



December 12, 2008

Kevin C. Fitzpatrick
Water Quality Section Manager
Washington State Department of Ecology
Northwest Regional Office
3190 – 160th Avenue SE
Bellevue, WA 98008-5452

RE: Notice of Violation (NOV) No. 6180

Dear Mr. Fitzpatrick:

On November 14, 2008, King County (the County) and the City of Tukwila (the City) received your letter dated November 13, 2008, with NOV No. 6180 attached. This letter constitutes our formal response.

The subject of the NOV is a 24-inch storm drain pipe (the Pipe) that runs along the northern edge of the Jorgensen Forge property between East Marginal Way and the Duwamish River. High levels of PCBs have been found in sediment samples taken from the bottom of the Pipe, the highest levels by far being at Stormdrain Manhole (SDMH) 24A¹, just downgradient of a currently plugged 12-inch lateral connecting into the Pipe from the Jorgensen property to the south. The NOV seems to be based on the supposition that ongoing PCB contamination in the Duwamish is associated with stormwater runoff from East Marginal Way and the King County International Airport (the airport) flowing through the PCBs in the Pipe². It also appears that the Washington State Department of Ecology (Ecology) has issued the NOV to the County and the City under the theory that because the Pipe is “an integral component of [the municipal] storm drainage system,” the municipalities operate it and “are responsible for its operation and maintenance.” Ecology further states that “[w]e have the technology and opportunity to remove most if not all of these PCB-contaminated sediments before they migrate into the river.” So, it appears that the outcome Ecology seeks is at the very least for the County and City to clean the pipe.

¹ See Washington State Department of Ecology, Lower Duwamish Waterway Source Control Action Plan for Early Action Area 4, December 2007, Figure 24 (enclosed).

² The NOV is actually rather vague with respect to what County and City actions are the basis of the actual violation, what the actual violation is, and what actual steps Ecology believes needs to be taken. Our response addresses what we interpret the NOV to mean.

First, we do not agree with the statement that the County and City are the operators of a privately owned pipe just because it conveys water away from the municipal storm sewer system. Neither the County nor the City own the Pipe or the land in which it lies. Additionally, neither the County nor the City own an easement for the operation or maintenance of the Pipe, which is in the jurisdictional and geographical boundaries, and therefore under the regulation of, the City. The Tukwila Municipal Code, at Section 4.30.090 (A)(3) clarifies that “[m]aintenance of private facilities”...[is] “the responsibility of the facility owner.” With respect to the County, King County Code 9.04.155 and .120 both state unambiguously that the County is not responsible for the maintenance of any drainage facilities that have not been accepted for maintenance. Under the law of both the City and the County, the maintenance of a facility that is privately owned on private land is the responsibility of the private owner.

The County and City regulations are consistent with the common law of drainage in Washington state (see enclosed memorandum) in which a downstream property owner is responsible for maintaining the viability on his property of any portion of a natural drainage system, even one that has been piped.

Ecology’s effort to rely on RCW 90.48.080 to effectuate a public cleanup of a polluted private pipe is contrary to both local regulation and state drainage law. If the public, through the agency of the County or City, were responsible for the pollution in the pipe, a case could be made for finding a way to make the cleanup a public responsibility. However, in this case, all available data indicate that the source of the pollution was most likely a direct release to SDMH 24A, as the level of PCBs found there, at 10 million µg/kg for Aroclor 1254, is far higher than the next highest levels found in the Pipe, at around 2.5 million µg/kg, also for Aroclor 1254, in the two private manholes upgradient.³ These are in turn far higher than the level of contamination in the soils above the pipe⁴. Even the distribution of PCBs in the Pipe strongly suggests that the PCBs are spreading upgradient from the point of highest contamination *toward* the municipal systems, not from them. This distribution indicates that the initial PCB contamination is affected by the tide, which twice daily fills the Pipe, and can be shown to produce significantly more flow in the Pipe than the municipal stormwater discharges⁵. Even if the municipal discharges were permanently diverted to another outfall, so they no longer discharged through an area of known contamination, the Pipe’s PCB load would continue to be a problematic source for the Duwamish because the tide is such a significant factor in the distribution of PCBs through the Pipe.

Both the County and the City are committed to ensuring that any discharges of PCBs from our systems into the Pipe are controlled to the maximum extent practicable. We are working together to address any issues related to PCB contamination in our stormwater discharges to the

³ See *ibid*.

⁴ See Floyd Snider, Phase II Transformer PCB Investigation Report Prepared for the Boeing Company, Seattle, Washington, August 3, 2005, Figure 3.8 (enclosed).

⁵ See PBS Engineering and Environmental, PCB Source Control Investigation of the City of Tukwila Stormwater System, Jorgensen Pipe Discharge Area, October 2008, page 8.

Pipe. As previously disclosed to Ecology, the City hired PBS Engineering & Environmental to prepare a report (enclosed and incorporated by reference into this response) investigating PCB sources into the part of its municipal system associated with East Marginal Way that discharges to the Pipe. The County is preparing a similar report for the portion of its system at the airport that discharges to the Pipe. However, recent tests of the City's catch basins draining to the Pipe show either no detectable PCBs, or very low levels⁶. The only catch basin in the County system draining to the Pipe with levels above Washington State sediment standards for PCBs is that closest to the Pipe (CB-584), which is likely tidally influenced and contaminated from downgradient, as the PCB levels at that location are considerably higher, and inconsistent with, the PCB levels in catch basins further upgradient at the airport⁷.

We understand that the stretch of the Duwamish River adjacent to the Jorgensen property is slated for a cleanup under CERCLA (The Comprehensive Environmental Response, Compensation, and Liability Act) because of PCB contamination. We also understand that this cleanup will not move forward until the potential sources of PCB contamination from the upland areas are removed. We can understand Ecology's desire to move the source removal process forward so that the Duwamish cleanup may proceed at a timely and efficient pace. However, to accomplish that purpose, Ecology should consider selecting a more direct remedy for resolving the problem of PCB pollution in the Pipe, one that is consistent with property law, drainage law, and with essential fairness—have the property and Pipe owner clean up the source of the contamination.

As we understand it, Ecology has an agreed order in place under the Model Toxics Control Act (MTCA) to address upland PCB sources at the Jorgensen site. As the Pipe and its PCB load are within the area addressed by the order, using the MTCA process to clean up the Pipe is the proper tool and makes sense. When the Pipe cleanup is integrated into the MTCA process, the timing of the cleanup can be phased to most efficiently deploy resources. The County and City will cooperate with the cleanup by temporarily blocking or diverting their stormwater discharges should that be necessary.

Finally, as alluded to above, the County notes that it does not have regulatory jurisdiction or enforcement power over the Pipe, nor does the County or the City have a legal right to access the Pipe over private property. Neither the County nor the City should be expected to remedy a source of contamination that they did not create and have no control over. Such a remedy would result in the use of scarce public resources and funds for a cleanup that is essentially a private responsibility. To use public funds for a private cleanup is, in our view, neither warranted nor legitimate under the circumstances and data as we understand them.

⁶ See *ibid*, p. 7.

⁷ See *ibid*, pp. 4 and 7.

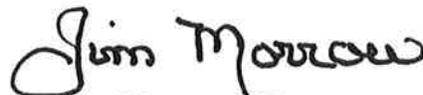
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Please contact Curt Crawford of King County at 206-296-8329 or Ryan Larson of the City of Tukwila at 206-431-2456 if you have further questions or need more information.

Sincerely,



Robert Burke
Division Director
King County Department of Transportation
King County International Airport



Jim Morrow, P.E.
Director, Public Works
City of Tukwila

RB:JM:bgD51

Enclosures

cc: Margaret J. King, Kenyon Disend PLLC, The Municipal Law Firm
Ryan Larson, Senior Surface Water Engineer, City of Tukwila
Joanna Richey, Assistant Division Director, Water and Land Resources Division
(WLRD), Department of Natural Resources and Parks (DNRP)
Curt Crawford, Manager, Stormwater Services Section, WLRD, DNRP

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bcc: Peter Dumaliang, Engineer, King County Airport Division, Department of
Transportation (DOT)
Rob Fritz, Supervising Ecologist, Roads Maintenance Section, Road Services Division,
DOT
Joe Rochelle, Deputy Prosecuting Attorney, Civil Division, Prosecuting Attorney Office
(PAO)
Scott Johnson, Senior Deputy Prosecuting Attorney, Civil Division, PAO
Bruce Tiffany, Engineer IV, Industrial Waste Program, Wastewater Treatment Division
(WTD), Department of Natural Resources and Parks (DNRP)
Jeff Stern, Lead, Sediment Management Program Manager, WTD, DNRP
Doug Navetski, Supervising Engineer, Water Quality Compliance Unit, WLRD, DNRP
Luanne Coachman, NPDES Municipal Stormwater Permit Coordinator, Stormwater
Services Section, WLRD, DNRP

List of Enclosures
By Order of Reference in Letter

1. Figure 24 – Jorgensen Forge Facility, Jorgensen Forge Facility – Boeing Plant 2 Facility, Property Line Stormwater Lines
2. Memorandum regarding Drainage Law Issue from Joseph B. Rochelle, Senior Deputy Prosecuting Attorney
3. Figure 3.8 – Subsurface PCB Distribution along Storm Pipe Alignments
4. PCB Source Control Investigation of the City of Tukwila Stormwater System