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 Judge/Calendar: _____

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SUPERIOR COURT OF WASHINGTON
FOR THURSTON COUNTY

SNOHOMISH 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.

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

I. NAME AND ADDRESS OF PETITIONER

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

1.2 Snohomish County's mailing address is as follows:

Snohomish County, by and through the
 Snohomish County Council
 3000 Rockefeller Avenue, M/S 609
 Everett, WA 98201
 Phone: (425) 388-3494
 Fax: (425) 388-3496

SNOHOMISH COUNTY'S PETITION FOR REVIEW OF
PCHB NOS. 12-093c AND 12-097c - 1

S:\Civil\Litigation\NPDES - 2012 Muni Permit Appeal C12-077 (PCHB 12-094)\Appeal\Petition for Review.docx

Snohomish County
 Prosecuting Attorney - Civil Division
 Robert J. Drewel Bldg., 8th Floor, M/S 504
 3000 Rockefeller Ave
 Everett, Washington 98201-4060
 (425)388-6330 Fax: (425)388-6333

COPY

1 1.3 Snohomish County is represented in this appeal by the Office of the
2 Snohomish County Prosecuting Attorney:

3 Bree Urban, Deputy Prosecuting Attorney
4 Snohomish County Prosecuting Attorney's Office
5 3000 Rockefeller Avenue, M/S 504
6 Everett, WA 98201-4046
7 Phone: (425) 388-6351
8 Email: burban@snoco.org

9 Alethea Hart, Deputy Prosecuting Attorney
10 Snohomish County Prosecuting Attorney's Office
11 3000 Rockefeller Avenue, M/S 504
12 Everett, WA 98201-4046
13 Phone: (425) 388-6354
14 Email: ahart@snoco.org

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

16 2.1 By this petition, Snohomish County appeals the October 2, 2013, Order on
17 Summary Judgment, issued by the Pollution Control Hearings Board, an agency of the
18 State of Washington ("PCHB"), in the consolidated case of Pierce County, et al. v. State of
19 Washington, Department of Ecology, et al., PCHB Nos. 12-093c and 12-097c. A copy of
20 the October 2, 2013, Order on Summary Judgment is attached to this petition as
21 Appendix A.

22 2.2 The PCHB issued its final decision and order in Pierce County, et al. v.
23 State of Washington, Department of Ecology, et al., PCHB Nos. 12-093c and 12-097c, on
24 March 21, 2014, making this appeal timely under RCW 34.05.542. A copy of the
25 March 21, 2014, Findings of Fact, Conclusions of Law, and Order is attached to this
26 petition as Appendix B.

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2.3 The PCHB's mailing address is as follows:

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

III. NAME AND ADDRESS OF RESPONDENT

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

3.2 Ecology's mailing address is as follows:

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

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

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

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

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IV. OTHER PARTIES

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

Pierce County, Appellant

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

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

King County, Appellant

Joseph B. Rochelle, Deputy Prosecuting Attorney
King County Prosecuting Attorney's Office
516 Third Avenue
Seattle, WA 98104-2385
Phone: (206) 477-1099
Fax: (206) 296-0191
Email: joe.rochelle@kingcounty.gov

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

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

8 Building Industry Association of Clark County, Appellant

9 James D. Howsley
10 Jordan Ramis, PC
11 1499 SE Tech Center Pl., Suite 380
12 Vancouver, WA 98683-9575
13 Phone: (360) 567-3913
14 Fax: (360) 567-3901
15 Email: jamie.howsley@jordanramis.com

16 City of Seattle, Intervenor

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

24 City of Tacoma, Intervenor

25 Elizabeth A. Pauli, City Attorney
26 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, 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

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King County, Appellant

Joseph B. Rochelle, Deputy Prosecuting Attorney
King County Prosecuting Attorney's Office
516 Third Avenue
Seattle, WA 98104-2385
Phone: (206) 477-1099
Fax: (206) 296-0191
Email: joe.rochelle@kingcounty.gov

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

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

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

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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

V. FACTS AND PROCEDURAL HISTORY

A. 2013-18 Phase I NPDES Municipal Stormwater Permit

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

5.2 Snohomish County is the owner or operator of a medium-sized municipal separate storm sewer system (“MS4”), as that term is defined by the CWA.² As the owner

¹ Codified at 33 U.S.C. § 1342.

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 separate storm sewer”); 40 C.F.R. § 122.26(b)(18) (defining “municipal separate storm sewer system”); see 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 123.

1 or operator of a medium-sized MS4, Snohomish County falls under “Phase I” of the
2 NPDES municipal stormwater permitting program.³ Snohomish County is therefore a
3 permittee subject to the Phase I Permit.

4 5.3 Upon Ecology’s issuance of the Phase I Permit, Snohomish County timely
5 appealed certain portions of the Phase I Permit to the PCHB as authorized by
6 RCW 43.21B.110.⁴

7
8 5.4 Four other parties, Pierce County,⁵ King County,⁶ Clark County⁷ and the
9 Building Industry Association of Clark County,⁸ also timely appealed the Phase I Permit to
10 the PCHB.

11 5.5 The City of Seattle, the City of Tacoma and the Washington State
12 Department of Transportation each sought and received permission to intervene in the
13 appeals of the Phase I Permit.⁹

14 5.6 Three additional parties, Puget Soundkeeper Alliance, Washington
15 Environmental Council and Rosemere Neighborhood Association, sought and received
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20 ³ See 33 U.S.C. § 1342(p)(2)(D) & 40 C.F.R. § 122, Appx. I; Natural Resources Defense Council, Inc. v. EPA,
21 966 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).

22 ⁴ See Snohomish County’s Notice of Appeal of the 2013-2018 Phase I Municipal Stormwater Permit, dated
August 30, 2012, PCHB No. 12-094.

23 ⁵ See Pierce County v. Ecology, PCHB No. 12-093.

24 ⁶ See King County v. Ecology, PCHB No. 12-096.

25 ⁷ See Clark County v. Ecology, PCHB No. 12-095.

26 ⁸ See BLAW of Clark County v. Ecology, PCHB No. 12-100.

⁹ 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.

1 permission to intervene in the appeals of the Phase I Permit on behalf of Ecology as
2 Respondent Intervenors.¹⁰

3 5.7 By order dated November 8, 2012, the PCHB consolidated the five separate
4 appeals of the Phase I Permit into one case, PCHB No. 12-093c.¹¹

5 **B. Phase II Western Washington NPDES Municipal Stormwater Permit**

6 5.8 On August 1, 2012, Ecology issued the 2013-18 Phase II Western
7 Washington NPDES Municipal Stormwater Permit (“Phase II Permit”) pursuant to the
8 WPCL, and the CWA’s NPDES permitting program. The Phase II Permit has an effective
9 date of August 1, 2013, and an expiration date of July 31, 2018.

10 5.9 Multiple parties timely appealed portions of the Phase II Permit to the
11 PCHB as authorized by RCW 43.21B.110. Other parties sought and received permission to
12 intervene in the Phase II Permit appeals. The PCHB then consolidated the Phase II Permit
13 appeals into a single case, PCHB No. 12-097c.

14 **C. Consolidation of Issues**

15 5.10 The PCHB determined that certain issues raised in PCHB No. 12-093c (the
16 consolidated Phase I Permit appeal) and PCHB No. 12-097c (the consolidated Phase II
17 Permit appeal) involved common questions of law and/or fact. For efficiency and
18 convenience, the PCHB consolidated the overlapping issues from PCHB No. 12-097c into
19 PCHB No. 12-093c, by Joint Order of Consolidation of Issues, dated January 16, 2013.¹²
20
21
22

23 ¹⁰ Pre-Hearing Order, Order of Consolidation, and Order Granting Intervention, dated November 8, 2012,
PCHB No. 12-103c.

24 ¹¹ Pre-Hearing Order, Order of Consolidation, and Order Granting Intervention, dated November 8, 2012,
PCHB No. 12-093c.

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

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

2 5.11 The PCHB issued the following three rulings on summary judgment in
3 consolidated PCHB Nos. 12-093c and 12-097c:

- 4 (i) Order on Puget Soundkeeper Alliance's and Ecology's Motion for Partial
5 Summary Judgment: Phase I Issue Nos. 2, 4, 5, 6, 7, 17(d) and (e) and 18;
6 and Phase II Issue Nos. 2(b) and (c), 3(b) – (e), 5, 9 and 17, dated
7 September 26, 2013;
- 8 (ii) Order on Summary Judgment: Phase I Issues Nos. 3, 17(a) and 20; and
9 Phase II Issues Nos. 2(a) and 3(a), dated October 2, 2013; and
- 10 (iii) Order on Summary Judgment: Phase I Issues No. 11, 14, 15, 16, 22 and 23,
11 dated October 8, 2013.

12 5.12 The issues remaining in consolidated PCHB Nos. 12-093c and 12-097c after
13 the three dispositive motions were issued went to trial before the PCHB in October of
14 2013. On March 21, 2014, the PCHB issued its final decision and order in the consolidated
15 case, entitled Findings of Fact, Conclusions of Law, and Order.

16 **E. Appeal of PCHB Decision**

17 5.13 Pursuant to RCW 43.21B.180, any party aggrieved by a final decision and
18 order of the PCHB may obtain judicial review of the decision under chapter 34.05 RCW,
19 the Washington Administrative Procedure Act (“APA”).

20 5.14 RCW 34.05.542 provides that a petition for review of an agency order may
21 be filed with the superior court within thirty days of the date on which the order was issued.
22 Accordingly, this petition is timely.

23 5.15 RCW 34.05.514 establishes the Superior Court for Thurston County as the
24 proper venue for an appeal under the APA. Accordingly, venue in this Court is proper.

1 5.16 By this petition, Snohomish County appeals the PCHB's Order on Summary
2 Judgment: Phase I Issues Nos. 3, 17(a) and 20; and Phase II Issues Nos. 2(a) and 3(a),
3 dated October 2, 2013, PCHB Nos. 12-093c and 12-097c. Snohomish County does not
4 appeal the PCHB's other rulings in the consolidated case.

5 **VI. GROUNDS FOR APPEAL/STATEMENTS OF ERROR**

6 6.1 The PCHB's Order on Summary Judgment: Phase I Issues Nos. 3, 17(a)
7 and 20; and Phase II Issues Nos. 2(a) and 3(a), dated October 2, 2013, PCHB Nos. 12-093c
8 and 12-097c suffers from one or more of the following errors:

- 9
- 10 (i) The PCHB erroneously interpreted and/or applied Washington law;
 - 11 (ii) The PCHB's order is in violation of constitutional provisions on its face
12 and/or as applied;
 - 13 (iii) The PCHB's order is arbitrary and capricious; and/or
 - 14 (iv) Contrary to the PCHB's order, Special Condition S5.C.5.a of the Phase I
15 Permit contains requirements that are unlawful, unreasonable, impracticable
16 and/or beyond the authority of Ecology to impose due to one or more of the
17 following reasons:
 - 18 (a) Said requirements conflict with or are inconsistent with
19 Washington's vested rights law;
 - 20 (b) Said requirements conflict with or are inconsistent with Washington
21 law regarding the finality of land use permitting decisions;
 - 22 (c) Said requirements require Snohomish County to regulate in a
23 manner that could expose Snohomish County to liability for
24 violating the rights accorded to property owners by Washington and
25 federal law; and/or
 - 26 (d) Said requirements improperly define and use terms related to land
use permitting and development.

1 6.2 As a permittee under the Phase I Permit, Snohomish County must comply
2 with all of the terms and conditions of the Phase I Permit, as those terms and conditions are
3 interpreted by the PCHB. Accordingly, Snohomish County is aggrieved or adversely
4 affected by the PCHB's Order on Summary Judgment: Phase I Issues Nos. 3, 17(a) and 20;
5 and Phase II Issues Nos. 2(a) and 3(a), dated October 2, 2013, PCHB Nos. 12-093c and 12-
6 097c. Under RCW 34.05.530, Snohomish County has standing to bring this appeal.

7
8 **VII. RELIEF REQUESTED**

9 7.1 Snohomish County asks this Court to issue an order correcting the PCHB's
10 legal errors described in this Petition for Review, reversing the PCHB's Order on Summary
11 Judgment: Phase I Issues Nos. 3, 17(a) and 20; and Phase II Issues Nos. 2(a) and 3(a),
12 dated October 2, 2013, and remanding the applicable provisions of the Phase I Permit to
13 Ecology for modification consistent with the Court's order.

14 7.2 Snohomish County asks this Court for any other relief the Court may deem
15 just and proper.

16 Respectfully submitted this 11th day of April, 2014.

17
18 MARK K. ROE
19 Snohomish County Prosecuting Attorney

20
21 By: 
22 Bree Urban, WSBA # 33194
23 Alethea Hart, WSBA # 32840
24 Deputy Prosecuting Attorneys
25 Attorneys for Snohomish County

CERTIFICATE OF SERVICE

I, Regina McManus, hereby certify that on this, I served a true and correct copy Snohomish County's Petition for Review of PCHB Nos. 12-093c & 12-097c upon the persons listed herein and by the following method(s):

RESPONDENTS:

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

- E-filed: eluho@eluho.wa.gov
- Facsimile: (360) 586-2253
- U.S. Mail, 1st Class, postage prepaid
- Hand Delivery
- Messenger Service

Washington State Department of Ecology
300 Desmond Drive SE
Lacy, WA 98503

- E-Service:
- Facsimile: (360) 407-6989
- U.S. Mail
- Hand Delivery
- Messenger Service

PARTIES OF RECORD:

Dept. of Ecology

Ronald L. Lavigne
Phyllis Barney
Attorney General of Washington
Ecology Division
P.O. Box 40117
Olympia, WA 98504-0117

- E-Service: ronaldl@atg.wa.gov
phyllisb@atg.wa.gov
ecyolyef@atg.wa.gov
donnafe@atg.wa.gov
- Facsimile: (360) 586-6760
- U.S. Mail
- Hand Delivery
- Messenger Service

King County

Joseph B. Rochelle
Deputy Prosecuting Attorney
King County Prosecuting Attorney's Office
516 Third Ave., W400
Seattle, WA 98104

- E-Service: joe.rochelle@kingcounty.gov
Mary.Livermore@kingcounty.gov
- Facsimile: (206) 296-0191
- U.S. Mail
- Hand Delivery
- Messenger Service

Pierce County & Coalition of Governmental Entities

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

- E-Service: terrl@foster.com
- Facsimile: (206) 749-2002
- U.S. Mail
- Hand Delivery
- Messenger Service

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

- E-Service: nelsj@foster.com
mccap@foster.com; ToveS@foster.com
- Facsimile: (509) 777-1616
- U.S. Mail
- Hand Delivery
- Messenger Service

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Clark County

Christine M. Cook
Christopher Horne
Deputy Prosecuting Attorney
Clark County Prosecuting Attorney's Office
Civil Division
P.O. Box 5000
Vancouver, WA 98666-5000

E-Service: christine.cook@clark.wa.gov
chris.horne@clark.wa.gov
thelma.kremer@clark.wa.gov
 Facsimile: (360) 397-2184
 U.S. Mail
 Hand Delivery
 Messenger Service

BLA of Clark County

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

E-Service: jamie.howsley@jordanramis.com
Ally.dille@jordanramis.com
 Facsimile: (503) 598-7373
 U.S. Mail
 Hand Delivery
 Messenger Service

Intervenor City of Seattle:

Theresa R. Wagner
Sr. Assistant City Attorney
Seattle City Attorney's Office
600 Fourth Ave., 4th Fl.
P.O. Box 94769
Seattle, WA 98124-4769

E-Service: theresa.wagner@seattle.gov
michele.worthy@seattle.gov
 Facsimile: (206) 684-8284
 U.S. Mail
 Hand Delivery
 Messenger Service

Intervenor City of Tacoma:

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

E-Service: epauli@ci.tacoma.wa.us
 Facsimile: (253) 591-5755
 U.S. Mail
 Hand Delivery
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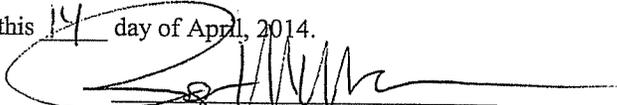
**Puget Soundkeeper Alliance, Washington
Environmental Council and Rosemere
Neighborhood Association**

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

E-Service: jbrimmer@earthjustice.org
true@earthjustice.org; jhasselman@earthjustice.org
chamborg@earthjustice.org
 Facsimile: (206) 343-1526
 U.S. Mail
 Hand Delivery
 Messenger Service

I declare under the penalty of perjury of the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

SIGNED at Everett, Washington, this 14 day of April, 2014.


Regina McManus