Case No. 46378-4-II

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 and WASHINGTON STATE DEPARTMENT OF ECOLOGY,

Respondents,

and

PUGET SOUNDKEEPER ALLIANCE, WASHINGTON ENVIRONMENTAL COUNCIL, AND ROSEMERE NEIGHBORHOOD ASSOCIATION,

Respondents.

RESPONDENT PUGET SOUNDKEEPER ALLIANCE'S OPENING BRIEF

JAN HASSELMAN (WSB #29107)
JANETTE K. BRIMMER (WSB #41271)
Earthjustice
705 Second Avenue, Suite 203
Seattle, WA 98104-1711
(206) 343-7340 | Phone
(206) 343-1526 | Fax

Attorneys for Respondents, Puget Soundkeeper Alliance, et al.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulations

Other Authorities

INTRODUCTION

Respondent Puget Soundkeeper Alliance *et al.* ("Soundkeeper") respectfully submits this responsive brief to the opening briefs filed by Appellants Snohomish County, King County, and Building Industry Association of Clark County. The PCHB's challenged summary judgment decision rejecting Appellants' overbroad interpretation of state vesting law in the context of state and federal pollution regulation should be affirmed for three reasons.

First, the requirements in the challenged Phase I Stormwater Permit (the "Permit") are simply not "land use controls" subject to state vesting law in the first instance.[1] While achievement of the Permit's water quality-based requirements plainly has implications for what happens on the landscape, the PCHB correctly reasoned that not every statute that touches land in any way is subject to vesting, as this would upset the careful balance struck by the legislature and undermine the goals of water pollution control laws. Second, even within the confines of state vesting law, there is ample discretion to require municipalities to exercise their authorities to the fullest to meet water quality goals. While Ecology

[1] CABR 004983. Soundkeeper adopts the citation format adopted by Snohomish County and will generally cite to the certified record for the first page of documents, but internal pagination of the cited document for accuracy.

correctly took the position that vesting doesn't apply to ordinances adopted to meet the requirements of stormwater permits, it also gave permittees substantial flexibility and exceedingly generous timeframes to shift permittees into compliance with the new standards. Finally, while the collision between the vesting statutes and the Permit's requirements posited by Appellants is an illusory one, the only possible outcome of such a collision is that state vesting law would have to give way to federal Clean Water Act requirements under the principles of federal preemption.

In sum, the PCHB correctly held that the challenged permit balances the imperatives of state vesting law with the goals of state and federal clean water laws. In this appeal, Appellants seek to eviscerate even the modest gains and overgenerous implementation timelines included in the Permit, allowing municipalities to continue to authorize ineffective and unlawful stormwater standards for years, and even decades, into the future. That effort should be rejected.

STATEMENT OF THE CASE

I. THE STORMWATER PROBLEM IN WESTERN WASHINGTON

It has long been recognized that stormwater pollution—runoff from roads, buildings, and other developed areas—is among the gravest threats to the health of Western Washington's rivers and marine waters. *Puget Soundkeeper Alliance v Wash. Dep't of Ecology*, 2008 WL

5510411, at *7 (PCHB, Apr. 2, 2008) ("Stormwater is the leading contributor to water quality pollution in urban waterways.... Stormwater discharges degrade water bodies and, consequently, impact human health, salmon habitat, drinking water, and the shellfish industry."). This is true not just of Washington, but the nation as a whole. *See, e.g.*, *Envtl. Def. Ctr. v. EPA*, 344 F.3d. 832, 840-41 (9th Cir. 2003) ("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.'").

As the PCHB has recognized repeatedly during the extensive litigation over municipal stormwater permits, the environmental status quo in Western Washington "is currently degraded, with many streams unable to support beneficial uses and even basic ecological function in large part due to stormwater runoff from developed areas." *Rosemere Neighborhood Ass'n v. Ecology*, 2011 WL 62921, at *9 (PCHB, Jan. 5, 2011). In the decision challenged here, the PCHB cited undisputed facts that runoff in Western Washington included "dangers to human health and drinking water from untreated stormwater, degradation of salmon habitat..., economic threats to the shellfish industry resulting from stormwater contamination, and overall degradation of water bodies affecting beneficial uses in Washington's waters." CABR003971 ("SJ Order") at 8.

Stormwater runoff is of particular concern to beneficial uses like salmon and steelhead populations, many of which are listed as threatened or endangered under federal law. *Rosemere*, 2011 WL 62921, at *10 ("potential impacts to fish and other aquatic organisms from stormwater can be significant"). The challenged municipal stormwater Permit is the chief regulatory mechanism under federal and state clean water laws to address this environmental crisis.

II. THE LAW'S HALTING PROGRESS ON CLEANING UP POLLUTING STORMWATER RUNOFF.

Congress enacted the modern federal Clean Water Act in 1972 ("CWA") with the sweeping goals of maintaining and restoring the "chemical, physical, and biological integrity" of the nation's waters, eliminating the discharge of pollutants, and providing for the protection and propagation of beneficial uses like fish, wildlife and recreation. 33 U.S.C. § 1251(a); *Pronsolino v. Nastri*, 291 F.3d 1123, 1126 (9th Cir. 2002). The goals of the parallel state water pollution control act are just as ambitious. *See* RCW 90.48.010 (state policy to maintain "highest possible standards to insure the purity of all waters of the state"); *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 590 (2004) ("[T]he state of Washington will exercise its powers, as fully and as effectively as possible, to retain and secure high quality for all waters of the state.").

The heart of the CWA is a prohibition on any discharge of pollution to waters without a permit that meets various criteria. The program is known as the National Pollution Discharge Elimination System ("NPDES").

The control of pollution from municipal separate stormwater sewer systems (known as "MS4s") has long been recognized as crucially important to meeting the CWA's ambitious goals. Even so, it would be difficult to find a regulatory program that has been the subject of greater delay. Soon after the enactment of the CWA, the U.S. Environmental Protection Agency ("EPA") issued regulations exempting MS4s from NPDES altogether. These rules were challenged and struck down by the Ninth Circuit. *NRDC v. Costle*, 568 F.2d 1369, 1377 (9th Cir. 1977). Further repeated delays by EPA in addressing the stormwater problem ultimately prompted Congress to amend the CWA with the Water Quality Act of 1987. Pub. L. No. 100-4, 101 Stat. 7 (1987); *see also* 132 Cong. Rec. 32,381 (1986) (Sen. Stafford) ("EPA should have developed this program a long time ago. Unfortunately, it did not.").

The 1987 amendments outlined a phased approach to issuing MS4 regulations. 33 U.S.C. § 1342(p)(2). Regulations governing stormwater discharges from large municipalities (the "Phase I" rules) were to be issued by early 1989, and permits were to be issued shortly thereafter, with compliance with permit terms required "as expeditiously as practicable,

but in no event later than 3 years after the date of issuance of" the permit. § 1342(p)(4)(A). EPA issued its first set of regulations for large municipalities almost two years after the statutory deadline. 55 Fed. Reg. 47990 (Nov. 16, 1990). The statute set a deadline of 1993 for EPA to adopt implementing rules for these smaller jurisdictions ("Phase II"), a deadline that EPA missed by six years. 64 Fed. Reg. 68722 (Dec. 8, 1999). These belated Phase II regulations, in turn, required issuance of Phase II permits by 2003. 40 C.F.R. § 122.26(e)(9).

The Washington Department of Ecology, which has been delegated the authority to implement the NDPES in Washington state, has routinely failed to meet MS4 program deadlines. Ecology did not issue the first Phase I permit until 1995, and—although the permits are supposed to be renewed every five years—left it in place until 2007. As discussed further below, that permit was declared invalid and set aside by the PCHB in 2008 as failing to meet clean water standards under state and federal law. Even though the PCHB directed Ecology to modify that permit to strengthen its environmental protections with better, more up-to-date stormwater controls, Ecology failed to do so, instead simply issuing a new permit in 2012 when the old one expired on the standard five-year schedule. That permit—the third generation of Phase I stormwater permits for Western Washington municipalities—is the subject of this

appeal.

III. OVERVIEW OF CHALLENGED PERMITS

In *Puget Soundkeeper Alliance v. Wash. Dep't of Ecology*, 2008 WL 5510413 (PCHB, Aug. 8, 2008), the PCHB found unlawful and set aside the 2007 Phase I permit because it failed to regulate stormwater runoff to the "maximum extent practicable" as required by federal and parallel state law. The focus of that decision was Ecology's failure to mandate use of "low impact development" ("LID") techniques to prevent the generation of stormwater runoff in the first instance. The Permit defines LID as "a stormwater and land use management strategy that strives to mimic pre-disturbance hydrologic processes of infiltration, filtration, storage, evaporation, and transpiration by emphasizing conservation, use of on-site natural features, site planning, and distributed stormwater management practices that are integrated into a project design." Permit, Appendix 1 at 4. The Board directed Ecology to amend the permit to impose LID techniques and make other changes.[2] *Rosemere Neighborhood Ass'n v. Ecology*, 2010 WL 3420570, at *2 (PCHB, Aug. 26, 2010) (PCHB "directed Ecology to revise the Phase I Permit to

[2] With respect to the Phase II permit appeal, the Board found that the 2007 Phase II Permit was also inadequate in its LID requirement, but noted that Ecology could allow the Phase II jurisdictions additional time to implement LID. *Puget Soundkeeper Alliance v. Ecology*, 2009 WL 434836, at *12 & 22-23 (PCHB, Feb. 2, 2009).

require permittees to aggressively employ low impact development technique where feasible, in combination with the flow control standard.").

Ecology effectively disregarded the PCHB Order and did not amend the 2007 Permits as instructed by the Board. Rather, Ecology engaged in a multi-year administrative process and waited until issuance of the 2013 Permit on the normal five-year schedule to include LID as a requirement for stormwater control. Ecology released the 2013 Permit for public comment in November 2011 and finalized it on August 1, 2012, but delayed the effective date for a year. The new Phase I permit sets a number of standards that affect new development and redevelopment projects, many of which are based around LID principles. Specifically, the Permit requires each permittee to adopt and make effective, through enforceable requirements, a local program that meets the requirements of the Permit by June 30, 2015—almost three years after the permits were issued, and seven years after the Board's decision in the 2007 Permit Appeal concluding that the law required more robust LID stormwater controls. Permit at 16. Of central interest to this appeal, and as modified by the PCHB, the local program adopted by June 30, 2015, "shall apply to all applications submitted after July 1, 2015, and shall also apply to projects" that for which applications were submitted before July 1, 2015,

but that do not start construction by June 30, 2020. *Id.*[3]

ARGUMENT

I. OVERVIEW OF WASHINGTON STATE'S VESTING LAW

A. Washington Vesting Law Seeks to Strike a Reasonable Balance Between Certainty and Public Interest.

Under Washington law, building permits and proposed divisions of land are to be considered under the zoning and other "land use control ordinances" in effect at the time a "fully completed application" has been filed. RCW 58.17.033 (subdivision code); RCW 19.27.095 (building permits). Under this doctrine, "developers who file a timely and complete building permit application obtain a vested right to have their application processed according to the zoning and building ordinances in effect at the time of the application." *West Main Assocs. v. City of Bellevue*, 106 Wn.2d 47, 50-51 (1986). Where a use for property is properly disclosed in a subdivision application, all of the permits required in the future vest at the time of the subdivision application. *See Noble Manor Co. v. Pierce Cnty.*, 133 Wn.2d 269, 278 (1997). This results in development that is

[3] For Phase II, the 2013 Permit deadlines are even more generous. The local program necessary to implement the Permit requirements need not be adopted until December 31, 2016, and for applications submitted before that date, the previous stormwater requirements can still apply as long as the projects commence construction by June 30, 2022. These timelines are extended even further for Cowlitz and Lewis Counties and for the City of Aberdeen. *Id.*

built to standards that are sometimes years out of date due to extended time between the application and actual construction.

The Washington vesting doctrine strives to balance competing objectives: on the one hand, the law to some extent favors property owners that seek certainty in planning development projects. *Abbey Rd. Grp. v. City of Bonney Lake*, 167 Wn.2d 242, 251 (2009); *West Main*, 106 Wn.2d at 51. On the other, courts recognize that vesting creates conflicts with public policy, and hence have been careful not to expand the doctrine. *Erickson & Assocs., Inc. v. McLerran*, 123 Wn.2d 864, 873 (1994) ("A proposed development which does not conform to newly adopted laws is, by definition, inimical to the public interest embodied in those laws."); *Noble Manor Co.*, 133 Wn.2d at 280 ("If a vested right is too easily granted, the public interest is subverted."). Accordingly, the Courts have declined repeatedly in recent years to extend the vesting doctrine beyond the strict terms of the statutes, finding that the policy and fairness considerations embodied therein are better suited to legislative rather than judicial balancing. *See, e.g., Abbey Rd. Grp.*, 167 Wn.2d at 251 (refusing to extend vesting to filing of site plan, and strictly applying building permit vesting statute).[4]

[4] Although initially a product of common law development, vesting is governed by statute, not common law. *Potala Village Kirkland v.*

B. Even Within the Vesting Statute, Municipalities Have Discretion to Protect the Environment.

Although generally more favorable to development interests than in most other states, the Washington vesting doctrine has limits. Even advocates of the state's outlier approach recognize that it is subject to multiple constraints to "ensure that the public interest can be carried out." *See* G. Overstreet & D. Kirschheim, *The Quest for the Best Test to Vest: Washington's Vested Rights Doctrine Beats the Rest*, 23 Seattle U. L. Rev. 1043, 1058 (2000). "[V]ested rights merely provide a developer the right to have an application considered under the rules and regulations in effect at the time he submitted his application—no more, no less." They do not guarantee an approval, nor do they create an exemption from other legal standards that apply. *Id.*

For example, the vesting statutes state that subdivisions and building permit applications vest only once applications that are valid and "fully complete" under local law. *Abbey Rd.*, 167 Wn.2d at 254. Communities have discretion to define what constitutes a valid and fully complete application sufficient to trigger vesting. RCW 59.17.033(2) ("The requirements for a fully completed application shall be defined by local ordinance."); *Westside Bus. Park*, 100 Wn. App. at 605 (what is

---

Kirkland, 334 P.3d 1143 (Div. I, 2014).

disclosed in application pursuant to local ordinance determines what vests at time of application); *accord Noble Manor*, 133 Wn.2d at 279 ("within the parameters of the doctrine established by statutory and case law, the city was free to develop vesting schemes best suited to a particular locality.").[5]

Moreover, in enacting the state vesting statutes, the legislature explicitly exempted conditions imposed pursuant to the State Environmental Policy Act ("SEPA"), RCW 43.21C. *See* RCW 58.17.033(3) ("The limitations imposed by this section shall not restrict conditions imposed under chapter 43.21C."); 19.27.095(6). SEPA is clear that jurisdictions retain broad authority to condition or deny permits where they present environmental risks, even where those permits comply with other ordinances and rules. RCW 43.21C.060 ("Any governmental action may be conditioned or denied pursuant to this chapter:"); WAC 197-11-660(1) ("Any governmental action on public or private proposals that are not exempt may be conditioned or denied under SEPA to mitigate the environmental impact. . . ."); *see also Polygon Corp. v. City of Seattle*, 90 Wn.2d 59, 63 (1978) ("Polygon first contends that SEPA does not

[5] That discretion is not unfettered, i.e., communities cannot define "complete" applications in a way that completely eviscerates the protections of vesting law. *See, e.g.*, *West Main Assocs.*, 106 Wn.2d at 52-53.

create in the superintendent the authority to deny a building permit which he is otherwise directed to issue under applicable laws and regulations. We disagree.").[6] Accordingly, "[a] municipality has the discretion to deny an application for a building permit because of adverse environmental impacts even if the application meets all other requirements and conditions of issuance." *West Main*, 106 Wn.2d at 53; *see also Adams v. Thurston Cnty.*, 70 Wn. App. 471 (Div. II, 1993) (municipalities can use information gained through SEPA to "condition or deny the project, even if the project is allowed under zoning and building ordinances frozen at the time of vesting. . . . Vesting of development rights at the time of submittal does not defeat the County's discretionary ability to condition or deny any plat based on environmental impacts.").

Once permits are issued, various provisions of state and local law generally put time limits on those permits—if they are not used within a specific time, they expire. *See, e.g.*, RCW 58.17.170 (subdivision will be governed by statutes and ordinances in place at time of approval for a period of between five and seven years, depending on date of application). In Snohomish County, for example, a developer must complete the

---

[6] SEPA and implementing regulations lay out some standards attendant to the exercise of this authority. *Id.* For example, denial or conditioning of a permit must be based on "policies, plans, rules or regulations" adopted by the jurisdiction. WAC 197-11-660(1)(a).

subdivision process within seven years of preliminary approval, or it will expire. Snohomish Co. Code 30.41A.300. Limited extensions can be granted under certain conditions. Similarly, building permits expire automatically after 18 months, and only one additional 18-month extension can be granted for cause. *Id.* § 30.50.144. The same is generally true in King County and other Phase I jurisdictions. *See, e.g.*, King Co. Code 16.02.290 (building permits expire one year after issuance); Clark Co. Code 14.05.105.5 ("Every permit issued shall become invalid unless the work authorized by such permit is completed within two years after its issuance.").

Accordingly, under the normal course of events, if developers do not act on their vested rights within the time allotted by state or local law, nothing prohibits the municipality from extinguishing those rights or otherwise conditioning the permit to reflect the updated standards that have been adopted in the meantime. In short, a vested right is not some immutable or intrinsic right for all time, but a balanced application of local legislative discretion with a limited shelf life.

II. WASHINGTON'S VESTING DOCTRINE DOES NOT APPLY TO THE REQUIREMENTS OF NPDES STORMWATER PERMITS.

A. Ordinances Adopted to Comply with an NPDES are Not "Land Use Control Ordinances".

The PCHB correctly concluded that the vesting doctrine does not

extend to environmental laws and requirements, including ordinances adopted in compliance with NPDES permits. SJ Order at 28-36; *see also New Castle Invs.*, 98 Wn. App. 224, 232 (Div. II, 1999) (vested rights rule is generally limited to those laws that resemble a zoning law). As the PCHB appropriately reasoned, the requirements in the 2013 Permits are dictated by clean water laws and serve the purpose of controlling pollution discharges resulting from runoff from developed areas. Importantly, these environmental outcomes of the Permit can typically be met a number of different ways: broadly speaking, the Permit gives significant flexibility to achieve outcomes through a range of different LID best management practices ("BMPs"). These pollution-oriented outcomes—and flexible means to achieve them—are not "land use control" ordinances like zoning. RCW 58.17.020; RCW 19.27.095. The Permit does not dictate a particular land use, but rather prescribes an environmental result, with a variety of preferred methods for achieving that result.

Of course, the use of land is implicated in meeting the environmental goals of the Permit—while there is abundant flexibility in meeting the Permit's goals, permit compliance presumably means that there are some outer limits on what a developer can do with a site. Appellants seek to leverage this unremarkable fact to create a new, sweeping category of vested rights, one that would undermine the

independent goals of state and federal pollution statutes. But it has never been the law that anything that "affects" the use and development of property is a "land use control ordinance" subject to state vesting law, as Appellants contend. Snohomish Co. Br. at 17; King Co. Br. at 18; *New Castle Invs.*, 98 Wn. App. at 232 (even if impact fees are related to land use, they are not land use control ordinances).

Rather, as discussed above, state vesting law is an attempt to balance competing objectives within a relatively narrow band of local land use ordinances, a balance that would be gravely disrupted with Appellants' proposed expansion of the doctrine to include NPDES pollution limits. Impact fees, health and safety standards, and environmental conditions imposed pursuant to SEPA surely "affect" the use of land, but are not subject to vesting. If Appellants' sweeping view of vesting prevailed, any number of laws—for example, air pollution standards, fire codes, and basic health and safety measures—could be frozen in place for all time the moment an application is filed. That is plainly not the law. *City of Seattle v. Hinkley*, 40 Wash. 468, 471 (1905) ("no such thing" as a vested right to "imperil the health or impair the safety of the community").[7] The requirements of federal and state water

[7] Even King County concedes that some of its critical areas regulations are not subject to vesting, as they implicate health, safety, and welfare

pollution controls are no different.

Although Appellants rely heavily on dicta contained in *Westside Bus. Park v. Pierce Cnty.*, 100 Wn. App. 599 (Div. II, 2000), that case neither controls nor is even particularly informative in this instance.[8] In *Westside Bus. Park,* the "only issue" was whether a "bare bones" short plat application that didn't disclose the intended use of the site vested the storm drainage regulations in effect at the time of the application. *Id.* at 602. The controversy concerned the adequacy of the short plat application to invoke vesting, not the nature of the drainage regulations themselves. *Id.* Moreover, the *Westside Bus. Park* court sidestepped the crucial question of whether applying vesting to federal pollution law would raise pre-emption concerns, as discussed further below. *See infra*, § IV. In short, *Westside Bus. Park* does not control the outcome here, as the PCHB correctly found.

Appellants struggle to portray the PCHB's decision as an outlier. However, the Board's findings were grounded in well-settled precedent.

---

concerns. King Co. Br. at 18.

[8] King County's insistence that the PCHB "ignored" *Westside Bus. Park* is puzzling, since the challenged decision explicitly distinguished that case. King Co. Br. at 3; SJ Order at 26. The PCHB discussed *Westside Bus. Park* at greater length in a previous decision on vesting. *Rosemere*, 2010 WL 3420570, at *7 (case "essentially involved a factual inquiry into the adequacy of the application…").

In *Rosemere Neighborhood Ass'n v. Wash. Dep't of Ecology & Clark County*, 2010 WL 3420570, at *6-7 (Aug. 26, 2010), for example, the Board also held that the 2007 version of the stormwater permit was not subject to state vesting laws because it was not a zoning or other land use control ordinance. The Board specifically found that the 2007 permit was "an environmental regulation which does not dictate particular uses of land but required only that, however the land is used, damage to the environment is kept within prescribed limits." *Id.* at *8. The *Rosemere* decision was appealed by both Clark County and the BIA. This Court declined Appellants' request to overturn that decision, *Rosemere Neighborhood Ass'n v. Clark Cnty.*, 170 Wn. App. 859, 869 & 875 (Div. II, 2012), and the state Supreme Court refused to review it further. 176 Wn.2d 1021 (Mar. 6, 2013).[9]

[9] The *Rosemere* decision cited two previous decisions by the Board rejecting the notion that NPDES stormwater permits are the kind of ordinances subject to limits of state land use law. In the 2007 Phase II Permit Appeal, the Board stated that the stormwater requirements in the NPDES permits originate in state and federal law as environmental requirements, not local-government initiation of regulation of development, and as such they are not for the purpose of controlling land use. *Puget Soundkeeper Alliance v. Wash. Dep't of Ecology*, 2008 WL 5510415, at *6 (Sept. 29, 2008) (rejecting claim that permits are subject to limitations of RCW 82.02.0200; "The purpose of the permits is to control the discharge of pollutants and not to control land use."). Shortly thereafter, the Board reiterated that the Construction General Stormwater NPDES Permit is not a land use control subject to vesting. *Cox v. Ecology*, 2009 WL 542494, at *4-5 (Feb. 26, 2009).

In sum, this appeal turns in significant part on whether ordinances adopted to comply with federal and state clean water requirements are "land use control ordinances" subject to state vesting law. The PCHB correctly answered that question in the negative, as the purpose of the ordinances is to control pollution—not control land use. While complying with the permit has an effect on land use, not everything that has any effect on development is subject to vesting, and a contrary ruling would upset the careful balance struck by the legislature and the courts. The Board has repeatedly found that NPDES requirements are not land use control ordinances, and the legislature—despite explicitly passing legislation relevant to the Permits—has not attempted to clarify the law otherwise. SJ Order at 34 ("The legislature's inaction in this regard … indicates legislative approval of the methods Ecology has included in the" permits, including its approach to vesting).

B. Even If Vesting Applied, Ecology Could Require Municipalities to Exercise Their Discretion to Meet Stormwater Pollution Standards.

For the reasons discussed above, state vesting law does not apply to federal and state water pollution control standards contained in the Permit. Even if it did, however, there would be little practical implication. Ecology could require jurisdictions to use their abundant discretion within existing vesting law to meet the updated water protection standards on the

same timeline that Appellants seek to circumvent through this appeal.

For example, Ecology could require jurisdictions to use their authority under SEPA to deny or condition projects that do not meet federal and state minimum standards for stormwater control—even for projects that vested to previous local ordinances. *Supra* at 11-13*; West Main*, 106 Wn.2d at 53. Indeed, this discretion was explicitly recognized by the PCHB in the Rosemere decision. *Rosemere,* 2010 WL 3420570, at *9 ("We also agree with Rosemere and Ecology that the Phase I permit requires municipal permittees to exercise their discretionary authorities to the fullest under vesting laws (if and where they might be applicable), in order to meet the requirements of federal and state clean water laws."). While reliance on SEPA's authorities requires reference to existing local policies, all regulated jurisdictions have policies in place to protect water quality and reduce stormwater pollution. *See, e.g.*, SCC 25.05.010 (Snohomish County policy "[t]o provide a comprehensive approach to managing surface water in order to respect and preserve the county's streams, lakes and other waterbodies; protect water quality; control, accommodate and discharge storm runoff…"). Separately, Ecology could require jurisdictions to establish standards for completion of a permit application such that vesting would not even be triggered under state law unless certain conditions were met. *Supra* at 11-12. Alternatively,

Ecology could require jurisdictions to amend their codes to impose stricter time limits (or extension standards) on building permits to avoid the possibility of projects vesting to outdated standards. *See* RCW 19.27.095.

The issue of discretion within the confines of state vesting law to meet permit standards is a mostly academic one, since vesting is inapplicable to water pollution standards in the first place. However, the outcome Appellants seek—allowing developers to build to outdated and unlawful stormwater standards years or decades into the future—would still not come to pass simply by virtue of applying vesting in this context. Ecology and the municipal permittees have the ability to meet updated standards even if vesting law applies. *See Adams*, 70 Wn. App. at 291 ("Vesting of development rights at the time of application or submittal does not defeat the County's discretionary ability to condition or deny any plat based on environmental impacts.").

III. THE PRACTICAL IMPACT OF THE EXTREMELY LONG DEADLINES FOR IMPLEMENTATION OF THE PERMITS' REQUIREMENTS LEAVE NO "UNCERTAINTY" FOR PERMITTEES OR DEVELOPERS.

At the heart of Washington's unique approach to vesting is a concern about fairness: the courts and the legislature have concluded that, in some circumstances, it can be unfair to change the standards for development projects after they have already been applied for. *West Main*

Assocs., 106 Wn.2d at 51 (doctrine "supported by notions of fundamental fairness"). But the fairness concerns that underlie the vesting doctrine are simply not present in this case. Indeed, if there are any fundamental fairness and public policy concerns here, they militate against, rather than in favor of, allowing developers to continue to build new projects that don't meet mandatory clean water standards for years into the future.[10]

As discussed above, the Permit was issued in response to a 2008 decision by the PCHB that the then-existing permit was not sufficiently protective of water quality to meet either federal or state clean water statutes. The PCHB explicitly directed Ecology to modify the permit to impose LID standards at that time.[11] Rather than comply with that mandate, Ecology chose to undergo an extensive public and stakeholder process (a process that included all of the municipalities and the builders, and multiple opportunities for comment), leading finally to the adoption of the Permit on August 1, 2012. The Permits' new standards for site and subdivision stormwater controls, in turn, do not have to be adopted and

[10] Soundkeeper advocated vigorously, but without success, for shorter timelines for implementation in this Permit. While it declined to bring its own appeal, Soundkeeper believes that the permit allows construction to unlawful and outdated standards for far too long into the future.

[11] All the parties to this litigation were parties in the 2007 permit appeal, and no party sought appellate review of the PCHB's decision to invalidate the permit.

applied by the permittees until July 1, 2015, almost three years after the Permit was issued, and seven years after the PCHB said that LID was required to comply with state and federal law. Notably, those requirements only apply to projects that submit an application on or after that date. For site and subdivision level projects that have been applied for prior to July 1, 2015, if they simply commence construction on or before June 30, 2020, they still do not have to comply with the LID and other requirements in the Permit. *Id.* Only in the extraordinary situation where a project hasn't started construction by mid-2020—a remarkable 12 years after the PCHB invalidated the permits as inadequately protective—might someone need to apply revised standards to an otherwise exempted project.

It is hard to determine how this radically extended timeline could be considered unfair. Developers and municipalities have been on notice since 2008 that there will be higher stormwater standards imposed and that the standard would incorporate LID requirements. Indeed, with respect to applications submitted after July 1, 2012, there can simply be no fairness objections at all. The permit is plainly conditioned in a way that establishes requirements on municipalities to impose new standards for projects that do not commence construction prior to 2020. *West Main Assocs.*, 106 Wn.2d at 51 (vesting doctrine intended to provide developers

with "reasonable certainty" of standards). As even Appellants recognize, the municipalities can simply alert applicants to this requirement as part of the permitting process, or condition development permits accordingly, sidestepping any concerns over vesting altogether.[12] As discussed above, municipalities can, and generally do, set standards for permitted applications and time limits under which permits have to be acted on. There is no obvious reason that permits applied for after July 2012 cannot also be conditioned in a way that the pre-Permit stormwater requirements authorized must be acted on within 8 years, or lost. If Appellants have failed to do that, it's their own failure, not any violation of law on Ecology's part.

For applications submitted prior to July 1, 2012, there is also no legitimate vesting concern, even if permit applicants didn't have the same notice as those who submit applications after the Permit was formally adopted.[13] The vesting statute states that subdivision standards shall be

---

[12] Snohomish County complains that this approach cannot work because "property owners have an affirmative right to receive a development permit that is not encumbered by the condition Ecology proposed." Snohomish Co. Br. at 36. The source of this affirmative right is a mystery, and the County's citation to a U.S. Supreme Court decision regarding the "unconstitutional conditions doctrine" is neither explained nor explicable.

[13] Even though the appeal was filed after this date, no Appellant—or indeed any party at all—submitted any evidence of any actual permit application that preceded this date that theoretically could not meet the Permit's construction start date over 8 years later. The concerns raised in

valid for seven years after the date of filing. RCW 58.17.170. The building permit statute has no timeline at all, leaving vesting deadlines to the discretion of local communities. RCW 19.27.095. But seven years after July 1, 2012, is before the Permit's construction cutoff of July 2020. In other words, developers who filed applications prior to July 2012 would not have any entitlement to vested standards by 2020, even if vesting applied. And while some jurisdictions allow extensions under circumstances, these are discretionary acts of the municipality that can be modified to come into compliance with the Permit, not anything required by operation of the vesting statutes.

King County illustrates its concerns with hypothetical examples which only serve to highlight the weakness of its position. As a threshold matter, the County introduces hypothetical facts in appellate briefing only because it failed to introduce evidence of actual facts in the hearing. If King County thought that the factual record needed to be developed, it should have done so.[14] In any event, in each of the County's examples, the developer applies for permits on December 31, 2014—two and a half years after the Permit was issued. Under the Permit's terms, that

---

this appeal are entirely hypothetical.

[14] Indeed, it was Appellants who declared that the facts were immaterial to the resolution of the vesting issue. *See* Snohomish Co. Brief at 4.

developer can still "lock in" the unlawful pre-permit development standards as long as it starts construction within five and a half years. Only if the project has not started construction by July 2020 is the developer subject to updated standards. In order words, the hypothetical developer would have had over two and a half years of clear notice that the project would be subject to these standards if construction didn't at least begin by 2020 and over five years to simply *start* construction of its project.

Moreover, in the unlikely event that it failed to meet that cutoff, permit compliance doesn't in any respect mean that the project can't go forward.[15] Rather, the project would simply have to apply LID techniques outlined in the Permit, adding features like rain gardens for roofs and permeable pavements for sidewalks: hardly an onerous requirement. Permit, Appendix 1 at 20-22. There are multiple different approaches to select from, and even these modest expectations can be waived if they meet certain "feasibility" criteria.[16] See *Pierce Cnty. v Dep't of Ecology*, 2014 WL 1262544, at *18 (PCHB, Mar. 21, 2014) (Permit "provide[s]

[15] Even a permit that "vests" prior to the new stormwater regulations will be subject to the previous version of the Permit, which is mostly the same except for the new LID provisions.

[16] Snohomish County's brief is misleading in that it presents a laundry list of stormwater management approaches as rigid requirements rather than a series of options.

significant flexibility to the permittees in the application of LID at the parcel and subdivision level, offering an array of alternative methods of compliance, exceptions, criteria for application of an infeasibility standard or consideration of other competing needs, among other items."). In short, the fairness concerns King County is concerned with simply don't exist in the real world.

In sum, the state vesting laws fundamentally represent a balance between competing objectives: fairness to developers, and the public's interest in the most effective development standards. The federal and state clean water statutes call for the most effective water pollution controls, to be applied as soon as "practicable." As the Courts have repeatedly affirmed, "it is important that the vested rights doctrine not be applied more broadly than its intended scope." *New Castle Invs.,* 98 Wn. App. at 232. Ecology sought to maintain the balance between certainty and clean water act goals—in Soundkeeper's view, with insufficient weight for clean water—by allowing an exceptionally generous amount of time before new standards would apply. Appellants seek to disrupt this balance in favor of allowing developers to lock in outdated standards all but permanently. This Court should decline the invitation to expand the vesting doctrine to cover the standards in this Permit. *Noble Manor*, 133 Wn.2d at 280 ("this Court will not extend the vested rights doctrine by judicial expansion").

IV. IF STATE VESTING AND LAND USE LAWS AND REGULATIONS APPLIED, THEY WOULD BE PREEMPTED BY THE FEDERAL CLEAN WATER ACT.

For the reasons discussed above, state vesting statutes simply do not apply to the requirements imposed by the 2013 Permits. The collision that Appellants perceive between the requirements of the federal and state clean water acts and the state's vesting statutes simply does not exist. In the event this Court disagrees, however, this claimed "collision" can only be resolved one way: state vesting and other land use laws must give way to conflicting federal authority. *Sayles v. Maugham*, 985 F.2d 451, 455 (9th Cir. 1993) (federal law preempts state law where compliance with both is "physically impossible" or where state law "would be an obstacle to the accomplishment of the full purposes and objectives of Congress"); SJ Order at 32 ("applying the vested rights doctrine as requested by the Appellants would allow developments to violate the state and federal water quality laws"); *Westside Bus. Park*, 100 Wn. App. at 608-09 (CWA preempts state laws if they "would be an obstacle to the accomplishment of the full purpose and objectives of congress").

It is well established that delegated NPDES programs may not impose less stringent requirements than those mandated by Congress. 33 U.S.C. § 1370(1); 40 C.F.R. § 123.25(a). In *N. Plains Res. Council v. Fid. Exploration & Dev. Co.*, 325 F.3d 1155 (9th Cir. 2003), the Ninth

Circuit rejected Montana's decision to exempt a discharge from the NPDES, finding that "Montana has no authority to create a permit exemption from the CWA for discharges that would otherwise be subject to the NPDES permitting process." *Id.* at 1164. The court reasoned that "absent statutory authority for Montana to create such exemptions, it cannot possibly be urged that Montana state law in itself can contradict or limit the scope of the CWA, for that would run squarely afoul of our Constitution's Supremacy Clause." *Id.* at 1165 (citing U.S. Const. art. VI, cl. 2; *Nat'l Audubon Soc'y v. Davis*, 307 F.3d 835, 851 (9th Cir. 2002)); *see also Or. State Pub. Research Grp. v. Pac. Coast Seafoods Co.*, 341 F. Supp. 2d 1170, 1178 (D. Or. 2004) ("[B]y enacting the CWA Congress created a widespread federal system of regulation, from which an area for state enforcement was carved. To avoid violating federal law, state laws and regulations must satisfy the specific requirements set forth in the federal laws and regulations.").[17]

In *Cox*, the PCHB acknowledged that applying the vested rights doctrine to the requirement to obtain permit coverage would conflict with

[17] It is further important to note that the State is delegated authority to administer the NPDES program subject to meeting the requirements of the Clean Water Act and EPA rules implementing the Act. 33 U.S.C. § 1342(b). Should a delegated state program later fail to do so, EPA is *required* to withdraw approval of the state program. 33 U.S.C. § 1342(b)(3); 40 C.F.R. § 123.63.

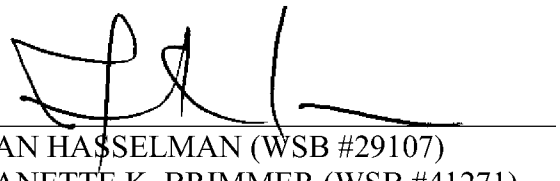
the goals of the CWA. *Cox*, 2009 WL 542494, at *5. The Board reasoned that because federal law requires increasingly stringent permit requirements to protect water quality, allowing a permit applicant to avoid obtaining a permit based on a vested right to follow older rules would conflict with the purposes of the CWA. *Id.*; *see also Pierce Cnty.*, at *34 ("the CWA and the state water quality laws anticipate increasingly more stringent requirements on those entities that discharge stormwater."). Allowing a permittee to continue authorizing developments that fail to meet current permit standards plainly frustrates the intent of Congress to impose increasingly stringent requirements over time, and collides with Congress's determination that stormwater must be reduced to the MEP.

Accordingly, interpreting the state vesting statute, or other state land use requirements, such as the GMA or LUPA, to allow continued authorization of development projects that do not apply LID (which this Board has previously found to constitute MEP under federal law) would create a square conflict with the Clean Water Act and trigger federal preemption. Such an interpretation should be avoided if possible. *See In the Matter of Williams*, 121 Wn.2d 125, 665 (1993) ("It is a general rule that statutes are construed to avoid constitutional difficulties when such construction is consistent with the purposes of the statute.").

CONCLUSION

While developers may have a limited vested right to develop properties under land use control standards in place at the time of their applications, they do not have a vested right to discharge pollution into Western Washington's shared waters without meeting the requirements of federal and state clean water laws. No party disputes that achievement of the Permit's updated LID standards is required to meet the standards of these laws, and Ecology was in fact extraordinarily generous to development interest in allowing them to be phased in over time. PSA respectfully asks that this Court uphold the PCHB's Order in its entirety.

Respectfully submitted this 19th day of December, 2014.



JAN HASSELMAN (WSB #29107)
JANETTE K. BRIMMER (WSB #41271)
Earthjustice
705 Second Avenue, Suite 203
Seattle, WA 98104
(206) 343-7340 | Phone
(206) 343-1526 | Fax
jhasselman@earthjustice.org
jbrimmer@earthjustice.org

Attorneys for Puget Soundkeeper Alliance, Washington Environmental Council, and Rosemere Neighborhood Association

CERTIFICATE OF SERVICE

I am a citizen of the United States and a resident of the State of Washington. I am over 18 years of age and not a party to this action. My business address is 705 Second Avenue, Suite 203, Seattle, Washington.

On December 19, 2014, I served a true and correct copy of the following documents on the parties listed below:

1. Respondent Puget Soundkeeper Alliance's Opening Brief.

Washington Court of Appeals, Division II 950 Braodway, Suite 300 Tacoma, WA 98402-4454	☒ via JIS Link COA
Alethea Hart Deputy Prosecuting Attorney Laura C. Kisielius Deputy Prosecuting Attorney Snohomish County Prosecuting Attorney's Office 3000 Rockefeller Avenue, M/S 504 Everett, WA 98201-4060 (425) 388-6330 | Phone (425) 388-6333 | Fax ahart@snoco.org laura.kisielius@snoco.org *Attorneys for Appellant Snohomish County*	☐ via facsimile ☐ via overnight courier ☐ via certified mail ☐ via first-class U.S. mail ☐ via legal messenger ☒ via email

Devon Shannon
Darren Carnell
Deputy Prosecuting Attorneys
King County Prosecuting Attorney's Office
E554 King County Courthouse
516 Third Avenue
King County Courthouse
Seattle, WA 98104
(206) 296-9015 | Phone
(206) 296-0191 | Fax
devon.shannon@kingcounty.gov
darren.carnell@kingcounty.gov
Attorneys for Appellant King County

☐ via facsimile
☐ via overnight courier
☐ via certified mail
☐ via first-class U.S. mail
☐ via legal messenger
☒ via email

James D. Howsley
Jordan Ramis PC
Attorneys at Law
1499 S.E. Tech Center Place, Suite 380
Vancouver, WA 98683
(360) 567-3900 | Phone
(360) 567-3901 | Fax
jamie.howsley@jordanramis.com
Attorney for Appellant Building Industry Association of Clark County

☐ via facsimile
☐ via overnight courier
☐ via certified mail
☐ via first-class U.S. mail
☐ via legal messenger
☒ via email

Ronald L. Lavigne
Senior Counsel
Phyllis J. Barney
Assistant Attorney General
Washington State Office of Attorney General
Ecology Division
2425 Bristol Court S.W., Floor 2
P.O. Box 40117
Olympia, WA 98504-0117
(360) 586-6770 | Phone
(360) 586-6760 | Fax
ronaldl@atg.wa.gov
phyllisb@atg.wa.gov
Attorneys for Respondent Department of Ecology

☐ via facsimile
☐ via overnight courier
☐ via certified mail
☐ via first-class U.S. mail
☐ via legal messenger
☒ via email

Lori Terry Gregory
Foster Pepper PLLC
1111 Third Avenue, Suite 3400
Seattle, WA 98101-3922
(206) 447-8902 | Phone
(206) 749-2002 | Fax
terrl@foster.com
Attorney for Pierce County

☐ via facsimile
☐ via overnight courier
☐ via certified mail
☐ via first-class U.S. mail
☐ via legal messenger
☒ via email

Christine M. Cook
Deputy Prosecuting Attorney
Clark County Prosecuting Attorney's Office
Civil Division
P.O. Box 5000
Vancouver, WA 98666-5000
(360) 397-2478 | Phone
(360) 397-2184 | Fax
christine.cook@clark.wa.gov
Attorney for Clark County

☐ via facsimile
☐ via overnight courier
☐ via certified mail
☐ via first-class U.S. mail
☐ via legal messenger
☒ via email

Jeff H. Capell
Deputy City Attorney
Elizabeth A. Pauli
Tacoma City Attorney's Office
Civil Division
747 Market Street, Room 1120
Tacoma, WA 98405-3767
(253) 591-5885 | Phone
(253) 591-5755 | Fax
jcapell@ci.tacoma.wa.us
epauli@ci.tacoma.wa.us
Attorney for City of Tacoma

☐ via facsimile
☐ via overnight courier
☐ via certified mail
☐ via first-class U.S. mail
☐ via legal messenger
☒ via email

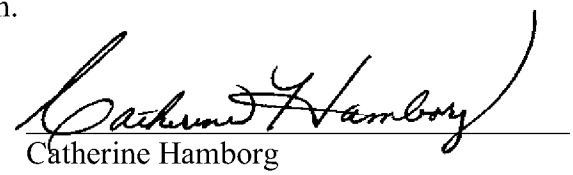
Theresa R. Wagner
Assistant City Attorney
Seattle City Attorney's Office
P.O. Box 94769
600 Fourth Avenue, 4th Floor
Seattle, WA 98124-4769
(206) 684-8200 | Phone
(206) 684-8284 | Fax
theresa.wagner@seattle.gov
Attorney for City of Seattle

☐ via facsimile
☐ via overnight courier
☐ via certified mail
☐ via first-class U.S. mail
☐ via legal messenger
☒ via email

Robert W. Ferguson
Attorney General
Susan Pierini
Assistant Attorney General
Attorney General's Office of Washington
Licensing & Administrative Law Division
1125 Washington Street S.E.
P.O. Box 40110
Olympia, WA 98504-0110
(360) 586-2780 | Phone
susanp1@atg.wa.gov
Attorney for Pollution Control Hearings Board

☐ via facsimile
☐ via overnight courier
☐ via certified mail
☐ via first-class U.S. mail
☐ via legal messenger
☒ via email

I, Catherine Hamborg, declare under penalty of perjury that the foregoing is true and correct. Executed on this 19th day of December, 2014, at Seattle, Washington.



Catherine Hamborg

EARTHJUSTICE

December 19, 2014 - 10:48 AM

Transmittal Letter

Document Uploaded: 3-463784-Respondents' Brief.pdf

Case Name: Snohomish County, King County, and Building Industry Association of Clark County v. PCHB and Washington State Department of Ecology

Court of Appeals Case Number: 46378-4

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: Respondents'

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Jan E Hasselman - Email: jhasselman@earthjustice.org