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Title: AN ORDINANCE authorizing the King County executive to execute an intergovernmental agreement with the Washington state Department of Ecology and the United States Army Corps of Engineers to allow King County to meet mitigation requirements in newly adopted federal rules through an in-lieu fee program, and to ensure consistency of the in-lieu program with the terms of the agreement; and amending Ordinance 11955, Section 9, as amended, and K.C.C. 2.16.045, Ordinance 15051, Section 151, and K.C.C. 21A.24.133, Ordinance 15051, Section 152, and K.C.C. 21A.24.137, Ordinance 10870, Section 486, as amended, and K.C.C. 21A.24.390, Ordinance 10870, Section 487, as amended, and K.C.C. 21A.24.400, Ordinance 10870, Section 488, as amended, and K.C.C. 21A.24.410 and Ordinance 10870, Section 489, as amended, and K.C.C. 21A.24.420.

Sponsors: Larry Phillips

Indexes: Washington, State of

Code sections: 2.16.045 -, 21A.24.133 - ., 21A.24.137 - ., 21A.24.390 -, 21A.24.400 -, 21A.24.410 -, 21A.24.420 -

Attachments: 1. Ordinance 17254.pdf, 2. 2011-0455 transmittal letter.doc, 3. 2011-0455 fiscal note.xls, 4. A. King County Mitigation Reserves Program In Lieu Fee Program Instrument, 5. 2011-0455 Att 2 (Program Instrument).docx, 6. 2012-0455 Att 3 (33cfr332).pdf, 7. 2012-0455 Att 4 (table cont).pdf, 8. 2011-0455 Staff Report - Wetland Mitigation.doc

Date	Ver.	Action By	Action	Result
1/17/2012	1	Metropolitan King County Council	Hearing Held	
1/17/2012	1	Metropolitan King County Council	Passed	Pass
1/10/2012	1	Transportation, Economy, and Environment Committee	Recommended Do Pass	Pass
11/7/2011	1	Metropolitan King County Council	Introduced and Referred	

Clerk 01/17/2012

AN ORDINANCE authorizing the King County executive to execute an intergovernmental agreement with the Washington state Department of Ecology and the United States Army Corps of Engineers to allow King County to meet mitigation requirements in newly adopted federal rules through an in-lieu fee program, and to ensure consistency of the in-lieu program with the terms of the agreement; and amending Ordinance 11955, Section 9, as amended, and K.C.C.

2.16.045, Ordinance 15051, Section 151, and K.C.C. 21A.24.133, Ordinance 15051, Section 152, and K.C.C. 21A.24.137, Ordinance 10870, Section 486, as amended, and K.C.C. 21A.24.390, Ordinance 10870, Section 487, as amended, and K.C.C. 21A.24.400, Ordinance 10870, Section 488, as amended, and K.C.C. 21A.24.410 and Ordinance 10870, Section 489, as amended, and K.C.C. 21A.24.420.

STATEMENT OF FACTS:

1. Permit applicants in King County whose proposed projects involve unavoidable impacts to aquatic resources are required to provide compensatory mitigation for such impacts by King County's Critical Areas Ordinance, in Ordinance 15051 from 2004.
2. Onsite compensatory mitigation is not always possible nor ecologically appropriate, and studies have shown that permittee offsite mitigation efforts have a high rate of failure.
3. An in-lieu fee mitigation program provides permittees the option of addressing offsite mitigation requirements by paying a fee in lieu of implementing their own mitigation to a program that typically has substantial mitigation experience.
4. Sponsors of such in lieu-fee programs use permittee-paid fees to implement appropriate compensatory mitigation in ways and in locations that provide a greater likelihood of continued ecological function and integrity of aquatic ecosystems.
5. King County's mitigation reserves program was established by King County's Critical Areas Ordinance, in Ordinance 15051, Sections 151 and 152, from 2004, and was implemented as an in-lieu fee mitigation program to provide permittees an alternative to onsite or permittee-responsible mitigation.
6. The mitigation reserves program has been in operation since 2005 and has implemented mitigation projects that satisfy the mitigation requirements of multiple governments, including

those of the United States Army Corps of Engineers ("USACE"), the state of Washington, King County and other local governments.

7. In April 2008, the United States Environmental Protection Agency ("EPA") and the USACE jointly issued new rules authorizing use of, and establishing requirements for, mitigation banks and in-lieu fee programs to provide compensatory mitigation for unavoidable impacts to waters of the United States, 40 CFR Part 230 and 33 CFR Part 320, respectively. These rules allow the USACE to enter into agreements with other governments and non-profits, who seek to offer mitigation credits to permittees for their unavoidable impacts to waters of the United States, and have those credits recognized as meeting mitigation requirements of the USACE.

8. Since the issuance of the new federal rules in April 2008, the mitigation reserves program has been working in partnership with representatives of the federal, state and local agencies and a number of tribes, including the USACE, the EPA, the U.S. Fish and Wildlife Service, the National Marine Fisheries Service, the Washington state Department of Ecology ("WADOE"), the Washington state Department of Fish and Wildlife, the Muckleshoot Indian Tribe and the Tulalip Indian Tribe to develop an agreement that would allow the mitigation reserves program to meet the numerous and detailed requirements of the new rules, while also satisfying state and local government mitigation requirements as well. The King County Mitigation Reserves Program In Lieu Fee Program Instrument ("MRP instrument"), Attachment A to this ordinance, represents the outcome of these efforts.

9. In the course of working on meeting the requirements of the MRP instrument, the in-lieu fee program recognized the need to develop revised processes and procedures and to follow a formal method of documentation reflecting commitments required by the new federal rules. This resulted in significant changes to the way the mitigation reserves program is to be administered, as reflected in the MRP instrument.

10. The mitigation reserves program, both in its current and in its proposed newly revised form under the MRP instrument, has as its main purpose and goal the achievement of no net loss of functions and values provided by wetlands and other aquatic areas as required by the Clean Water Act, and other applicable laws.

11. The mitigation reserves program operates, and will continue to operate under the MRP instrument, in a watershed context to ensure that mitigation addresses the most important recovery needs of ecosystems and watersheds.

12. In the MRP instrument, the mitigation fee schedule has been set, as required by the federal rule, to account for full costs of implementing mitigation projects and managing the projects to ensure their continued viability over time, as well as costs associated with administering the program.

13. Mitigation fees are required by the federal rule to be held in a separate interest bearing fund, similar to a fund which King County already has established. K.C.C. 21A.24.390.

14. The appropriation of sufficient funds from the separate in-lieu fee program fund to pay for mitigation projects is a requirement of the MRP instrument, and prior to certifying the program, the USACE requires that the department of natural resources and parks make a commitment that it will seek appropriations from the council for additional funds in the event available funds from the in-lieu fee fund are insufficient to meet mitigation obligations.

15. The MRP Instrument, developed in partnership with representatives of federal, state, and local governments and Indian tribes, provides for an interagency review team, composed of the same or similar such representatives, who will have input on all major decisions regarding the operation and implementation of the mitigation reserves program, as it relates to credits for federal, state and local permittees having impacts on aquatic areas.

16. The MRP instrument is proposed as a binding three-party agreement by and among King

County, the USACE and the WADOE that memorializes the rights and obligations of the these parties to the MRP instrument.

17. The District Engineer of the USACE, Seattle District, and the WADOE have indicated their intent to sign the MRP instrument and, thereby, certify the program upon execution by King County, at which point the program can begin operating in accordance with the 2008 federal rules.

18. Upon certification, King County's in-lieu fee program will be the first such program to be certified under the new federal rules in Washington state and may set precedent for other local governments seeking such certification regionally and nationally.

BE IT ORDAINED BY THE COUNCIL OF KING COUNTY:

SECTION 1. The executive is hereby authorized to execute on behalf of King County the King County Mitigation Reserves Program In Lieu Fee Program Instrument, in substantially the form of Attachment A to this ordinance, with the Washington state Department of Ecology and the United States Army Corps of Engineers for implementation and use of King County's mitigation reserves program's in-lieu fee program to meet mitigation requirements of federal, state and local government agencies.

SECTION 2. The water and land resources division of the department of natural resources and parks is hereby authorized to administer and operate the mitigation reserves program's in-lieu fee program with assistance from the department of development and environmental services.

SECTION 3. Ordinance 11955, Section 9, as amended, and K.C.C. 2.16.045 are each hereby amended to read as follows:

A. The department of natural resources and parks is responsible to manage and be fiscally accountable for the wastewater treatment division, water and land resources division, solid waste division and parks and recreation division. The department shall administer and implement the requirements of the federal Clean Water Act, federal Endangered Species Act and other federal and state laws and regulations related to those

requirements. The department shall perform the metropolitan water pollution abatement function referred to in this section as — the water quality program, as set forth in chapter 35.58 RCW, K.C.C. Title 28 and other federal and state laws and regulations applicable to that function, although financial planning for and administration of the water quality program shall be conducted consistent with financial policies approved by the council. The department shall coordinate the county's National Pollutant Discharge Elimination System ("NPDES") municipal stormwater permit program. The department shall provide the support to the county's participation in the regional water supply planning process including the development of reclaimed water and the review of local utility district plans for conformance with county plans and policies and shall participate in the process of preparing coordinated water system plans to ensure conformance with county plans and policies. The department shall provide for the active and passive recreational needs of the region, consistent with the mission of the parks and recreation division described in subsection E.1 of this section. The department shall designate as natural resource lands those county-owned lands that serve important natural resource functions, including, but not limited to, benefiting and protecting natural drainage systems, drainage basins, flood control systems, ecosystems, water quality, ground water, fisheries and wildlife habitat and other natural resource purposes. The department shall act to ensure integration of environmental programs across utility and resource functions and to balance stewardship with economic development issues. To ensure integration and balanced stewardship through the director's office the department shall oversee strategic planning using staff resources budgeted in the department's divisions. Strategic planning may include, but not be limited to: integration of land and water resource protection; coordination of ~~((groundwater))~~ ground water, water reuse and water supply plan approval; development of new funding approaches for resource protection; establishment of new partnerships with businesses, community organizations and citizens; and better coordination of sewerage and flood control facilities to prevent water quality degradation. The director's office shall manage the county's historic preservation program including landmark designation, protection and enhancement to support tourism development, downtown revitalization and environmental and cultural sustainability.

B.1. The duties of the (~~waste-water~~) wastewater treatment division shall include the following:

- a. administering the functions and programs related to the operation, maintenance, construction, repair, replacement and improvement of the metropolitan sewerage system and its financing;
- b. administering the county's sewage disposal agreements with cities and special districts;
- c. providing planning for the water quality capital program;
- d. providing design, engineering and construction management services related to the water quality capital programs including new facilities development and maintenance of the existing infrastructure;
- e. providing support services such as project management, environmental review, permit and right-of-way acquisitions, scheduling and project control; and
- f. regulating industrial discharges into the metropolitan sewerage system.

2. The council may assign responsibility for services ancillary to and in support of the operation and maintenance of the metropolitan water pollution abatement system under chapter 35.58 RCW, including, but not limited to, human resources, accounting, budgeting, finance, engineering, fleet administration, maintenance, laboratory, monitoring, inspection and planning, as it determines appropriate.

C. The duties of the water and land resources division shall include the following:

1. Proposing or updating, or both, and implementing adopted policies, plans and programs relating to water and land resources, open space and other natural resources that protect fisheries, natural resources, water quality and ground water and that solve and prevent drainage problems;
2. Responding to major river floods and addressing drainage problems in unincorporated portions of the county as provided in K.C.C. Title 9, the Surface Water Management Program, in K.C.C. chapter 20.12, the King County Flood Hazard Reduction Plan Policies and other policies established by the council;
3. Within available resources, maintaining major river channels, and surface and storm drainage systems and lands to minimize flood hazards and protect fisheries resources, drainage systems and lands, and water quality;

4. Providing coordination and technical assistance within the county and other governments to assist in setting and implementing priorities for water and land resources, including sample collection, laboratory services, monitoring, analysis and other activities to protect, enhance and evaluate the quality of land, habitat and water resources in the county;

5. Planning the surface water management capital program, providing design, engineering and construction management services related to the surface water management capital program including new facilities development and maintenance of the existing infrastructure and providing support services such as project management, environmental review, permit and right-of-way acquisitions, scheduling and project control;

6. Preparing standards for storm water management facilities that are constructed as part of land development;

7. Providing technical assistance and education to businesses and the general public to encourage environmental stewardship;

8. Implementing the county park, open space, trails, agriculture, forestry, and other natural resources acquisition programs, including planning, site selection, financing, acquisition, project budget management and purchasing fee and less than fee interests;

9. Monitoring and protecting the county's development rights interests related to agricultural lands;

10. Consulting in the preparation of management plans for protection and use of the natural resource values of county owned lands, including natural resource lands, dedicated and deeded open space lands and lands acquired by the county as a condition of land development approval, and consulting with the parks and recreation division the appropriate means to execute such management plans;

11. The office of rural and resource lands shall be a distinct functional unit of the division reporting directly to the water and land resources division manager. The office shall plan, manage and be responsible for administering the county's rural and resource lands programs including, but not limited to, agriculture,

farmlands preservation, current use taxation programs, forestry, noxious weeds, terrestrial wildlife and habitat, rural economic development, and encouraging environmental stewardship; ~~((and))~~

12. Planning, prioritizing, seeking funding for, designing and implementing restoration projects on natural resource lands, dedicated and deeded open space lands and lands acquired by the county as a condition of land development approval in coordination with the parks and recreation division; and

13. Administering and operating the mitigation reserves program's in-lieu fee program.

D. The duties of the solid waste division shall include the following:

1. Managing and operating the county's comprehensive solid waste program on a self-supporting basis;
2. Administering the county's solid waste interlocal agreements with cities and towns;
3. Diverting as much material as possible from disposal in a manner that reduces the overall costs of solid waste management to county residents and businesses, conserves resources, protects the environment and strengthens the county's economy;
4. Managing and being accountable for all transfer station operations and landfills, as well as the transportation of waste between county facilities;
5. Procuring and maintaining all capital and operating equipment specific to the solid waste function;
6. Providing planning, design, engineering and construction management services related to the solid waste capital program including new facilities development and maintenance of existing infrastructure;
7. Providing support services such as project management, environmental review, permit acquisitions, scheduling and project control; and
8. Actively pursuing all revenue sources in an effort to maintain the lowest possible rate structure for the benefit of county residents.

E. The duties of the parks and recreation division shall include the following:

1. Carrying out the county's parks and recreation division mission, which is to provide regional trails,

regional passive parks, regional resource and ecological lands and regional active recreation facilities, rural parks and local unincorporated area parks within the urban growth boundary until annexed, by employing entrepreneurial strategies that raise revenues to support park operations and facilitating agreements with other jurisdictions and entities to provide for recreational services and other activities;

2. Proposing and implementing adopted policies, plans and programs related to the provision of regional and rural parks and recreation facilities and programs and natural resource lands in King County and local parks in the unincorporated portion of King County within the urban growth boundary until those areas are annexed;

3. Within available resources, managing, operating and maintaining or facilitating the management, operation and maintenance of the county parks and recreation facilities;

4. Within available resources, maintaining, restoring or facilitating the maintenance of regional resource and ecological lands in consultation with the water and land resources division;

5. Monitoring and protecting the county's real property and development rights interests acquired through the conservation futures and other open space and natural resource programs, with the exception of development rights on agricultural lands, ensuring to the greatest extent practicable that subsequent county land use policies remain compatible with the acquired interests;

6. Preparing and implementing in consultation with the water and land resources division the management plans for protection and use of the natural resource values of county owned lands, including natural resource lands, dedicated and deeded open space lands and lands acquired by the county as a condition of land development approval, and determining appropriate means to execute those management plans;

7. Administering, operating and maintaining those lands designated as natural resource lands, using any work forces as appropriate;

8. Developing and maintaining an operational master plan and develop and monitoring a capital improvement plan as defined in K.C.C. chapter 4.04;

9. Within available resources, developing and facilitating agreements for the development of specific active park and recreation facilities;

10. Coordinating with other departments and divisions as appropriate in the preparation of grant applications for park and open space acquisition, development and operations;

11. Developing, managing, or facilitating agreements for the provision of recreational programs; and

12. Facilitating programs that promote the safe enjoyment of county-owned swimming pools and guarded swim beaches.

SECTION 4. Ordinance 15051, Section 151, and K.C.C. 21A.24.133 are each hereby amended to read as follows:

A. To the maximum extent practical, an applicant shall mitigate adverse impacts to a wetland, aquatic area, wildlife habitat conservation area or wildlife habitat network on or contiguous to the development site.

The department may approve mitigation that is off the development site if an applicant demonstrates that:

1. It is not practical to mitigate on or contiguous to the development proposal site; and

2. The off-site mitigation will achieve equivalent or greater hydrological, water quality and wetland or aquatic area habitat functions.

B. When off-site mitigation is authorized, the department shall give priority to locations within the same drainage subbasin as the development proposal site that meet the following:

1. Mitigation banking sites and resource mitigation reserves as authorized by this chapter;

2. Private mitigation sites that are established in compliance with the requirements of this chapter and approved by the department; and

3. Public mitigation sites that have been ranked in a process that has been supported by ecological assessments, including wetland and aquatic areas established as priorities for mitigation in King County basin plans or other watershed plans.

C. The department may require documentation that the mitigation site has been permanently preserved

from future development or alteration that would be inconsistent with the functions of the mitigation. The documentation may include, but is not limited to, a conservation easement or other agreement between the applicant and owner of the mitigation site. King County may enter into agreements or become a party to any easement or other agreement necessary to ensure that the site continues to exist in its mitigated condition.

D. The department shall maintain a list of sites available for use for off-site mitigation projects.

E. The department ~~((may))~~ and the department of natural resources and parks have developed a program to allow the payment of a fee in lieu of providing mitigation on a development site. The program ~~((should))~~ addresses:

1. When the payment of a fee is allowed considering the availability of a site in geographic proximity with comparable hydrologic and biological functions and potential for future habitat fragmentation and degradation; and

2. The use of the fees for mitigation on public or private sites that have been ranked according to ecological criteria through one or more programs that have included a public process.

SECTION 5. Ordinance 15051, Section 152, and K.C.C. 21A.24.137 are each hereby amended to read as follows:

The department may approve mitigation to compensate for the adverse impacts of a development proposal to critical areas through the creation and approval of a resource mitigation reserve and through use of an in-lieu fee program. The use of a resource mitigation reserve or in-lieu fee program to compensate for unavoidable impacts to a critical area is not allowed in the agricultural production districts if the purpose is to compensate for development outside of the agricultural production districts.

SECTION 6. Ordinance 10870, Section 486, as amended, and K.C.C. 21A.24.390 are each hereby amended to read as follows:

There is hereby created a critical areas mitigation fund and a separate in-lieu fee program fund. The King County finance and business operations division shall administer ~~((this))~~ the funds.

SECTION 7. Ordinance 10870, Section 487, as amended, and K.C.C. 21A.24.400 are each hereby amended to read as follows:

King County shall deposit all moneys received (~~((as mitigation payments through a fee in-lieu mitigation program or))~~) from penalties resulting from the violation of rules and laws regulating development and activities within critical areas into the critical areas mitigation fund. Fees received as a result of participation in the in-lieu fee program shall be placed into the in-lieu fee program fund. With council authorization, the department may contribute funds from the critical areas mitigation fund to the in-lieu fee program fund.

SECTION 8. Ordinance 10870, Section 488, as amended, and K.C.C. 21A.24.410 are each hereby amended to read as follows:

Moneys from the critical areas mitigation fund shall only be used for paying the cost of enforcing and implementing critical area laws and rules and for contributing to programs, activities or projects in the in-lieu fee program. Moneys collected for the in-lieu fee program shall only be used for programmatic activities and projects in the in-lieu fee program.

SECTION 9. Ordinance 10870, Section 489, as amended, and K.C.C. 21A.24.420 are each hereby amended as follows:

King County shall deposit moneys in the critical areas mitigation fund and the in-lieu fee program fund not needed for immediate expenditure (~~((in a))~~) into an investment fund in accordance with RCW 36.29.020. The director is the designated (~~((investment))~~) fund (~~((director))~~) manager for the critical areas mitigation fund. The director of the department of natural resources and parks is the designated fund manager for the in-lieu fee program fund.