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SUPERIOR COURT OF WASHINGTON
FOR THURSTON COUNTY

KING COUNTY, a political subdivision of the State
of Washington,

Petitioner,
Appellant Below,

vs.

POLLUTION CONTROL HEARINGS BOARD, an
agency of the State of Washington;

and

WASHINGTON STATE DEPARTMENT OF
ECOLOGY, an agency of the State of Washington,

Respondent,
Respondent Below.

Cause No.

KING COUNTY'S PETITION
FOR REVIEW OF PCHB
NOS. 12-093c & 12-097c

I. NAME AND ADDRESS OF PETITIONER

1.1 Appellant King County is a political subdivision of the State of Washington
("King County").

1.2 King County's mailing address is as follows:

///

///

1 King County Prosecuting Attorney's Office
2 King County Courthouse
3 E554 King County Courthouse
4 516 Third Avenue
5 Seattle, Washington 98104
6 Phone: (206) 477-1120
7 Fax: (206) 296-0191

8 1.3 King County is represented in this appeal by the King County Prosecuting
9 Attorney's Office:

10 Devon Shannon, Senior Deputy Prosecuting Attorney
11 King County County Prosecuting Attorney's Office
12 516 3rd Avenue, Room W400
13 Seattle, WA 98104
14 Phone: (206) 477-1120
15 Email: devon.shannon@kingcounty.gov

16 Darren Carnell, Senior Deputy Prosecuting Attorney
17 King County County Prosecuting Attorney's Office
18 516 3rd Avenue, Room W400
19 Seattle, WA 98104
20 Phone: (206) 477-1120
21 Email: darren.carnell@kingcounty.gov

22 Joseph Rochelle, Senior Deputy Prosecuting Attorney
23 King County County Prosecuting Attorney's Office
24 516 3rd Avenue, Room W400
25 Seattle, WA 98104
26 Phone: (206) 477-1120
Email: joe.rochelle@kingcounty.gov

27 **II. NAME AND ADDRESS OF AGENCY WHOSE ACTION IS AT ISSUE**

28 2.1 By this petition, King County appeals the October 2, 2013, Order on
29 Summary Judgment, issued by the Pollution Control Hearings Board, an agency of the
30 State of Washington ("PCHB"), in the consolidated case of Pierce County, et al. v. State of
31 Washington, Department of Ecology, et al.; PCHB Nos. 12-093c and 12-097c. A copy of

1 the October 2, 2013, Order on Summary Judgment is attached to this petition as
2 Appendix A.

3 2.2 The PCHB issued its final decision and order in Pierce County, et al. v.
4 State of Washington, Department of Ecology, et al., PCHB Nos. 12-093c and 12-097c, on
5 March 21, 2014, making this appeal timely under RCW 34.05.542. A copy of the
6 March 21, 2014, Findings of Fact, Conclusions of Law, and Order is attached to this
7 petition as Appendix B.

8 2.3 The PCHB's mailing address is as follows:

9
10 Pollution Control Hearings Board
11 Environmental and Land Use Hearings Office
12 P.O. Box 40903
13 Olympia, WA 98504-0903
14 Phone: (360) 664-9160
15 Fax: (360) 586-2253
16 Email: eluho@eluhwa.gov

17 **III. NAME AND ADDRESS OF RESPONDENT**

18 3.1 Respondent the Washington State Department of Ecology is an agency of
19 the State of Washington ("Ecology").

20 3.2 Ecology's mailing address is as follows:

21 Washington State Department of Ecology
22 P.O. Box 47608
23 Olympia, WA 98504-7608
24 Phone: (360) 407-6000
25 Fax: (360) 407-6989

26 3.3 Ecology is represented in this matter by the Office of the Washington State
Attorney General, Ecology Division:

///

1 Ronald L. Lavigne, Senior Counsel
2 Attorney General's Office
3 Ecology Division
4 P.O. Box 40117
5 Olympia, WA 98504-0117
6 Phone: (360) 586-6751
7 Fax: (360) 586-6760
8 Email: RonaldL@atg.wa.gov

9 Phyllis J. Barney, Assistant Attorney General
10 Office of the Attorney General
11 P.O. Box 40117
12 Olympia, WA 98504-0117
13 Phone: (360) 586-4616
14 Fax: (360) 586-6760
15 Email: phyllisb@atg.wa.gov

16 **IV. OTHER PARTIES**

17 4.1 In addition to King County and Ecology, PCHB No.12-093c involved
18 several additional parties, listed below with the mailing addresses of their respective
19 counsel of record:

20 Pierce County, Appellant
21 Lori Terry Gregory
22 Foster Pepper PLLC
23 1111 Third Avenue, Suite 3400
24 Seattle, WA 98101-3922
25 Phone: (206) 447-8902
26 Fax: (206) 749-2002
Email: terrl@foster.com

John R. Nelson
Foster Pepper PLLC
422 West Riverside Ave., Ste. 1310
Spokane, WA 99201-0302
Phone: (509)777-1604
Fax: (866)749-9343
Email: nelsj@foster.com

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Snohomish County, Appellant

Bree Urban, Deputy Prosecuting Attorney
Snohomish County Prosecuting Attorney's Office
3000 Rockefeller Avenue, M/S 504
Everett, WA 98201-4046
Phone: (425) 388-6351
Email: burban@snoco.org

Alethea Hart, Deputy Prosecuting Attorney
Snohomish County Prosecuting Attorney's Office
3000 Rockefeller Avenue, M/S 504
Everett, WA 98201-4046
Phone: (425) 388-6354
Email: ahart@snoco.org

Clark County, Appellant

Christine M. Cook, Deputy Prosecuting Attorney
Clark County Prosecuting Attorney's Office
P.O. Box 5000
Vancouver, WA 98666-5000
Phone: (360) 397-2478
Fax: (360) 759-2148
Email: christine.cook@clark.wa.gov

Christopher Horne, Deputy Prosecuting Attorney
Clark County Prosecuting Attorney's Office
P.O. Box 5000
Vancouver, WA 98666-5000
Phone: (360) 397-2478
Fax: (360) 759-2148
Email: chris.horne@clark.wa.gov

Building Industry Association of Clark County, Appellant

James D. Howsley
Jordan Ramis, PC
1499 SE Tech Center Pl., Suite 380
Vancouver, WA 98683-9575
Phone: (360) 567-3913
Fax: (360) 567-3901
Email: jamie.howsley@jordanramis.com

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City of Seattle, Intervenor

Theresa Wagner, Assistant City Attorney
Seattle City Attorney's Office
P.O. Box 94769
Seattle, WA 98124-4769
Phone: (206) 233-2159
Fax: (206) 684-8284
Email: theresa.wagner@seattle.gov

City of Tacoma, Intervenor

Elizabeth A. Pauli, City Attorney
Tacoma City Attorney's Office
747 Market Street, Room 1120
Tacoma, WA 98402-3701
Phone: (253) 591-5885
Fax: (253) 591-5755
Email: epauli@ci.tacoma.wa.us

Puget Soundkeeper Alliance, Respondent Intervenor

Janette Brimmer
Earthjustice
705 Second Avenue, Suite 203
Seattle, WA 98104-1711
Phone: (206) 343-7340
Fax: (206) 343-1526
Email: jbrimmer@earthjustice.org

Washington Environmental Council, Respondent Intervenor

Janette Brimmer
Earthjustice
705 Second Avenue, Suite 203
Seattle, WA 98104-1711
Phone: (206) 343-7340
Fax: (206) 343-1526
Email: jbrimmer@earthjustice.org

Rosemere Neighborhood Association, Respondent Intervenor

Janette Brimmer
Earthjustice
705 Second Avenue, Suite 203
Seattle, WA 98104-1711
Phone: (206) 343-7340

Fax: (206) 343-1526
Email: jbrimmer@earthjustice.org

4.2 In addition to Ecology and King County, PCHB No.12-097c involved several additional parties, listed below with the mailing addresses of their respective counsel of record:

Coalition of Governmental Entities, Appellants:

- City of Auburn
- City of Bainbridge Island
- City of Bellevue
- City of Burlington
- City of Des Moines
- City of Everett
- City of Kent
- City of Issaquah
- City of Mount Vernon
- City of Renton
- City of Seatac
- City of Snoqualmie
- City of Sumner
- Cowlitz County

Lori Terry Gregory
Foster Pepper PLLC
1111 Third Avenue, Suite 3400
Seattle, WA 98101-3922
Phone: (206) 447-8902
Fax: (206) 749-2002
Email: terrl@foster.com

Coalition of Governmental Entities, Appellant-Intervenors:

- City of Kirkland
- City of Kelso
- City of Sammamish
- City of Camas
- City of Longview
- City of Lynnwood
- City of Poulsbo
- City of Bremerton
- City of Bothell
- City of Ferndale

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Lori Terry Gregory
Foster Pepper PLLC
1111 Third Avenue, Suite 3400
Seattle, WA 98101-3922
Phone: (206) 447-8902
Fax: (206) 749-2002
Email: terrl@foster.com

Washington State Department of Transportation, Appellant
Robert T. Hatfield
Kimberly Frinnell
Assistant Attorney General
Transportation and Public Construction Div.
P.O. Box 40113
Olympia, WA 98504-0113
Phone: (360) 753-4051
Fax: (360) 586-6847
Email: Roberth1@atg.wa.gov
kimberlyF1@atg.wa.gov
tpcef@atg.wa.gov

Puget Soundkeeper Alliance, Respondent Intervenor
Janette Brimmer
Earthjustice
705 Second Avenue, Suite 203
Seattle, WA 98104-1711
Phone: (206) 343-7340
Fax: (206) 343-1526
Email: jbrimmer@earthjustice.org

Washington Environmental Council, Respondent Intervenor
Janette Brimmer
Earthjustice
705 Second Avenue, Suite 203
Seattle, WA 98104-1711
Phone: (206) 343-7340
Fax: (206) 343-1526
Email: jbrimmer@earthjustice.org

Rosemere Neighborhood Association, Respondent Intervenor
Janette Brimmer
Earthjustice
705 Second Avenue, Suite 203

1 Seattle, WA 98104-1711
2 Phone: (206) 343-7340
3 Fax: (206) 343-1526
4 Email: jbrimmer@earthjustice.org

5 **V. FACTS AND PROCEDURAL HISTORY**

6 **A. 2013-18 Phase I NPDES Municipal Stormwater Permit**

7 5.1 On August 1, 2012, Ecology issued the 2013-18 Phase I Municipal
8 Stormwater Permit (“Phase I Permit”) pursuant to the State of Washington Water Pollution
9 Control Law, chapter 90.48 RCW (“WPCL”), and the National Pollutant Discharge
10 Elimination System (“NPDES”) permitting program established by Section 402¹ of the
11 federal Clean Water Act, 33 U.S.C. § 1251 *et seq.* (“CWA”). The Phase I Permit has an
12 effective date of August 1, 2013, and an expiration date of July 31, 2018.

13 5.2 King County is the owner or operator of a large-sized municipal separate
14 storm sewer system (“MS4”), as that term is defined by the CWA.² As the owner or
15 operator of a large-sized MS4, King County falls under “Phase I” of the NPDES municipal
16 stormwater permitting program.³ King County is therefore a permittee subject to the
17 Phase I Permit.

18 5.3 Upon Ecology’s issuance of the Phase I Permit, King County timely
19 appealed certain portions of the Phase I Permit to the PCHB as authorized by
20

21 ¹ Codified at 33 U.S.C. § 1342.

22 ² See 33 U.S.C. § 1342(p)(2)(D); 40 C.F.R. Pt. 122, Appx. I; 40 C.F.R. § 122.26(b)(8) (defining “municipal
23 separate storm sewer”); 40 C.F.R. § 122.26(b)(18) (defining “municipal separate storm sewer system”); see
24 also 40 C.F.R. § 123.2, stating the definitions contained in 40 C.F.R. Part 122 apply throughout 40 C.F.R. Part
25 123.

26 ³ See 33 U.S.C. § 1342(p)(2)(D) & 40 C.F.R. § 122, Appx. I; Natural Resources Defense Council, Inc. v. EPA,
966 F.2d 1292, 1295-96 (9th Cir. 1992) (discussing the “phase-in” approach to NPDES municipal stormwater
permits); see also Environmental Defense Center, Inc. v. EPA, 344 F.3d 832, 840-42 (9th Cir. 2003).
(discussing the two phases of the NPDES municipal stormwater permit program).

1 RCW 43.21B.110. A copy of King County's Notice of Appeal of the Phase I Municipal
2 Stormwater Permit is attached to this petition as Appendix C.

3 5.4 Four other parties, Pierce County,⁴ Snohomish County,⁵ Clark County⁶ and
4 the Building Industry Association of Clark County,⁷ also timely appealed the Phase I
5 Permit to the PCHB.

6 5.5 The City of Seattle, the City of Tacoma and the Washington State
7 Department of Transportation each sought and received permission to intervene in the
8 appeals of the Phase I Permit.⁸

9 5.6 Three additional parties, Puget Soundkeeper Alliance, Washington
10 Environmental Council and Rosemere Neighborhood Association, sought and received
11 permission to intervene in the appeals of the Phase I Permit on behalf of Ecology as
12 Respondent Intervenors.⁹

13 5.7 By order dated November 8, 2012, the PCHB consolidated the five separate
14 appeals of the Phase I Permit into one case, PCHB No. 12-093c.¹⁰

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16
17 **B. Phase II Western Washington NPDES Municipal Stormwater Permit**

18 5.8 On August 1, 2012, Ecology issued the 2013-18 Phase II Western
19 Washington NPDES Municipal Stormwater Permit ("Phase II Permit") pursuant to the
20

21 ⁴ See Pierce County v. Ecology, PCHB No. 12-093.

22 ⁵ See Snohomish County v. Ecology, PCHB No. 12-094.

23 ⁶ See Clark County v. Ecology, PCHB No. 12-095.

24 ⁷ See BIAW of Clark County v. Ecology, PCHB No. 12-100.

25 ⁸ Intervention was granted to Seattle and Tacoma by Order Granting Intervention, dated September 25, 2012, PCHB Nos. 12-093, -094, -095, -096, and -100. Intervention was granted to WSDOT by Pre-Hearing Order, Order of Consolidation, and Order Granting Intervention, dated November 8, 2012, PCHB No. 12-093c.

26 ⁹ Pre-Hearing Order, Order of Consolidation, and Order Granting Intervention, dated November 8, 2012, PCHB No. 12-103c.

¹⁰ Pre-Hearing Order, Order of Consolidation, and Order Granting Intervention, dated November 8, 2012, PCHB No. 12-093c.

1 WPCL, and the CWA's NPDES permitting program. The Phase II Permit has an effective
2 date of August 1, 2013, and an expiration date of July 31, 2018.

3 5.9 On August 31, 2012, King County timely appealed certain portions of the
4 Phase II Permit to the PCHB as authorized by RCW 43.21B.110. A copy of King County's
5 Notice of Appeal of the Phase II Municipal Stormwater Permit is attached as Appendix D.

6 5.10 In addition to King County, the Washington State Department of
7 Transportation and multiple parties timely appealed portions of the Phase II Permit to the
8 PCHB as authorized by RCW 43.21B.110. Other parties sought and received permission to
9 intervene in the Phase II Permit appeals. The PCHB then consolidated the Phase II Permit
10 appeals into a single case, PCHB No. 12-097c.
11

12 **C. Consolidation of Issues**

13 5.11 The PCHB determined that certain issues raised in PCHB No. 12-093c (the
14 consolidated Phase I Permit appeal) and PCHB No. 12-097c (the consolidated Phase II
15 Permit appeal) involved common questions of law and/or fact. For efficiency and
16 convenience, the PCHB consolidated the overlapping issues from PCHB No. 12-097c into
17 PCHB No. 12-093c, by Joint Order of Consolidation of Issues, dated January 16, 2013.¹¹
18

19 **D. Dispositive Rulings in Consolidated PCHB Nos. 12-093c and 12-097c**

20 5.12 The PCHB issued the following three rulings on summary judgment in
21 consolidated PCHB Nos. 12-093c and 12-097c:

- 22 (i) Order on Puget Soundkeeper Alliance's and Ecology's Motion for Partial
23 Summary Judgment: Phase I Issue Nos. 2, 4, 5, 6, 7, 17(d) and (e) and 18;

24 ¹¹ While not pertinent to this petition, the remaining issues in PCHB No. 12-097c (i.e., the issues that were not
25 consolidated into PCHB No. 12-093c because they did not involve common issues of law and/or fact with
26 issues raised in PCHB No. 12-093c) remained in a separate case and proceeded on a separate schedule.

1 and Phase II Issue Nos. 2(b) and (c), 3(b) – (e), 5, 9 and 17, dated
September 26, 2013;

2 (ii) Order on Summary Judgment: Phase I Issues Nos. 3, 17(a) and 20; and
3 Phase II Issues Nos. 2(a) and 3(a), dated October 2, 2013; and

4 (iii) Order on Summary Judgment: Phase I Issues No. 11, 14, 15, 16, 22 and 23,
5 dated October 8, 2013.

6 5.13 The issues remaining in consolidated PCHB Nos. 12-093c and 12-097c after
7 the three dispositive motions were issued went to trial before the PCHB in October of
8 2013. On March 21, 2014, the PCHB issued its final decision and order in the consolidated
9 case, entitled Findings of Fact, Conclusions of Law, and Order.

10 **E. Appeal of PCHB Decision**

11 5.14 Pursuant to RCW 43.21B.180, any party aggrieved by a final decision and
12 order of the PCHB may obtain judicial review of the decision under chapter 34.05 RCW,
13 the Washington Administrative Procedure Act (“APA”).

14 5.15 RCW 34.05.542 provides that a petition for review of an agency order may
15 be filed with the superior court within thirty days of the date on which the order was issued.
16 Accordingly, this petition is timely.

17 5.16 RCW 34.05.514 establishes the Superior Court for Thurston County as the
18 proper venue for an appeal under the APA. Accordingly, venue in this Court is proper.

19 5.17 By this petition, King County appeals the PCHB’s Order on Summary
20 Judgment: Phase I Issues Nos. 3, and 17(a); and Phase II Issues Nos. 2(a) and 3(a), dated
21 October 2, 2013, PCHB Nos. 12-093c and 12-097c. King County does not appeal the
22 PCHB’s other rulings in the consolidated case.
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VI. GROUND FOR APPEAL/STATEMENTS OF ERROR

6.1 The PCHB's Order on Summary Judgment: Phase I Issues Nos. 3, and 17(a); and Phase II Issues Nos. 2(a) and 3(a), dated October 2, 2013, PCHB Nos. 12-093c and 12-097c suffers from one or more of the following errors:

- (i) The PCHB erroneously interpreted and/or applied Washington law;
- (ii) The PCHB's order is in violation of constitutional provisions on its face and/or as applied;
- (iii) The PCHB's order is arbitrary and capricious; and/or
- (iv) Contrary to the PCHB's order, Special Condition S5.C.5.a of the Phase I Permit contains requirements that are unlawful, unreasonable, impracticable and/or beyond the authority of Ecology to impose due to one or more of the following reasons:
 - (a) Said requirements conflict with or are inconsistent with Washington's vested rights law;
 - (b) Said requirements conflict with or are inconsistent with Washington law regarding the finality of land use permitting decisions;
 - (c) Said requirements require King County to regulate in a manner that could expose King County to liability for violating the rights accorded to property owners by Washington and federal law; and/or
 - (d) Said requirements improperly define and use terms related to land use permitting and development.

6.2 As a permittee under the Phase I Permit, King County must comply with all of the terms and conditions of the Phase I Permit, as those terms and conditions are interpreted by the PCHB. Accordingly, King County is aggrieved or adversely affected by the PCHB's Order on Summary Judgment: Phase I Issues Nos. 3, and 17(a); and Phase II Issues Nos. 2(a) and 3(a), dated October 2, 2013, PCHB Nos. 12-093c and 12-097c. Under RCW 34.05.530, King County has standing to bring this appeal.

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VII. RELIEF REQUESTED

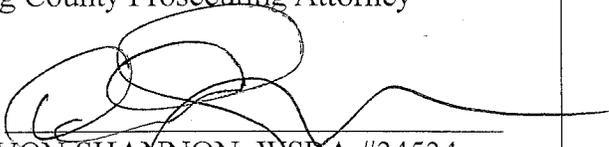
7.1 King County asks this Court to issue an order correcting the PCHB's legal errors described in this Petition for Review, reversing the PCHB's Order on Summary Judgment: Phase I Issues Nos. 3, and 17(a); and Phase II Issues Nos. 2(a) and 3(a), dated October 2, 2013, and remanding the applicable provisions of the Phase I and Phase II Permits to Ecology for modification consistent with the Court's order.

7.2 King County asks this Court for any other relief the Court may deem just and proper.

Respectfully submitted this 18 day of April, 2014.

DANIEL T. SATTERBERG

King County Prosecuting Attorney

By: 

DEVON SHANNON, WSBA #34534

DARREN CARNELL, WSBA #25347

JOSEPH ROCHELLE, WSBA #26978

Senior Deputy Prosecuting Attorney

Attorneys for King County

1 EXPEDITE
 No hearing set
 Hearing is set
Date: _____
Time: _____
Judge/Calendar: _____

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7 SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY

8 KING COUNTY, a political subdivision of the)
State of Washington,)
9)
Petitioner,)
Appellant Below,)
10)
vs.)
11)
POLLUTION CONTROL HEARINGS BOARD,)
an agency of the State of Washington;)
12)
and)
13)
WASHINGTON STATE DEPARTMENT OF)
14)
ECOLOGY, an agency of the State of Washington,)
))
Respondent,)
15)
Respondent Below.)

No. _____
CERTIFICATE OF SERVICE

16 1. I, Diana Cherberg, hereby certify that I am a legal secretary employed by the King
17 County Prosecuting Attorney's Office, am over the age of 18, am not a party to this action and
18 am competent to testify herein.

20 2. On April 18, 2014, I did cause to be delivered via legal messenger, a true
21 and correct copy of *King County's Petition for Review of PCHB NOS. 12-093c & 12-097c,*
22 Cover Sheet and this Certificate of Service to the following parties:

23 ///



1 **RESPONDENTS:**

2 Pollution Control Hearings Board
3 Environmental and Land Use Hearings Office
4 1111 Israel Road SW, Suite 301
5 Tumwater, WA 98501

6 Ronald L. Lavigne
7 Phyllis Barney
8 Washington State Department of Ecology
9 300 Desmond Drive SE
10 Lacy, WA 98503

11 **PARTIES OF RECORD:**

12 ***Snohomish County***

13 Bree Urban, Deputy Prosecuting Attorney
14 Alethea Hart, Prosecuting Attorney
15 Snohomish County Prosecuting Attorney's Office
16 3000 Rockefeller Avenue, M/S 504
17 Everett, WA 98201-4046

18 ***Pierce County & Coalition of Governmental Entities***

19 Lori Terry Gregory
20 Foster Pepper PLLC
21 1111 Third Ave., Ste. 3400
22 Seattle, WA 98101-3922

23 John Ray Nelson
Foster Pepper PLLC
U.S. Bank Bldg.
West 422 Riverside Ave., Ste. 1310
Spokane, WA 99201-0302

24 ***Clark County***

25 Christine M. Cook
26 Christopher Horne
27 Deputy Prosecuting Attorney
28 Clark County Prosecuting Attorney's Office
29 Civil Division
30 1300 Franklin St., 3rd Floor
31 Vancouver, WA 98666-5000

32 ///

33 ///

1 *Washington State Department of Transportation, Appellant*

2 Robert T. Hatfield
3 Kimberly Frinnell
4 Assistant Attorney General
7141 Cleanwater Drive, SW
Tumwater, WA 98501-6503

5 *BIA of Clark County*

6 James D. Howsley
7 Jordan Ramis PC
1499 SE Tech Center Pl., #380
Vancouver, WA 98664

8 *Intervenor City of Seattle:*

9 Theresa R. Wagner
10 Sr. Assistant City Attorney
Seattle City Attorney's Office
600 Fourth Ave., 4th Floor
11 Seattle, WA 98124-4769

12 *Intervenor City of Tacoma:*

13 Elizabeth A. Pauli
14 City Attorney
Tacoma City Attorney's Office
747 Market Street, Room 1120
Tacoma, WA 98402-3767

15 *Puget Soundkeeper Alliance, Washington Environmental Council and Rosemere Neighborhood Association*

16 Jan Hasselman
17 Janette K. Brimmer
Todd True
18 Earth Justice
705 Second Ave., Ste. 203
Seattle, WA 98104-1711

19 ///
20 ///
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1 I declare under penalty of perjury under the laws of the State of Washington that the
2 foregoing is true and correct.

3 DATED this 18th day of April, 2014 at Seattle, Washington.

4 DANIEL T. SATTERBERG
King County Prosecuting Attorney

5 By: 
6 Diana Cherberg, Legal Assistant to
7 DEVON SHANNON, WSBA #34534
8 Senior Deputy Prosecuting Attorney
9 Attorneys for King County
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