NO. 92805-3

SUPREME COURT OF THE STATE OF WASHINGTON

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

Respondent,

v.

WASHINGTON STATE DEPARTMENT OF ECOLOGY,

Petitioner,

and

POLLUTION CONTROL HEARINGS BOARD; PUGET SOUNDKEEPER ALLIANCE; WASHINGTON ENVIRONMENT COUNCIL, and ROSEMERE NEIGHBORHOOD ASSOCIATION,

Respondents Below.

KING COUNTY'S ANSWER TO PETITIONS FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington State Cases

Statutes and Court Rules

INTRODUCTION

The Court of Appeals decision in this matter provides a clear and concise path forward for local jurisdictions and permit applicants. The decision ensures state vesting laws are respected while recognizing the objectives of state and federal laws to reduce municipal stormwater pollutants to the maximum extent practicable. The public interest is best served by denying the Petitioners' requests for review and upholding the Court of Appeals' well-reasoned decision.

I. IDENTITY OF RESPONDENT

King County, by and through the King County Prosecuting Attorney's Office, respectfully requests this Court deny review of the June 26, 2012 published opinion of the Court of Appeals in *Snohomish County v. Pollution Control Hearings Board*, No. 46378-4-II (2016 WL 225256) ("Slip op.")

II. ANSWER TO ISSUES PRESENTED FOR REVIEW

1. Per established case law, stormwater regulations are "land use controls," subject to state vesting statutes when applied through vested permit applications.
2. The Clean Water Act does not preempt state vesting statutes where its "maximum extent practicable" requirement facilitates compliance with both state and federal law.

III. STATEMENT OF THE CASE

The federal Clean Water Act[1] (CWA) requires regulation of municipal stormwater discharge through National Pollutant Discharge Elimination System (NPDES) permits. These permits require local controls that will reduce discharge of pollutants "to the maximum extent practicable." 33 U.S.C. ¶ 1342(p)(3)(B)(iii). Instead of creating a rigid regulatory system, the federal government delegates the implementation of specific pollution control requirements to the states. In Washington, the Department of Ecology (Ecology) is charged with establishing NPDES permit conditions, including timing requirements. RCW 90.48.260(1)(a).

The 2013 Phase I NPDES Permit ("Permit") developed by Ecology, which is the subject permit here, requires local jurisdictions to adopt a stormwater management program "to prevent and control the impacts of runoff from new development, redevelopment, and construction activities." Permit Condition S5.C.5 (AR 4997). Ecology then goes one step further, requiring that local jurisdictions apply the new program requirements "to all applications submitted after July 1, 2015 and...to projects approved prior [to] July 1, 2015, which have not started construction by June 30, 2020." AR at 4998. King County must, therefore, update its stormwater ordinances and apply the newly adopted

[1] 33 U.S.C. ¶ 1251, et seq., the Water Pollution Control Act, is referred to herein as the CWA.

regulations to vested permit applicants who do not begin construction by June 30, 2020. This timing requirement is the subject of the parties' dispute.

The Court of Appeals found that the timing requirement ran afoul of state vesting laws. It also held that the state vesting statutes are not preempted by the CWA in the context of NPDES permit timing requirements applied by a state agency.

V. ARGUMENT FOR DENIAL OF REVIEW

A. Stormwater regulations are "land use controls," subject to state vesting statutes.

The Court of Appeals correctly concluded that Permit Condition S5.C.5.a.iii conflicts with the statutory vested rights doctrine. Its decision is based, in large part, on existing case law that interprets stormwater regulations as "land use control ordinances." *See Westside Bus. Park v. Pierce Cnty.*, 100 Wn. App. 599, 607, 5 P.3d 713 (2000); *Phillips v. King County*,136 Wn.2d 946, 963, 968 P.2d 871 (1998). Moreover, their decision relies on the established definition of land use controls as those regulations that "exercise a restraining or directing influence over land use." *New Castle Investments v. City of LaCenter*, 98 Wn. App. 244, 228, 989 P.2d 569 (1999). The Court of Appeals decision does not expand the

vesting doctrine, but rather applies it consistently with established case law. *Westside*, 100 Wn. App. 599 (2000).

Notably, neither Petitioner disputes that stormwater regulations exert a restraining and directing influence over the development of land. Instead, Petitioners focus on the environmental objectives of the NPDES permit system, arguing that environmental regulations cannot simultaneously be land use control ordinances. The Court of Appeals decision points out the fallacy of this unsupported argument, cataloging many examples of environmental regulations that are subject to the vested rights doctrine. Slip op., at 14.

As established in prior case law, stormwater regulations are land use control ordinances. Land use control ordinances are subject to state vesting statutes. *See* RCW 19.28.020; RCW 58.17.033(1); RCW 36.70B.180. To comply with those statutes, local jurisdictions cannot apply newly adopted stormwater regulations to vested permit applicants.

The plain language of RCW 90.48.260 does not speak to whether vesting statutes apply to the application of stormwater controls through specific land use permits. The general provisions of RCW 90.48.260 should not be expanded beyond its plain text to create a conflict with the specific protections of state vesting statutes. Without explicit language exempting stormwater requirements from state vesting laws, RCW

90.48.260 cannot be interpreted to abrogate those rights. Basic rules of statutory construction would dictate the opposite result from that urged by the Petitioners.

B. The Clean Water Act does not preempt state vesting statutes.

There is a strong presumption against preemption under Washington law. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 864, 93 P.3d 108 (2004). Petitioners do not argue that there is a direct statutory conflict, but instead suggest that the state vesting laws present an obstacle to accomplishing the full purposes and objectives of the CWA. King County disagrees, as did the Court of Appeals in its decision. Slip op. at 22-24.

The federal directive under the CWA is a delegation to the state, in this case Ecology, to ensure implementation of "controls to reduce the discharge of pollutants to the maximum extent practicable." 33 U.S.C. ¶ 1342(p)(3)(B)(iii). This general delegation of authority elucidates two reasons preemption is avoided here. First, federal law delegates to Ecology, giving the state agency significant discretion to determine how (and when) the discharge limitation goals are met. The State has employed this flexibility in creating its timing requirements without any hint that these timelines are specifically dictated by federal law. There is

no specific directive in the CWA that mandates a particular compliance date: This is left to the discretion of the state agency.

Second, the phrase "maximum extent practicable" recognizes the need for flexibility at the state level in implementing the CWA objectives. It is perfectly reasonable for a state to conclude that imposition of new stormwater regulations on vested projects, in conflict with state law, is not "practicable." Because the CWA leaves the door open for Ecology to act consistently with state law, it cannot be said that CWA objectives are thwarted by complying with state vesting statutes.

The Court of Appeals decision reflects a logical harmonization of our state vesting statutes and the environmental protections afforded by the CWA. The "maximum extent practical" reaches its limit where it would require violation of state law. This does not undercut the importance of developing and implementing stringent water quality standards, but rather recognizes the need to act consistently with rights afforded by state law where possible.

Neither the state nor local jurisdictions are seeking to create a permit exemption for discharges that are specifically prohibited under federal law. As acknowledged by Ecology, "The only issue in this appeal is the timing requirement for implementation of the stormwater controls." Ecology Petition, at 13. This is an issue of *when*, not *whether* the controls

are implemented amongst certain groups of applicants. All permit applicants will be subject to state and federal discharge requirements, to the "maximum extent practical." State vesting laws do not contradict federal law, but demonstrate the point at which application of new stormwater regulations to local permits are impractical.

VI. CONCLUSION

Based on the foregoing, King County respectfully requests that the Supreme Court deny review of the Court of Appeals January 19, 2016 decision.

DATED this 18 day of March, 2016.

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Respectfully submitted,

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Attached please find *King County's Answer To Petitions for Review* and a *Certificate of Service* to be filed in **NO. 92805-3, Snohomish County, King County and Building Industry Association of Clark County v. Washington State Department of Ecology and Pollution Control Hearings Board; Puget Soundkeeper Alliance; Washington Environment Council, and Rosemere Neighborhood Association.**

I am filing on behalf Devon Shannon, WSBA # 34534.

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Certificate of Service

I, Rita Hagan, declare that I caused to be filed with the Supreme Court of the State of Washington, KING COUNTY'S ANSWER TO PETITIONS FOR REVIEW and this CERTIFICATE OF SERVICE ; to be served on the following parities in the manner noted below.

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