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DEPARTMENT OF ECOLOGY
OFFICE OF DIRECTOR

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

CITY OF TACOMA, Appellant, v. WASHINGTON STATE DEPARTMENT OF ECOLOGY, Respondent.	**PCHB NO. 07-027** **WSDOT'S PETITION TO INTERVENE**

I. PETITION

The Washington State Department of Transportation (WSDOT) hereby petitions the Pollution Control Hearings Board (Board) for an order allowing it to intervene in the above-captioned appeal of the Washington State Department of Ecology's (Ecology) Phase I Municipal Stormwater Permit issued on January 17, 2007 (the Permit). This Petition is made pursuant to WAC 371-08-420, WAC 371-08-450, and CR 24 and is supported by the attached Declaration of Megan White.

WSDOT requests that the Board decide this Petition on WSDOT's written submissions, unless the Petition is opposed. If any party opposes, WSDOT requests the opportunity for oral argument before or during the Prehearing Conference. WSDOT has

ATTORNEY GENERAL OF WASHINGTON
Transportation & Public Construction Division
7141 Cleanwater Drive SW
PO BOX 40113
Olympia, WA 98504-0113
(360) 753-6126 Facsimile: (360) 586-6847

contacted the parties and awaits a response from one or more parties regarding concurrence or opposition.

WSDOT specifically requests permission to participate in the Prehearing Conference as an Intervenor.

II. INTERVENOR

WSDOT is an agency of the State of Washington which owns, operates, and maintains the state highway system, including many storm drainage systems statewide. This Petition is brought by the Office of the Attorney General, State of Washington.

WSDOT's contact information is:

Washington State Department of Transportation
Environmental Services Office
Attn: Megan White, Director
310 Maple Park Avenue S.E.
P.O. Box 47331
Olympia, WA 98504-47331

Phone: (360) 705-7480
Facsimile: (360) 705-6833

Counsel for WSDOT is:

Stephen Klasinski
Assistant Attorney General
Transportation & Public Construction Division
P.O. Box 40113
Olympia, WA 98504-0113

Phone: (360) 753-4051
Facsimile: (360) 586-6847

III. STATEMENT OF FACTS

Ecology issued the Phase I Municipal Stormwater Permit on January 17, 2007, with an effective date of February 16, 2007 (Permit). A copy of the Permit is appended to the Notice of Appeal. The Permit regulates municipal stormwater discharges of the Permittees identified in the Permit. The named Permittees include the City of Tacoma, the City of Seattle, Clark County, King County, Pierce County, and Snohomish County. The Port of Seattle and the

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Transportation & Public Construction Division
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Port of Tacoma are identified as Secondary Permittees. A number of the permittees and a couple of public interest groups have appealed the Permit on various grounds.

WSDOT owns and operates storm drainage systems regulated under the Clean Water Act's NPDES permit program as they meet the definition of Municipal Separate Storm Sewer Systems. WSDOT was a named permittee of the previously issued Phase I Municipal Stormwater Permit, but is not a named permittee under the Permit on appeal. Instead, WSDOT is working with Ecology on the development of its own municipal stormwater permit. The issuance of this permit, initially scheduled to be issued concurrently with reissuance of the permit under appeal, has been postponed. See the Declaration of Megan White.

Many of the provisions to be included in WSDOT's permit are substantially similar or even identical with those in the Permit being appealed. The outcome of these appeals will undoubtedly set precedent for similar provisions in WSDOT's permit. However, WSDOT's interest and circumstances vary from those of the named Permittees. Consequently, WSDOT needs to intervene in these appeals to provide its particular perspective to any litigation or settlement talks that evolve. See the Declaration of Megan White.

IV. AUTHORITIES AND ARGUMENT

The Board should approve WSDOT's Petition as an intervention of right or, in the alternative, a permissive intervention. WSDOT holds a direct and substantial interest in the subject permit and the outcome of these appeals and is so situated that the disposition as a practical matter very well may impair or impede its ability to protect its interest in its own permit. In addition, no other existing party can adequately represent WSDOT in these appeals. Finally, WSDOT's interests in the development of its own permit have numerous questions of law and fact in common with those being decided in these appeals.

ATTORNEY GENERAL OF WASHINGTON
Transportation & Public Construction Division
7141 Cleanwater Drive SW
PO BOX 40113
Olympia, WA 98504-0113
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A. WAC 371-08-420.

WAC 371-08-420 governs intervention in proceedings before this Board. That rule provides:

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

B. Civil Rule 24.

Civil Rule (CR) 24 provides for two types of intervention, intervention of right and permissive intervention. WSDOT qualifies for intervention under either category.

1. Intervention of Right.

CR 24(a) governs intervention of right and provides:

> (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

In Westerman v. Corey, 125 Wn.2d 277, 303, 892 P.2d 1067 (1994), the Supreme Court stated that CR 24 provides a four-part test for intervention of right.

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

a. Timeliness. The Board has not yet conducted the Prehearing Conference, set a schedule, heard arguments, or taken testimony. WSDOT's intervention in these proceedings will not delay the orderly process of these hearings in any manner. The Petition is timely.

ATTORNEY GENERAL OF WASHINGTON
Transportation & Public Construction Division
7141 Cleanwater Drive SW
PO BOX 40113
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b. **WSDOT's Interest.** WSDOT's yet to be issued permit will regulate its stormwater systems in a manner substantially similar or even identical with the permit being appealed. The Board's factual determinations and legal conclusions will serve as binding precedent and will thus directly affect the issuance of WSDOT's permit. WSDOT has a direct interest in the outcome of these appeals.

c. **Impairment of WSDOT's Interest.** As an applicant for a stormwater permit that will be substantially similar and, in some respects, identical with that being appealed, WSDOT is so situated that disposition of these appeals very well may determine the outcome of its permit. Consequently, WSDOT's interests will be impaired unless it is allowed to intervene and participate in these proceedings.

d. **Inadequate Representation.** WSDOT operates stormwater systems statewide under a variety of conditions. Its circumstances are, at least in some instances, quite different that those of a county, city, or port. See the Declaration of Megan White. Although WSDOT agrees to a large degree with Ecology's approach, Ecology is the regulatory agency and cannot adequately represent the interests of WSDOT, a regulated agency. WSDOT is the only party to these appeals that can adequately represent its interests.

2. **Permissive Intervention.**

CR 24(b) governs permissive intervention and provides:

> (b) Permissive Intervention. Upon timely application, anyone may be permitted to intervene in an action: (1) When a statute confers a conditional right to intervene; or (2) When an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state 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.

ATTORNEY GENERAL OF WASHINGTON
Transportation & Public Construction Division
7141 Cleanwater Drive SW
PO BOX 40113
Olympia, WA 98504-0113
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WSDOT's yet to be issued permit will include provisions that will be substantially similar or even identical with those under appeal here. While in some instances WSDOT's circumstances might have somewhat different nuances, the factual determinations to be made in these appeals involve matters in common with those in WSDOT's permit. In addition, WSDOT's permit will be governed by the same federal and state statutes and rules involved in these appeals. WSDOT's claims and defenses share much in common with those being litigated in these appeals.

WSDOT's intervention at this time will not delay these proceedings as they are in a preliminary state. Nor will the rights of any original parties be prejudiced. This Board should exercise its discretion and permit intervention.

V. CONCLUSION

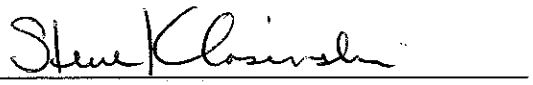
WSDOT respectfully requests the Board grant its Petition to Intervene. WSDOT has a direct and substantial interest in the outcome of these appeals and is so situated that the disposition will as a practical matter impair or impede its ability to protect its interests in the issuance of its own permit. No other party can adequately represent WSDOT's interests. WSDOT's interests share questions of fact and law in common with those being decided in these appeals. The petition is timely, and intervention will not unduly delay or prejudice the adjudication of the rights of the original parties.

WSDOT requests that its petition be decided on its written submissions unless the petition is opposed, in which case WSDOT requests oral argument. Pursuant to WAC 371-08-450, WSDOT will submit a proposed order if such is requested by the presiding officer.

ATTORNEY GENERAL OF WASHINGTON
Transportation & Public Construction Division
7141 Cleanwater Drive SW
PO BOX 40113
Olympia, WA 98504-0113
(360) 753-6126 Facsimile: (360) 586-6847

DATED this 5th day of April, 2007.

ROBERT M. MCKENNA
Attorney General



STEPHEN KLASINSKI, WSBA# 11419
Assistant Attorney General
Attorney for Respondent
WASHINGTON STATE DEPARTMENT OF TRANSPORTATION

ATTORNEY GENERAL OF WASHINGTON
Transportation & Public Construction Division
7141 Cleanwater Drive SW
PO BOX 40113
Olympia, WA 98504-0113
(360) 753-6126 Facsimile: (360) 586-6847