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December 26, 2007

Clerk  
Pollution Control Hearings Board  
4224 6th Avenue S.E., Building 2, Rowe Six  
P.O. Box 40903  
Lacey, WA 98504-0903

**Re: Puget Soundkeeper Alliance v. State of Washington, Department of Ecology,  
PCHB Nos. 07-021 et seq.**

Dear Sir or Madam:

Enclosed for filing please find an original and three (3) copies of the CORRECTED Joint Motion by The National Association of Clean Water Agencies and The National Association of Flood and Stormwater Management Agencies for Leave to File Brief as Amici Curiae on Special Condition S4.

The Joint Motion originally sent to your office on December 21, 2007 inadvertently included the National League of Cities, which is not a party to this motion, in the caption to the pleading and in the declaration of service.

Once this has been filed, please return a time stamped copy in the enclosed, postage prepaid envelope.

Sincerely,

  
David W. Burchmore

Enclosures

**POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON**

<b>PUGET SOUNDKEEPER ALLIANCE,</b>	:	
<b>et al.,</b>	:	
<b>Appellants,</b>	:	
	:	<b>PCHB NOS. 07-021, 07-026, 07-027</b>
<b>v.</b>	:	<b>07-028, 07-029, 07-030</b>
	:	<b>07-037, and</b>
<b>STATE OF WASHINGTON,</b>	:	
<b>DEPARTMENT OF ECOLOGY,</b>	:	<b>PCHB NOS. 07-22, 07-23, 07-31</b>
	:	
<b>Respondent</b>	:	
	:	
<b>CITY OF SEATTLE, et al.,</b>	:	<b>DECLARATION OF SERVICE</b>
	:	
<b>Intervenors</b>	:	

David W. Burchmore declares under penalty of perjury:

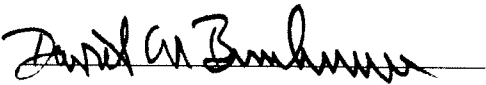
On December 21, 2007, I caused to be served a true and correct copy of the JOINT MOTION BY THE NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES AND THE NATIONAL ASSOCIATION OF FLOOD AND STORMWATER MANAGEMENT AGENCIES FOR LEAVE TO FILE BRIEF AS AMICI CURIAE ON SPECIAL CONDITION S.4, via email to the following:

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17 I declare under penalty of perjury that the foregoing is true and correct.

18 DATED this 26th day of December, 2007, at Cleveland, Ohio.

20 

21 David W. Burchmore

**POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON**

**PUGET SOUNDKEEPER ALLIANCE, :  
et al., :**

**Appellants, :**

**v. :**

**STATE OF WASHINGTON, :  
DEPARTMENT OF ECOLOGY, :**

**Respondent :**

**CITY OF SEATTLE, et al., :**

**Intervenors :**

**PCHB NOS. 07-021, 07-026, 07-027  
07-028, 07-029, 07-030  
07-037, and**

**PCHB NOS. 07-22, 07-23, 07-31**

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**JOINT MOTION BY THE NATIONAL ASSOCIATION OF CLEAN WATER  
AGENCIES AND THE NATIONAL ASSOCIATION OF FLOOD AND STORMWATER  
MANAGEMENT AGENCIES FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*  
ON SPECIAL CONDITION S.4**

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The National Association of Clean Water Agencies (NACWA) and the National Association of Flood and Stormwater Management Agencies (NAFSMA) (collectively the “*amici*”) respectfully move this Board for leave to file an amicus brief on Special Condition S.4 in support of the municipal permittees who will be filing dispositive motions on that issue as Appellants and Intervenors in above-captioned Phase I and Phase II stormwater permit appeals. In support thereof, the *amici* state as follows:

The members of the *amici* represent a large number of city and county governments and public works organizations responsible for the operation, oversight and management of municipal separate storm sewer systems; as well as agencies, companies and professionals involved in ensuring that such systems are designed, funded, operated and maintained in compliance with

1 applicable laws and regulations.

2 NAFSMA is a national non-profit association of municipalities, special purpose public  
3 districts, and state agencies. Its members represent a broad nationwide spectrum of flood control,  
4 water conservation, stormwater management, wastewater, and other water-related districts,  
5 bureaus, departments, and other instruments of state and local government. NAFSMA's 130  
6 member agencies (including 6 cities and counties in the State of Washington) serve a combined  
7 population of approximately fifty (50) million people.

8 NACWA represents the interests of nearly 300 of the nation's wastewater treatment  
9 agencies, including 5 public agency members in the State of Washington. NACWA members  
10 serve the majority of the sewered population in the United States, and collectively treat and  
11 reclaim more than 18 billion gallons of wastewater each day. Numerous NACWA members are  
12 regulated by the Clean Water Act's permit program for municipal separate storm sewer systems.

13 The *amici* have an interest in this litigation because their members are directly involved in  
14 the administration of stormwater utilities and the implementation of stormwater management  
15 programs mandated by Section 402(p) of the Clean Water Act ("CWA"), 33 U.S.C. 1342(p), by  
16 the U.S. Environmental Protection Agency's ("U.S. EPA") implementing regulations at 40 CFR  
17 §§ 122.26 (the "Phase I" permit program, applicable to larger cities) and 122.30 through 37 (the  
18 "Phase II" permit program, applicable to smaller cities and to those otherwise exempted from  
19 Phase I), and by the corresponding state regulations in states such as Washington that have been  
20 delegated authority by U.S. EPA to administer the National Pollutant Discharge Elimination  
21 System ("NPDES") permit program in their respective jurisdictions.

22 Collectively, the *amici* have played an active role in the development of U.S. EPA's  
23 stormwater regulatory program since its inception in 1990. Indeed, representatives from the  
24 *amici*'s member organizations were involved in the legislative debate which led to the enactment  
25 of CWA § 402(p) in 1987. CWA § 402(p)(3)(B)(iii) specified that, instead of requiring  
26 compliance with the technology-based and water quality-based effluent limitations applicable to

1 other types of discharges, permits for discharges from municipal storm sewers shall require  
2 controls to reduce the discharge of pollutants to the “maximum extent practicable” (“MEP”).

3       Following U.S. EPA’s promulgation of the “Phase I” stormwater regulations in 1990,  
4 NAFSMA participated as an Intervenor in *Natural Resources Defense Council, Inc. v. EPA*, 966  
5 F.2d 1292 (9th Cir. 1992) (“*NRDC*”), in which the Ninth Circuit upheld those regulations and  
6 found that the 1987 CWA amendments established a new and less stringent type of control for  
7 municipal separate storm sewer system (“MS4”) discharges, and that “Congress did not mandate  
8 a minimum standards approach or specify that EPA develop minimal performance requirements”  
9 for MS4s. 966 F.2d at 1308.

10       Representatives of each of the *amicus* groups were also active participants in the Federal  
11 Advisory Committee Act (FACA) Storm Water Phase II Subcommittee, which worked with EPA  
12 from 1995 through 1998 to develop the final “Phase II” regulations for small MS4s such as the  
13 Phase II permittees involved in this case. Collectively, the groups participated as *amici curiae* in  
14 *Defenders of Wildlife v. Browner*, 197 F.3d 1035 (9th Cir. 1999) (“*Defenders*”), in which the  
15 Ninth Circuit Court of Appeals held that the text of CWA § 402(p), the structure of the CWA as a  
16 whole, and the court’s prior ruling in *NRDC* all demonstrated that Congress did not require MS4  
17 discharges to achieve strict compliance with state water quality standards. Finally, the *amici* also  
18 submitted a joint brief in support of U.S. EPA’s petition for rehearing in *Environmental Defense*  
19 *Center v. EPA*, 344 F.3d 832 (9th Cir. 2003) that was directly responsible for the Ninth Circuit’s  
20 issuance of an amended opinion reaffirming the court’s previous holding (in *Defenders*) that MEP  
21 is the only standard that MS4 discharges are required to meet.

22       Although this Board’s rules of Practice and Procedure in Chapter 371-08 WAC contain no  
23 explicit provisions regarding *amicus* briefs, the Board has routinely granted permission for the  
24 filing of such briefs by interested parties in previous cases. In *Okanogan Wilderness League v.*  
25 *State of Washington, Department of Ecology*, PCHB No. 98-84 (June 10, 1999), the presiding  
26 officer granted permission for the Jamestown S’Kallam Tribe to file an *amicus* brief in support of

1 an order issued by the Department of Ecology prior to the hearing on the matter, and the Board  
2 considered the Tribe's amicus brief in issuing its Final Findings of Fact, Conclusions of Law and  
3 Order. In *Puget Soundkeeper Alliance, et al. v. State of Washington, Department of Ecology*,  
4 PCHB No. 02-162 (August 4, 2003), the Board issued an order granting the City of Everett leave  
5 to file an amicus brief on the day set for hearing of the case. In *Methow Valley Irrigation District*  
6 *v. State of Washington, Department of Ecology*, PCHB No. 02-071 (February 27, 2003), the  
7 Board gave consideration to the joint amicus brief filed in support of the Irrigation District's  
8 motion for summary judgment by the Washington State Farm Bureau, Okanogan County, Twisp  
9 Valley Power & Irrigation Company and the Washington Power Alliance. In *Waste Action*  
10 *Project, et al. v. State of Washington, Department of Ecology*, PCHB 97-69 (October 13, 1997),  
11 the Board reviewed and considered the amicus brief filed by the Marine Environmental Coalition  
12 before ruling on the parties cross-motions for summary judgment.


13 In the instant proceedings, the Board has ordered that all dispositive motions regarding  
14 Special Condition S.4 shall be filed and served on all Phase I and Phase II parties on January 16,  
15 2008. The interests of the *amici* are aligned with those of the municipal permittees involved in  
16 these proceedings, and the *amici* seek leave to file their brief in support of the position taken by  
17 those parties on the legal issues that have been identified by the Board for the Condition S.4  
18 hearing, as outlined in the Board's Third Prehearing Orders for the Phase I and Phase II appeals,  
19 dated December 11, 2007.

20 For each of the foregoing reasons, the *amici* request that their Motion for Leave to File  
21 Brief as *Amici Curiae* be granted by this Board.

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DATED: December 26, 2007

Respectfully submitted,

  
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