No. 91156-8

SUPREME COURT OF THE STATE OF WASHINGTON

WAHKIAKUM COUNTY,

Petitioner,

v.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,

Respondent.

AMICUS CURIAE MEMORANDUM OF LEWIS COUNTY

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I. INTRODUCTION

Ecology's arguments would be relevant if the county ordinance conflicted with the Biosolids Act. It does not. The ordinance is consistent with both purposes of the statute, and therefore, the Court of Appeals' constitutional analysis is unnecessary. *See Tunstall v. Bergeson*, 141 Wn.2d 201, 211, 5 P.3d 691 (2000). Moreover, the Court of Appeals' constitutional analysis is flawed. The Court's analysis mistakenly relies on the ***minority*** holding in *Biggers v. City of Bainbridge Island,* 162 Wn.2d 683, 169 P.3d 14 (2007). Pursuant to RAP 13.4(b)(1) and (4), the county's petition should be granted.

II. ARGUMENT

A. The Biosolids Act States Two Express Purposes

The Biosolids Act has ***two*** express purposes. RCW 70.95J.005 requires ecology to establish a sludge management program that, **"to the maximum extent possible ensure[s]:**

> **(1) that sludge is reused as a beneficial commodity and**
> **(2) is managed in a manner that minimizes risk to public health and the environment."**

RCW 70.95J.005(2)(numbering and emphasis added). The Court of Appeals opinion recognizes the first purpose, but ignores the second.

The Legislature specifically found that "[m]unicipal sludge can contain metals and microorganisms that, under certain circumstances, may pose a risk to public health." RCW 70.95J.005(1)(e). The second purpose addresses this legislative finding by requiring ecology, "to the maximum extent possible, ensure that municipal sludge ... is managed in a manner that minimizes risk to public health and the environment." RCW 70.95J.005(2).

B. The Ordinance and the Act Do Not Conflict

In short, the statute requires ecology to manage the sludge program to maximize reuse ***and*** to minimize the risk to public health and the environment. The Wahkiakum county ordinance is consistent with ***both*** purposes. It permits the unrestricted application of Class A biosolids, thereby promoting reuse. It prohibits Class B biosolids, the kind that the Legislature determined in RCW 70.95J.005(1)(e) threaten public health and the environment, thereby minimizing the risk to public health and the

environment. Thus, the ordinance neither prohibits what the Act permits nor permits what the Act prohibits and is not in conflict with the statute. Ecology and the Court of Appeals find a conflict between the ordinance and the Act ***only*** because they read the protection of public health and the environment out of the statute.

C. Ecology and the Court of Appeals Imply a Statutory Purpose that Does Not Exist.

Although ecology and the Court of Appeals ignore the plain language of the statute stating its two *express* purposes, they *imply* a legislative purpose to minimize the cost to cities and towns of reusing waste. The implication is unsupported. The legislative purposes of the Biosolids Act are stated in RCW 70.95J.005. Nowhere in that section does the Legislature say the purpose of the statute is to *minimize* reuse costs to cities and towns. *See* RCW 70.95J.005; *Laws of Washington* 1992 c. 174. Sure, the Legislature recognized that "sludge management is often a financial burden to municipalities and ratepayers." RCW 70.95J.005(1)(c). The Legislature also found that biosolids are toxic. RCW 70.95J.005(1)(e). But these are statements of legislative fact, not of statutory purpose. Furthermore, the Legislature coupled its finding of toxicity of biosolids with an express mandate to ecology

to ensure that municipal sewage sludge is managed in a manner that minimizes risk to public health and the environment. RCW 70.95J.005(2). There is no corresponding statutory purpose to minimize the costs to cities and towns.

The rest of the biosolids chapter at 70.95J RCW is likewise *silent* on the financial issue. There is no statutory purpose to sacrifice public health or the environment for the benefit of municipal finances and the recycling industry. The only mention of "economic infeasibility of using or disposing of sludge material other than in a landfill" is in a *different* bill passed years *before* the Biosolids Act. RCW 70.95.255; *Laws of Washington* 1986 c. 297. The Legislature's *subsequent and express directive in the Biosolids Act* to ensure "to the maximum extent possible... [sludge] is managed in a manner that minimizes the risk to public health and the environment" trumps any *implication* that the *Biosolids Act* was instead intended to promote municipal finances. *See* RCW 70.95J.005(2).

D. There Is No Conflict and this Court Need Not Address Ecology's Constitutional Arguments

There is no conflict between the Act and the county ordinance and ecology's constitutional arguments never should have been

addressed. *Tunstall, supra*, 141 Wn.2d at 211. The elimination of the environmental protection purpose of the Act improperly removes the statutory controls the Legislature imposed on ecology's biosolids program, threatens the public health and the environment, and therefore, presents an issue of substantial public interest. *See* RAP 13.4(b)(4).

E. Even If There Were a Conflict, It Is Not Irreconcilable

Nevertheless, if the Wahkiakum county ordinance is deemed by this Court to be in conflict with the Biosolids Act, it is not in irreconcilable conflict. The county simply went further than the state statute (as read by ecology and the Court of Appeals) in regulating biosolids, as it is constitutionally permitted to do.

This Court has ruled that "[a] local ordinance may require more than state law requires" where laws are prohibitory or regulatory. *Rabon v. City of Seattle*, 135 Wn.2d 278, 292-93, 957 P.2d 621 (1997) (prohibitory) (emphasis added). *See also Lenci v. City of Seattle*, 63 Wn.2d 664, 670-71, 388 P.2d 926 (1964)(regulatory). "[T]his court has repeatedly stated that a local ordinance does not conflict with a state statute in the constitutional sense merely because the ordinance prohibits a wider scope of activity." *Brown*

v. City of Yakima, 116 Wn.2d 556, 562, 807 P.2d 353 (1991), citing *City of Seattle v. Eze*, 111 Wn.2d 22, 33, 759 P.2d 366 (1988)(emphasis added); *State of Washington ex rel. Schilberg v. Everett District Justice Court*, 92 Wn.2d 106, 108, 594 P.2d 448 (1979); *Bellingham v. Schampera*, 57 Wn.2d 106, 111, 356 P.2d 292 (1960).

For example, in *Brown*, *supra*, a local ordinance was held not to conflict with the state fireworks law where the local ordinance went further in its prohibition of dangerous fireworks than state law by providing for a shorter time period for lawful possession. This Court upheld the city's imposition of restrictions on the right to possess dangerous fireworks in addition to those imposed by state law. In *Weden v. San Juan Cty.,* 135 Wn.2d 678, 689, 958 P.2d 273 (1998), this Court upheld a county ordinance *banning* personal water vessels throughout county for all but emergency purposes because of threats to swimmers, other vessels, wildlife and habitat, as well as to the area's tourist-based economy. This Court upheld the right of local government to impose the ban. In *Rabon*, *supra*, this Court upheld the city's police power measures requiring the destruction of dangerous dogs, even in circumstances where state law permitted owners to keep them alive. This Court upheld the

ordinance, notwithstanding the conflict, citing the right of the local jurisdiction to go further than the state in prohibiting or regulating dangerous dogs. Therefore, the county's ordinance is not impliedly pre-empted by the Act merely because the ordinance prohibits a wider scope of activity than is permitted by the Act.

F. The Biosolids Act Is No More Comprehensive than the Laws this Court Has Found Do Not Impliedly Preempt Local Regulation

Ecology argued and the Court of Appeals accepted that the state statute in *Schillberg* is not like the "comprehensive" regulation of biosolids. In fact, the biosolids chapter of the Revised Code of Washington (RCW) consists of a mere six (6) pages, *with* annotations. *See* 70.95J RCW. Moreover, the statutes regulating fireworks, dangerous dogs and watercraft, are substantially more "comprehensive" than the Biosolids Act. *See* 70.77 RCW (Fireworks – 70 pages); 79A.60 RCW (Recreational vessels – 67 pages); 16.08 RCW (Dogs – 18 pages).

G. The Court of Appeals' Implied Preemption Analysis Relies on the Minority Holding in *Biggers*

Based on this dubious finding of "comprehensiveness," the Court of Appeals opinion creates a new implied preemption test. The opinion claims that a county enactment is invalid if it "exercises

power that the statutory scheme did not confer on local governments." *Department of Ecology v. Wahkiakum Cy.*, ____Wn. App.___, 337 P.3d 364, 367 (2014). This is flatly wrong.

The Court of Appeals relies upon this Court's opinions in *Biggers v. City of Bainbridge Island,* 162 Wn.2d 683, 169 P.3d 14 (2007), for this proposition, but that case did not so hold. In fact, the Court of Appeals' published opinion repeatedly cites *Biggers* for the ***exact opposite of*** what this Court actually held, mistakenly relying upon the ***minority*** of justices in *Biggers*, who argued that the moratorium should be preempted:

> Our Supreme Court held that the moratorium irreconcilably conflicted with the state's Shoreline Management Act (SMA) because the SMA created a comprehensive regulatory scheme for permitting shoreline development. *Biggers*, 162 Wash.2d at 697-98, 169 P.3d 14.

Wahkiakum Cy., supra, at 368 (citing lead opinion). This is not the *Biggers* holding, as the stated position did not receive a fifth vote. In fact, *Biggers* upheld the city's authority to impose a moratorium.

The Court of Appeals' mistake arises from the 4-1-4 vote in *Biggers*, with the ostensible dissent actually prevailing on the issue of preemption. *See Biggers*, *supra*, at 703 (Chambers, J. concurring in result). If one reads only the first paragraph of the

lead opinion, instead of all three opinions, one will reach the same mistaken conclusion as reached by the Court of Appeals. But, on the issue of preemption, this Court actually held that the city was ***not*** preempted from adopting a moratorium.

The *Biggers* dissent, relying upon *Weden, supra,* concluded that the city had the authority to adopt the moratorium. The one concurring justice, Justice Chambers, agreed – with the ostensible dissent -- that the city had the authority to adopt a reasonable moratorium. *Biggers, supra,* at 703. The only difference was that Justice Chambers disagreed with the city's imposition of a permanent ban disguised as a "rolling moratorium." *Id.* The *Biggers* Court rejected the proposition for which the Court of Appeals cites it, and the Court of Appeals opinion conflicts with a Supreme Court decision. Pursuant to RAP 13.4(b)(1), this Court should grant review.

H. <u>The County Ordinance is Constitutional</u>

The Court of Appeals' conflicts with this Court's decisions. The correct test is the irreconcilable conflict test which is not triggered in this case. The Wahkiakum county ordinance is not in conflict as it advances *both* purposes of the Biosolids Act by, on the one hand,

promoting reuse and, on the other hand, protecting the public and the environment from the threats the Legislature found existed as a matter of legislative fact. *See* RCW 70.95J.005(1)(e).

III. CONCLUSION

The Legislature directed ecology *both* to maximize the reuse of sewage sludge and to minimize the risk to public health and the environment. Ecology accepted the first directive but ignored the second. Ecology's nescience of its obligation threatens public health and the environment, precisely what the Legislature intended to avoid. Instead, ecology uses the statute the Legislature passed to implement the federal Clean Water Act amendments to facilitate the contamination of the very waters the statute was intended to protect. The Biosolids Act does not support ecology's position and this Court should review this case to address an issue of substantial public interest and to redress the conflict between this Court's majority holding in *Biggers* and the Court of Appeals' conflicting opinion.

RESPECTFULLY SUBMITTED this 30 day of January, 2015.

GLENN J. CARTER, WSBA# 33863
Chief Civil Deputy Prosecuting Attorney

SUPREME COURT OF THE STATE OF WASHINGTON

WAHKIAKUM COUNTY, Petitioner, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Respondent.	NO. 91156-8 CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, I certify that on the 30th day of January, 2015, I caused to be served a true and correct copy of Lewis County's Amicus Curiae Memorandum and Motion to File Amicus Curiae Memorandum in the above-captioned action upon the parties herein, as identified below, both by United States Mail and by email:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Dated this 31st day of January, 2015, at Chehalis, Washington.

CASEY MAUERMANN, Sr. Paralegal
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Certificate of Service

OFFICE RECEPTIONIST, CLERK

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Good Morning,

Attached please find Lewis County's Motion to File Amicus Brief as well as Lewis County's Amicus Curiae Memorandum.

Thank you,

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