NO. 46378-4

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

SNOHOMISH COUNTY, KING COUNTY, AND BUILDING INDUSTRY ASSOCIATION OF CLARK COUNTY,

Petitioners,

v.

POLLUTION CONTROL HEARINGS BOARD; STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY; PUGET SOUNDKEEPER ALLIANCE, WASHINGTON ENVIRONMENTAL COUNCIL, and ROSEMERE NEIGHBORHOOD ASSOCIATION,

Respondents.

RESPONDENT STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY'S RESPONSE BRIEF

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I. INTRODUCTION

As this Court has recognized, the public interest is subverted if a vested right is too easily granted. In this case, King County, Snohomish County, and the Building Industry Association of Clark County (collectively "Appellants") appeal a summary judgment decision issued by the Pollution Control Hearings Board ("Board") that properly concluded environmental requirements imposed on municipalities pursuant to the federal Clean Water Act and state Water Pollution Control Act are not subject to the state's vested rights doctrine. While recent cases have refused to judicially expand the vested rights doctrine, Appellants request that the Court expand the vested rights doctrine in a manner that would allow development projects to go forward without having to comply with state and federal environmental laws. However, the vested rights doctrine does not apply to environmental requirements the state directs local government to implement in order to meet the requirements of state and federal water pollution laws. If the Court finds a conflict between Washington's vested rights doctrine and the federal Clean Water Act, the vested rights doctrine must yield to the requirements of the Clean Water Act.

The Court should affirm the Board's summary judgment decision and reject Appellants' invitation to expand the vested rights doctrine to

preclude implementation of environmental requirements necessary to comply with the Clean Water Act and Water Pollution Control Act.

II. ISSUE PRESENTED

Did the Board correctly rule that vesting does not apply to environmental requirements the State directs local governments to implement in order to comply with the federal Clean Water Act and state Water Pollution Control Act?

III. STATEMENT OF THE CASE

A. Federal And State Water Pollution Control Laws

The federal Water Pollution Control Act, also known as the Clean Water Act, makes it unlawful for any person to discharge pollutants from a point source into navigable waters of the United States unless the discharge is in compliance with a National Pollutant Discharge Elimination System ("NPDES") permit. 33 U.S.C. §§ 1311(a), 1342(a), 1362(12). The Clean Water Act requires that discharges from municipal storm sewers be regulated by NPDES permits and that such permits "shall require controls to reduce the discharge of pollutants to the maximum extent practicable." 33 U.S.C. § 1342(p)(3)(B)(iii). Congress authorized the Environmental Protection Agency ("EPA") to delegate the NPDES permit program to states. 33 U.S.C. § 1342(b). States are prohibited from enforcing water pollution control requirements that are less stringent than

Clean Water Act requirements. 33 U.S.C. § 1370. EPA has delegated the NPDES permit program to Washington, and Ecology is designated the state Water Pollution Control Agency for all purposes of the Clean Water Act in Washington State, and is authorized to "take all action necessary" to meet the requirements of the Clean Water Act. RCW 90.48.260(1). Ecology's authority includes "[c]omplete authority to establish and administer a comprehensive" pollution discharge elimination permit program. RCW 90.48.260(1)(a). Ecology is specifically granted authority to establish "[e]ffluent treatment and limitation requirements together with timing requirements related thereto." RCW 90.48.260(1)(a)(i).

Washington's Water Pollution Control Act declares the "public policy of the state of Washington to maintain the highest possible standards to insure the purity of all waters of the state consistent with public health and public enjoyment thereof." RCW 90.48.010. The Water Pollution Control Act makes it unlawful to discharge, permit, or allow the discharge of, any material that shall cause or tend to cause pollution into waters of the state. RCW 90.48.080. The discharge of waste material by any county or municipal or public corporation must be authorized by a state waste discharge permit. RCW 90.48.162. Ecology must require the use of "all known available and reasonable" methods to prevent and control the pollution of waters of the state. RCW 90.48.010. Ecology is

prohibited from issuing a permit that allows the discharge of toxicants that would violate any water quality standard. RCW 90.48.520. Washington's water quality standards include the protection of aquatic life as a designated use, including salmonid spawning, rearing, migration, and habitat. WAC 173-201A-200(1). Washington's water quality standards also include anti-degradation requirements that prohibit a degradation of existing water quality that would interfere with or become injurious to existing or designated uses of the state's waters. WAC 173-201A-310.

B. The Stormwater Problem

The Ninth Circuit has described the stormwater problem as follows:

> Stormwater runoff is one of the most significant sources of water pollution in the nation, at times comparable to, if not greater than, contamination from industrial and sewage sources. Storm sewer waters carry suspended metals, sediments, algae-promoting nutrients (nitrogen and phosphorous), floatable trash, used motor oil, raw sewage, pesticides, and other toxic contaminants into streams, rivers, lakes, and estuaries across the United States. . . . Among the sources of stormwater contamination are urban development, industrial facilities, construction sites, and illicit discharges and connections to storm sewer systems.

Envtl. Defense Ctr. v. U.S. EPA, 344 F.3d 832, 840–41 (9th Cir. 2003) (internal quotations omitted).

Stormwater is also a significant environmental problem in Washington State,

> Stormwater is the leading contributor to water quality pollution in the state's urban waterways, and is considered to be the state's fastest growing water quality problem as urbanization continues to spread throughout the state. Common pollutants in stormwater include lead, zinc, cadmium, copper, chromium, arsenic, bacterial/viral agents, oil & grease, organic toxins, sediments, nutrients, heat, and oxygen-demanding organics. Municipal stormwater also causes hydrologic impacts, because the quantity and peak flows of run-off are increased by the large impervious surfaces in urban areas. Stormwater discharges degrade water bodies, and consequently, impact human health, salmon habitat, drinking water, and the shellfish industry.

Puget Soundkeeper Alliance v. Dep't of Ecology, PCHB Phase 1 Nos. 07-021, 07-026 through -030, and 07-037, and Phase II Nos. 07-022, -023, at 25 (FF 30), Findings of Fact (FF), Conclusions of Law (CL) and Order, Condition S4 (Aug. 7, 2008).

Ecology's regulation of stormwater runoff from new development, redevelopment, and construction sites is targeted at addressing these significant threats to public health and the environment. The Phase I Municipal Stormwater Permit regulates stormwater discharges from large and medium municipal storm sewers. Certified Appeal Board Record ("CABR") at 004983. [1] The primary permittees under the Phase I Permit

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[1] Reference to the Certified Appeal Board Record ("CABR") is the six digit bates numbered record certified by the Board and designated as Clerk's Papers. As Snohomish County has noted, there is an overlap in numbering between the Clerk's

are Tacoma, Seattle, and Clark, King, Pierce, and Snohomish Counties. CABR at 004987. Ecology regulates stormwater discharges from small municipal storm sewers with two Phase II Permits, one for small municipalities in Western Washington and one for small municipalities in Eastern Washington. Neither of the Phase II permits are subject to this appeal.

C. The Board's Decision Regarding The 2007 Municipal Stormwater Permit

The Appeal before the Court concerns the Phase I Municipal Stormwater Permit Ecology issued on August 1, 2012, with an effective date of August 1, 2013 ("2013 Permit"). CABR at 004983–5177. The 2013 Permit is the third iteration of Phase I municipal stormwater permits issued in Washington. *Pierce Cnty. v. Dep't of Ecology*, PCHB Phase I No. 12-093c, and Phase II No. 12-097c, FF 3, Findings of Fact, Conclusions of Law, and Order (Mar. 21, 2014) ("2014 Decision"). CABR at 004057. Ecology issued the first Phase I Permit in 1995, and issued the second Phase I Permit in 2007. *Id.* The 2013 Permit incorporates Ecology's experience with the prior Phase I Permits, and the Board's decision regarding the 2007 Permit.

Papers and the Certified Appeal Board Record. Snohomish County's Opening Brief at 3 n.1. In order to avoid confusion, Ecology will follow Snohomish County's lead and cite to the CABR.

Puget Soundkeeper Alliance and several permittees appealed the 2007 Permit. *Id.* FF 4. The Board determined that the Permit's reliance on a flow control standard was insufficient and that aggressive use of low impact development ("LID") practices in combination with the flow control standard was necessary to meet the state all known available and reasonable treatment ("AKART") standard and the federal maximum extent practicable ("MEP") standard:

> [I]n order to reduce pollution in urban stormwater to the maximum extent practicable, and to apply AKART, it is necessary to aggressively employ LID practices *in combination with* conventional stormwater management methods. Thus we conclude that under state law, the permit must require greater application of LID techniques, where feasible, in combination with the flow control standard, to meet the AKART standard. The Permit must also require the application of LID, where feasible, and conventional engineered stormwater management techniques to remove pollutants from stormwater to the maximum extent practicable in order to comply with federal law.

Puget Soundkeeper Alliance v. Dep't of Ecology, PCHB Nos. 07-021, 07-26 through -030, and 07-037, at 58 (CL 16), Findings of Fact, Conclusions of Law and Order (Aug. 7, 2008) ("2008 Decision").

The Board remanded the 2007 Permit to Ecology with directions to require permittees "to adopt enforceable ordinances that require use of LID techniques where feasible in conjunction with conventional stormwater management methods." *Id.* at 72.

D. The 2013 Municipal Stormwater Permit

Ecology did not modify the 2007 Permit as directed by the Board. CABR at 004061 (2014 Decision at 16, FF 8). Instead, Ecology formed two low impact development advisory committees to assist Ecology in developing technical guidance and a performance standard for low impact development. *Id.* FF 8, 9. Based on input from the advisory committees, Ecology included modest requirements for low impact development in the 2013 Permit. The Permit only requires low impact development techniques for new development and redevelopment projects that meet certain thresholds specified in Appendix 1 of the Permit and that will discharge stormwater to a municipal separate storm sewer system. In particular, Ecology developed List No. 1 and List No. 2, which identify on-site stormwater best management practices that apply to projects based on factors such as parcel size and quantity of hard surface area created. *See* CABR at 005067, 005077–5079 (2013 Permit). Projects that result in at least 2000 square feet of new plus replaced hard surfaces or disturb at least 7000 square feet of land are subject to List No. 1. *Id.* at 005067, 005077. Projects that result in at least 5000 square feet of new plus replaced hard surfaces, or that convert at least ¾ acres vegetation to lawn or landscape areas, or convert at least 2 ½ acres of native vegetation to pasture are subject to List No. 2. *Id.* at 005067, 005078. Ecology also

developed a low impact development performance standard to provide flexibility to permittees and project applicants that are required to use low impact development techniques. *Id.* at 005077. Most project applicants that trigger low impact development requirements have the option of using either the appropriate best management practices list or complying with the low impact development performance standard. *Id.* at 005076, 005077. If an applicant elects to use the list approach, the applicant must consider the on-site best management practices in the order listed for each surface type, and must use the first best management practice considered "feasible."[2] CABR at 004069 (2014 Decision, FF 29).[3] If all of the on-site best management practices on the respective lists are infeasible, the project is not required to take any further action with regard to on-site stormwater management. *Id.* CABR at 004070 (FF 30).

The permit requires that permittees implement a stormwater management program that includes "ordinances or other enforceable documents" to implement the minimum requirements, thresholds, and definitions in Appendix 1, including the requirements related to on-site stormwater best management practices. CABR at 004997 (2013 Permit,

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[2] Each list addresses three surfaces; lawn and landscaped areas, roofs, and other hard surfaces. CABR at 005078–79.

[3] The feasibility of a best management practice is evaluated against the infeasibility criteria identified for each best management practice in the 2012 Stormwater Manual and the competing needs criteria in the 2012 Stormwater Manual. CABR at 004069 (2014 Decision, FF 29).

Condition S5.C.5.a.i). In the alternative, permittees are given the option to adopt "ordinances or other enforceable documents" that include minimum requirements, thresholds, and definitions that Ecology determines are equivalent to the Appendix 1 requirements. *Id.*

In the 2007 Permit, Ecology set a deadline for permittees to adopt a stormwater management program to implement Permit requirements, but did not specify when permittees where required to implement the program and did not specify how the local program was to be applied to projects that were in the development process at the time permittees adopted their stormwater management programs. CABR at 001268 (Declaration of Bill Moore (Moore Decl.) ¶ 4). These shortcomings came to light during the Board's consideration of an alternative flow control program Ecology had approved for Clark County in the *Rosemere v. Dep't of Ecology and Clark County* case. *Id.* In that case, the Board concluded that state vesting laws do not automatically apply to the provisions in municipal stormwater permits that Ecology issues to comply with state and federal environmental laws. *Id.* at 001269 (¶ 5). During the development of the 2013 Permit, Ecology used its authority to establish timing requirements for permit limitations and defined when and how the new stormwater requirements apply to projects in the development process. *Id. See also* RCW 90.48.260(1)(a)(i) (granting Ecology "complete authority" to

establish timing requirements related to permit limitation requirements). Ecology defined when and how the new stormwater requirements apply to projects in the development process in order to avoid ambiguity, provide for consistency among permittees, and limit liability for permittees and project proponents by specifying when and how the new stormwater requirements apply. CABR at 001269 (Moore Decl. ¶ 6).

Condition S5.C.5 of the 2013 Permit requires that a permittee's stormwater management program include "a program to prevent and control the impacts of runoff from new development, redevelopment, and construction activities." CABR at 004997. Condition S5.C.5.a.iii, requires permittees to adopt their program and make it effective no later than June 30, 2015; and further requires that the program "shall apply to all applications submitted after July 1, 2015 and shall apply to projects approved prior [to] July 1, 2015, which have not started construction by June 30, 2020."[4] 2013 Permit; CABR at 004998. This timing requirement is the subject of this appeal.

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[4] In its Summary Judgment Order, the Board directed Ecology to replace "projects approved" with "application submitted" in the second sentence of Condition S5.C.5.a.iii. CABR at 004011–12. Ecology has recently modified the second sentence of Condition S5.C.5.a.iii to read as follows: "The local program adopted to meet the requirements of S5.C.5.a.i through ii shall apply to all applications submitted after June 30, 2015 and shall apply to applications submitted no later than June 30, 2015, which have not started construction by June 30, 2020." The modified Permit is

E. The Appeal Of The 2013 Municipal Stormwater Permit

Pierce County, Snohomish County, Clark County, King County, and the Building Industry Association of Clark County ("BIA") appealed the 2013 Permit to the Board. CABR at 004049 (2014 Decision). Seattle, Tacoma, the Washington State Department of Transportation, Puget Soundkeeper Alliance, Washington Environmental Council, and Rosemere Neighborhood Association were granted intervention. *Id.* The parties identified numerous legal issues including the issue raised in this appeal, whether the timing requirement in Condition S5.C.5 violates land use laws. In particular, the issue raised in this appeal is whether the timing requirement in Condition S5.C.5.a.iii violates the vested rights and finality doctrines. Snohomish County moved for summary judgment on this issue. *Pierce Cnty. v. Dep't of Ecology*, PCHB Nos. 12-093c and 12-097c, Order on Summary Judgment (Oct. 2, 2013) ("2013 Summary Judgment Order"). CABR at 003973 n.1. Appellant BIA joined Snohomish County's Motion. CABR at 002534–2548. Appellant King County did not join or otherwise participate in Snohomish County's Motion. The Board denied Snohomish County's Motion and granted summary judgment to Ecology and Puget Soundkeeper Alliance. CABR at 004012

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available at: http://www.ecy.wa.gov/programs/wq/stormwater/municipal/phaseIpermit/phipermit.html

(2013 Summary Judgment Order). The Board concluded that the requirements in the Permit are not land use control ordinances governed by the state's vested rights doctrine and that the Permit does not violate the finality doctrine. CABR at 003998–4007 (2013 Summary Judgment Order). The Board resolved the remaining issues in its 2014 Decision, and like the Board's 2007 Decision, no party appealed the 2014 Decision. However, Appellants did appeal the 2013 Summary Judgment Order to Thurston County Superior Court. Appellants sought direct review and by order dated September 5, 2014, this Court granted direct review. In its Ruling Accepting Direct Review, the Court accepted review "of the PCHB's order on summary judgment regarding whether the conditions imposed by the Phase I Permit violates land use laws." Ruling Accepting Direct Review at 3–4. Accordingly, the only issue in this appeal is whether the second sentence in Condition S5.C.5.a.iii of the 2013 Permit violates the vesting or finality doctrines.

IV. ARGUMENT

A. The Vesting Doctrine Does Not Apply To Environmental Requirements That The State Directs Municipalities To Implement In Order To Satisfy The Requirements Of State And Federal Water Pollution Laws

As Appellants acknowledge, the vesting doctrine only applies to zoning or other land use control ordinances. King County Brief at 8,

Snohomish County Brief at 17, BIA Brief at 5. The vesting doctrine does not apply to the requirements in the 2013 Permit because the requirements are not zoning or other land use control ordinances, but are environmental requirements mandated by the state rather than local government, are required to implement state and federal water pollution control statutes, and are otherwise dissimilar to zoning ordinances that regulate how land may be used.

As discussed above, the Board's 2008 Decision concluded that the aggressive use of low impact development techniques was required to comply with the federal Clean Water Act and state Water Pollution Control Act. In its 2014 Decision, the Board held that the 2013 Permit "correctly implemented the prior decision of the Board on the previous iteration of the Permit[], while giving the permittees considerable flexibility in implementation of many provisions." CABR at 004048 (2014 Decision).[5]

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[5] The 2013 Permit gives permittees the flexibility of adopting "ordinances or other enforceable documents" to implement the requirements for development, redevelopment, and construction sites. CABR at 004997. Permittees also have the option to use the 2012 Stormwater Management Manual for Western Washington or to develop their own requirements to "protect water quality, reduce the discharge of pollutants to the maximum extent practicable, and satisfy the state AKART requirements." *Id.* at 004997–98. Most project applicants that trigger the low impact development requirements can meet the requirements by either using the list approach or meeting the low impact development performance standard. *Id.* at 005007. Applicants that use the list approach only need to use the first listed low impact development technique that is feasible, and are not required to take any further action with regard to on-site stormwater management if all of the listed best management practices are

King County "does not dispute that the NPDES Permit program is environmental in its statutory origin and objectives." Appellant King County's Opening Brief ("King County Brief") at 16. King County also acknowledges that the vested rights doctrine does not apply to an NPDES permit. *Id.* at 22. However, both King and Snohomish Counties argue that the vested rights doctrine does apply to the requirements in the 2013 Permit because the counties are required to apply the updated environmental stormwater controls to development projects they regulate. King County Brief at 16 (noting that permittees must apply the stormwater requirements to local land use permits); Snohomish County's Opening Brief ("Snohomish County Brief") at 19 (noting that permittees must apply the stormwater requirements in the Permit to "new development.").

In Washington, vesting generally refers to "the notion that a land use application, under the proper conditions, will be considered only under the land use statutes and ordinances in effect at the time of the application's submission." *Noble Manor Co. v. Pierce Cnty.,* 133 Wn.2d 269, 275, 943 P.2d 1378 (1997). However, the "vested rights doctrine is not a blanket rule requiring cities and towns to process all permit applications according to the rules in place at the outset of the permit

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infeasible. CABR at 004070. Finally, the 2013 Permit allows permittees to adjust the Permit's minimum requirements, and to grant variances from the minimum requirements if application of the requirements "imposes a severe and unexpected economic hardship to a project applicant." CABR at 005087.

review. Instead, the doctrine places limits on *municipal discretion* and permits landowners or developers 'to plan their conduct with reasonable certainty of the legal consequences'." *Erickson & Assoc., Inc. v. McLerran*, 123 Wn.2d 864, 873, 872 P.2d 1090 (1994) (emphasis added) (quoting *West Main Assoc. v. City of Bellevue,* 106 Wn.2d 47, 51, 720 P.2d 782 (1986).

The purpose of the vested rights doctrine is to limit the exercise of "municipal discretion," not to limit the state's ability to implement environmental requirements necessary to comply with state and federal water pollution laws. Phase I permittees do not exercise "municipal discretion" when they implement environmental conditions imposed by the state to meet the requirements of state and federal water pollution laws. Consequently, vesting does not apply to environmental conditions that the state directs local governments to implement to meet the requirements of state and federal water pollution laws. The fact that the environmental requirements are implemented by local government and impact development at the local level, does not make the requirements the product of local government, and therefore subject to vesting, because the state retains control over the final content and approval of the regulations.

In *Citizens for Rationale Shoreline Planning v. Whatcom Cnty.*, 172 Wn.2d 384, 389, 258 P.2d 36 (2011), the issue before the Court was

"[w]hether shoreline master programs constitute local government regulations subject to RCW 82.02.020's prohibition on taxes, fees, or charges." The court held that "[r]estrictions or conditions on the development of land may amount to an indirect tax, fee, or charge." *Id.* at 390. However, the Court held that a local ordinance developed to meet the requirements of the Shoreline Management Act was not the product of local government and therefore not subject to RCW 82.02.020 because state law directed Whatcom County to act by a certain date, created the overarching framework for the County's shoreline management program, and left final approval of the County's program in the hands of Ecology. *Id.* at 392–93.

Under the 2013 Permit, Ecology established the timing requirements of the stormwater controls for new development, redevelopment, and construction sites pursuant to a state law that gives Ecology complete authority to establish timing requirements for permit limitations. RCW 90.48.260(1)(a)(i). The 2013 Permit establishes the overarching framework and requirements that permittees must include in their stormwater management programs. CABR at 004997 (Condition S5.C.5.a.i, .ii). Ecology's review and approval of a permittees "local manual and ordinances is required." *Id.* CABR at 004998 (Condition S5.C.5.a.iii). As in *Citizens for Rationale Shoreline Planning*, the

"ordinances or other enforceable documents" local governments adopt and implement under the 2013 Permit are not the product of the local government permittees, but are the product of state action to ensure compliance with state and federal water pollution laws. While *Citizens for Rationale Shoreline Planning* involved application of RCW 82.02.020 rather than the vested rights doctrine, the case stands for the proposition that some development regulations adopted and implemented by local government are "not the product of local government," and would therefore not be subject to vesting.

In addition, statutes and case law recognize that the source of a requirement governs whether the requirement is a "land use control ordinance" subject to vesting.

In *New Castle Inv. v. City of LaCenter*, 98 Wn. App. 224, 238, 989 P.2d 569 (1999), this Court held that "consistent with legislative intent and public policy behind" transportation impact fees and the vesting statute, "[t]he vesting statute does not apply to TIFs." The Court based its holding, in part, on the dictionary definition of "control" and the fact that transportation impact fees do not "control" development. *Id*. at 229. However, the Court readily recognized that "the dictionary definition of one word does not decide this case, for our primary goal is to ascertain the Legislature's intended meaning of the term." *Id*. The Court then

proceeded to evaluate the legislative intent behind both transportation impact fees and the vested rights statutes. As part of its analysis, the Court recognized that "development interests protected by the vested rights doctrine come at a cost to the public interest because the practical effect of recognizing a vested right is to sanction the creation of a new nonconforming use. If a vested right is too easily granted, the public interest is subverted." *Id.* at 231 (quoting *Noble Manor Co. v. Pierce Cnty.*, 133 Wn.2d at 280.. The Court also noted that "[t]he vested rights rule is generally limited to those laws which can loosely be considered 'zoning' laws." *Id.* at 232 (quoting Wash. State Bar Ass'n, *Washington Real Property Desk Book*, § 97.8(2)(d) (3rd ed. 1996). Since transportation impact fees do not limit the use of land, nor resemble a zoning law, "it is not the type of right that vests under the vested rights doctrine." *Id.* The requirements in the 2013 Permit also do not limit the use of land, nor resemble a zoning law. Rather, the Permit requirements;

> are designed to address pollution, not to control the use of land. The authority for these conditions is contained in state and federal environmental laws, not any land use-related statute. The requirement to use various best management practices to control stormwater runoff from new development or redevelopment, including the LID BMPs, does not change the type of use the land may be put to (residential, commercial, etc.), nor is it a tool to regulate the subdivision of land. Rather, the requirements of the Phase I and II Permits are, by their nature, aimed at

> improving the quality of the environment and the beneficial uses of the state's waters for the public at large.

CABR at 004000-4001 (2013 Summary Judgment Order). The statutory character of the environmental requirements in the 2013 Permit indicates that these requirements are "in a different category from other land use statutes and do[] not fall within the definition of 'land use control ordinance.' " *New Castle Inv.*, 98 Wn. App. at 236.

The discussion of legislative intent in *New Castle* demonstrates why the requirements in the 2013 Permit are environmental regulations and not a land use control ordinance. The *New Castle* Court recognized that the Legislature had authorized the recovery of the indirect effects of growth and also recognized that if transportation impact fees "were frozen, then new growth could take place without the developer paying its fair share for improving public facilities." *Id.* at 237. The same is true with respect to the environmental requirements in the 2013 Permit. The Legislature has declared that the public policy of the state is to "maintain the highest possible standards to insure the purity of all waters of the state." RCW 90.48.010. The Legislature has also prohibited not only the discharge of pollutants to waters of the state, but has also prohibited any person from permitting or allowing pollution to enter state waters. RCW 90.48.080. If water pollution requirements are frozen, new

development that discharges polluted stormwater to waters of the state via a municipality's stormwater sewer system will violate RCW 90.48.080 by discharging pollution to waters of the state; and the municipality will also violate RCW 90.48.080 by allowing pollution to enter waters of the state via its stormwater sewer system. Environmental requirements imposed by the state to meet state and federal water pollution control laws are not the type of right the Legislature intended to freeze under the vested rights statutes. In fact, the Legislature has specifically noted the difference between state and federal environmental laws and development regulations, and has authorized local governments to use state and federal laws to mitigate the adverse environmental impacts of development projects.

In the local project review statute, the Legislature authorized local governments to streamline review under the State Environmental Policy Act ("SEPA") by determining whether "development regulations and other applicable laws" provide adequate mitigation for a project's adverse environmental impacts. RCW 36.70B.030(4). SEPA directs local governments to determine whether the "adverse environmental impacts" of a proposed project can be adequately mitigated by "changing, clarifying, or conditioning" the proposed project based, in part, on the regulatory requirements of "state or federal laws." RCW 43.21C.240.

Notably, the vesting statutes for building permits, subdivisions and short subdivisions do not restrict conditions imposed under SEPA. RCW 58.17.033(3), 19.27.095(6) (vesting limitations "shall not restrict conditions imposed under chapter 43.21C RCW.").

The Legislature did not intend vesting to apply to state or federal environmental laws that may impact a development project regulated by a local government. To the contrary, the Legislature authorized local government to rely on state and federal environmental laws to change, clarify, or condition a proposed development project as necessary to mitigate the adverse environmental impacts of the project.

Like the transportation impact fees at issue in *New Castle*, environmental requirements imposed on local government by the state of Washington in order to comply with state and federal water pollution laws is not the type of right that the Legislature intended to be subject to the vested right doctrine.

B. Even If The Vesting Doctrine Applies To The Requirements In The 2013 Permit Controlling Water Pollution Is An Exercise Of Police Powers That Extinguishes Any Alleged Vested Right

As King County notes, some of its critical area regulations "do not vest because of overriding health, safety and welfare concerns, in which case the County applies current regulations under its police power." King County Brief at 18 n.4. King County's use of its police power to

extinguish vested rights to its critical area regulations where necessary to protect public health, safety, and general welfare is appropriate because "[t]here is no such thing as an inherent or vested right to imperil the health or impair the safety of the community." *City of Seattle v. Hinckley*, 40 Wash. 468, 471, 82 P. 747 (1905). More recent Supreme Court authority confirms this principle. In *Rhod-A-Zalea & 35th, Inc. v. Snohomish Cnty.*, 136 Wn.2d 1, 959 P.2d 1024 (1998), the Supreme Court affirmed Snohomish County's exercise of its police power to require an existing peat mining operation to comply with grading regulations the County adopted after the peat mining operation began operations. In rejecting *Rhod-A-Zalea's* argument that its nonconforming use was not subject to later enacted police power regulations, the Court noted that such a requirement "would have serious repercussions for all governments attempting to regulate property." *Id.* at 15. One of the examples the Court relied on to demonstrate the problem with *Rhod-A-Zalea's* argument was "a nonconforming factory would be exempt from later enacted noise or pollution regulations." *Id.* In other words, pollution regulation is a legitimate exercise of police power legislation. Under *Rhod-A-Zalea*, Ecology could have directed local government permittees to adopt ordinances or other enforceable documents to require all existing development to comply with the updated stormwater practices necessary

to meet the federal Clean Water Act and state Water Pollution Control Act. If local governments can use their police power authority to require existing development to meet updated pollution regulations, there is no reason why local governments cannot use their police power authority to require new development, redevelopment, and construction sites to meet updated pollution requirements to address the significant adverse environmental impacts of municipal stormwater, as King County apparently does with respect to its critical area regulations.

The test for evaluating the reasonableness of the exercise of police power is: (1) police power legislation must be reasonably necessary in the interest of the public health, safety, morals, and the general welfare; (2) police power legislation must be substantially related to the evil sought to be cured; and (3) the class of businesses, products, or persons subject to the exercise of police power legislation must be reasonably related to the legitimate object of the legislation. *Hass v. City of Kirkland*, 78 Wn.2d 929, 933–34, 481 P.2d 9 (1971). The updated stormwater requirements in the 2013 Permit easily meet this test.

First, the Legislature has specifically declared a public policy of maintaining the highest possible standards to ensure the purity of all waters of the state consistent with "public health." RCW 90.48.010. In addition, typical impacts of stormwater include "dangers to human health

and drinking water from untreated stormwater, degradation of salmon habitat through the effects of hydrologic flows and toxicity . . . , economic threats to the shellfish industry resulting from stormwater contamination, and overall degradation of water bodies affecting beneficial uses of Washington's waters." CABR at 003978 (2013 Summary Judgment Order). Protecting the public from these adverse impacts is reasonably necessary in the interests of the public health, safety, morals, and the general welfare.

Second, urban runoff "has been named as the foremost cause of impairment of surveyed ocean waters" and "urban development" and "construction sites" are two of the sources of stormwater contamination. *Envtl. Defense Ctr.*, 344 F.3d at 841. Requiring new development, redevelopment, and construction sites to comply with updated stormwater controls is substantially related to curing the stormwater problems that plague Washington's waters because these sites are sources of the stormwater problem. Finally, since new development, redevelopment, and construction sites contribute to the stormwater problem, requiring these activities to comply with updated stormwater requirements is reasonably related to addressing the stormwater problem.[6] In sum, even if development projects vest to outdated stormwater controls, it is a valid

[6] As the *Hass* court recognized, the "third test is really an offshoot of the second with some equal protection overtones." *Hass,* 78 Wn.2d at 934.

exercise of police power for local government permittees to require new development, redevelopment, and construction sites to comply with the updated requirements in the 2013 Permit.

C. If A Vested Right To Outdated Stormwater Controls Cannot Be Extinguished Through The Exercise Of Police Power Washington's Vested Rights Doctrine Is Preempted By The Clean Water Act

As this Court has recognized, federal law preempts state law where compliance with both laws is physically impossible, or state law would be an obstacle to accomplishing the full purposes and objectives of Congress. *Westside Business Park, LLC v. Pierce Cnty.*, 100 Wn. App. 599, 608-09, 5 P.3d 713 (2000). Here, the vested rights doctrine is preempted by the Clean Water Act because application of the vested rights doctrine to the requirements in the 2013 Permit would be an obstacle to accomplishing the full purposes and objectives of Congress.[7]

In the federal Clean Water Act, Congress required that permits issued for discharges from municipal storm sewers, "shall require controls to reduce the discharge of pollutants to the maximum extent

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[7] Appellants contend that *Westside* already establishes that stormwater drainage ordinances are land use control ordinances subject to vesting. King County Brief at 13, Snohomish County Brief at 18, BIA Brief at 7. However, *Westside* involved the adequacy of a short plat application to invoke vesting, and did not evaluate the contents of Pierce County's stormwater drainage ordinances. *Westside*, 100 Wn. App. at 602. In addition, the *Westside* court specifically declined to evaluate the interplay between Washington's vested rights doctrine and the requirements of the federal Clean Water Act because Pierce County had failed to raise the issue before the hearing examiner and the issue was "not a manifest error affecting a constitutional right." *Id.* at 609.

practicable . . . ." 33 U.S.C. § 1342(p)(3)(B)(iii). The Board has concluded that the updated stormwater requirements in the 2013 Permit constitute all known, available and reasonable methods to control pollution (AKART) under the state Water Pollution Control Act, and meet the requirement to control stormwater pollution to the maximum extent practicable (MEP) under the federal Clean Water Act. CABR at 004095 (2014 Decision, CL 10). No party has challenged this conclusion. Appellants' argument is one of timing–according to Appellants, only those projects that submit a complete application after July 1, 2015, are required to comply with the updated stormwater pollution control requirements in the 2013 Permit. If Washington's vested rights doctrine is allowed to exempt development projects from the updated stormwater pollution control requirements in the 2013 Permit, as argued by Appellants, discharges from these projects will not reduce the discharge of pollutants to the maximum extent practicable as required by the Clean Water Act. The result will be "an obstacle to the accomplishment of the full purposes and objectives of Congress." *Westside,* 100 Wn. App. at 608–09.

As an example, King County suggests that development agreements "frequently span 15-20 years." King County Brief at 26. Consequently, if the updated stormwater pollution control requirements in the 2013 Permit are subject to vesting, development projects that

discharge to King County's municipal storm sewers would be allowed to move forward for decades without complying with the Clean Water Act's mandate that discharges from municipal storm sewers reduce the discharge of pollutants to the maximum extent practicable. This would clearly be an obstacle to accomplishing the full purposes and objectives of Congress.

The Court does not need to reach the preemption issue because, as argued above, the updated stormwater pollution control requirements in the 2013 Permit are not subject to vesting. However, if the Court concludes the updated stormwater pollution control requirements are subject to vesting, the state's vesting law must yield to the requirements of the federal Clean Water Act.

D. Snohomish County's Finality Argument Is Simply An Extension Of The Vested Rights Argument And Does Not Prevent The Application Of Updated Stormwater Regulations Necessary To Meet State And Federal Environmental Laws

As an offshoot of its vesting argument, Snohomish County argues that Condition S5.C.5.a.iii requires the County to act in a manner inconsistent with the doctrine of finality. Snohomish County Brief at 31. In particular, Snohomish County argues that the requirement to apply updated environmental stormwater regulations to development projects that submit applications prior to July 1, 2015, but do not start construction

by June 30, 2020, would require the County to "unilaterally amend, alter or revoke an approved project permit", authority the County claims it does not have. *Id.* However, as Ecology argued before the Board, the County will not need to amend, alter, or revoke an approved project permit if the permit includes a condition that informs the applicant of the need to comply with the updated environmental stormwater conditions if the applicant does not start construction by June 30, 2020.[8] If the applicant fails to start construction by June 30, 2020, the County will not need to amend, alter, or revoke the approved project permit, but will only need to enforce the approved permit. Ecology issued the 2013 Permit on August 1, 2012, and the County could have placed the suggested condition in any project permits it issued after that date. Subdivisions and short subdivisions vest for 7 years if the preliminary plat was approved on or before December 31, 2014. RCW 58.17.140(3)(a).[9] As a practical matter, the suggested condition would only need to be included in plats approved

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[8] Snohomish County misunderstands Ecology's position and the requirements of the 2013 Permit when it suggests that Ecology argued below that the condition would be placed in "any project approval issued on or after June 30, 2013." *Id.* at 35. As Ecology made clear in its response to Snohomish County's Motion for Summary Judgment below, the requirements in Condition S5.C.5.a only apply to those projects that meet the threshold requirements in Appendix 1 of the Permit, and will discharge stormwater to the County's municipal storm sewer. CABR at 001255. It is only this subset of projects that would be subject to the suggested condition.

[9] The vesting period for subdivisions and short subdivisions is 5 years if the preliminary plat is approved on or after January 1, 2015. RCW 58.17.140(3)(a).

on or after June 20, 2013, seven years prior to the June 20, 2020 "start construction" date.

The County responds to Ecology's suggestion by circling back to its vesting argument. Snohomish County Brief at 37 (arguing that the condition suggested by Ecology would "truncate vested property rights" and is no more lawful than truncating vested rights by applying new development regulations to vested applications). However, as argued above, the vested rights doctrine is not, and cannot be, an obstacle to the implementation of the environmental stormwater requirements in the 2013 Permit. The finality doctrine does not make Condition S5.C.5.a.iii unlawful.

V. CONCLUSION

For the reasons discussed above, the State of Washington, Department of Ecology respectfully requests that the Court affirm the

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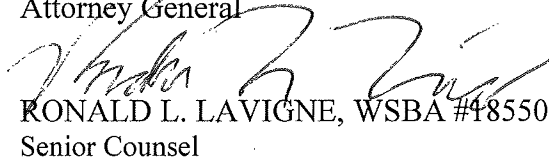
Pollution Control Hearings Board's October 2, 2013 Order on Summary Judgment.

RESPECTFULLY SUBMITTED this 22d day of December, 2014.

ROBERT W. FERGUSON
Attorney General



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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the state of Washington that on December 22, 2014, I caused to be served the Department of Ecology's Response Brief in the above-captioned matter upon the parties herein as indicated below:

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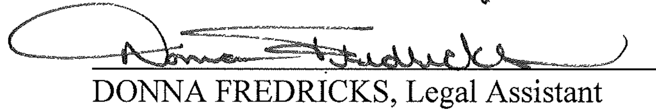

DONNA FREDRICKS, Legal Assistant

WASHINGTON STATE ATTORNEY GENERAL

December 22, 2014 - 3:29 PM

Transmittal Letter

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Court of Appeals Case Number: 46378-4

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Comments:

Respondent State of Washington, Department of Ecology's Response Brief

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