter dated February 21, 2007, from Joseph B. Rochelle to the Clerk of the Pollution Control Hearings Board, a copy of King County's Petition to Intervene with attached Declaration of Curt W. Crawford, P.E., and a copy of this Certificate of Service and Mailing to:

Washington State Pollution Control Hearings Board (original and one copy)
Environmental Hearings Office
4224 -- 6th Avenue S.E., Rowe Six, Bldg. 2
Lacey, WA 98504-0903

Mary Sue Wilson
Ronald L. Lavigne

1 Washington State Attorney General's Office
2 2425 Bristol Court SW, 2nd Floor
3 P.O. Box 40117
4 Olympia, WA 98504-0117

5 Washington State Department of Ecology
6 300 Desmond Drive
7 Lacey, WA 98503

8 I also caused true and correct copies to be delivered in the manner indicated to the
9 parties listed below:

10 Theresa Wagner, Assistant City Attorney (via U.S. Mail)
11 Seattle City Attorney's Office
12 600 Fourth Avenue, 10th Floor
13 Seattle, WA 98104-1877

14 Doug Mosich (via U.S. Mail)
15 Tacoma City Attorney's Office
16 747 Market St., Rm. 1120
17 Tacoma, WA 98402

18 Bronson Potter (via U.S. Mail)
19 Clark County Prosecuting Attorney's Office
20 Civil Division
21 P.O. Box 5000
22 Vancouver, WA 98666-5000

23 Tad Shimazu (via U.S. Mail)
Williams Kastner & Gibbs, PLLC
601 Union Street, Suite 4100
P.O. Box 21926
Seattle, Washington 98101

Phil Prettyman (via U.S. Mail)
Pierce County Prosecuting Attorney's Office
955 Tacoma Avenue S., Ste. 301
Tacoma, WA 98402

Catherine Drews (via U.S. Mail)
Elizabeth Anderson
Civil Division
Snohomish County Prosecutor's Office

1 3000 Rockefeller, M/S 504
2 Everett, WA 98201-4046

3 Susan Ridgley
4 Port of Seattle Legal Department
5 P.O. Box 1209
6 Seattle WA 98111

(via U.S. Mail)

7 Stephen J. Tan
8 Tanya Barnett
9 Cascadia Law Group PLLC
10 1201 Third Avenue, Suite 320
11 Seattle, WA 98101

(via U.S. Mail)

12 Jan Hasselman
13 Todd True
14 Earthjustice
15 705 Second Avenue, Suite 203
16 Seattle, WA 98104

(via U.S. Mail)

17 Richard A. Smith
18 Smith & Lowney, PLLC
19 2317 East John Street
20 Seattle, WA 98112

(via U.S. Mail)

21 Dated this 21st day of February, 2007.

22 
23 Mary A. Livermore
Legal Secretary to Joseph B. Rochelle

CERTIFICATE OF SERVICE
AND MAILING

- 3

17 of 18

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