

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.

**STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY'S
RESPONSE TO AMICUS CURIAE BRIEF OF MASTER
BUILDERS ASSOCIATION OF KING AND
SNOHOMISH COUNTIES**

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I. INTRODUCTION

This case presents the question of whether a vested right under Washington's vested rights statutes includes a developer's "right" to pollute waters of the state of Washington in violation of the federal Clean Water Act and Washington's Water Pollution Control Act. Amicus Master Builders Association of King and Snohomish Counties ("MBA") argues that developers who elect to discharge stormwater to publicly owned stormwater conveyance systems are vested to outdated stormwater control techniques that fail to address the significant adverse environmental impacts caused by municipal stormwater.

The challenged 2012 Phase I Municipal Stormwater Permit ("Permit") condition in this case sets a reasonable timeline for implementing flexible requirements to control the stormwater that new developments discharge to publicly owned stormwater conveyance systems. MBA argues that resolution of this case will have a "profound" impact on the building industry, but its brief actually demonstrates developers will have little, if any, difficulty complying with the reasonable timing requirement in Condition S5.C.5.a.iii of the Permit. While Washington's vested rights statutes are generous to developers, the right to pollute waters of the state in violation of state and federal water quality laws is not one of the rights that vests under Washington's statutes.

As discussed below, MBA appears to misunderstand the limited scope of the Permit as well as the flexibility provided in the Permit. This misunderstanding leads MBA to speculate regarding the consequences of the challenged timing requirement despite the fact that there is no evidence in the record to support MBA's speculation. The challenged Permit requirement is imposed by the state on local government permittees and is not a zoning or other land use control subject to vesting. To the extent the timing requirement is subject to vesting, the State's vesting statute is preempted by the federal Clean Water Act.

II. ARGUMENT

A. MBA Misunderstands The Limited Scope Of The Permit

MBA argues that Ecology's position with respect to the challenged Permit condition "is one step away from requiring every home and commercial building in the state to be torn down and redesigned to provide stormwater controls in compliance with the Phase I Permit." Brief of Amicus Curiae MBA ("MBA Brief") at 16. However, the challenged Permit requirements do not apply to all development projects. The requirements only apply to those development projects that elect to discharge stormwater to a publicly owned stormwater conveyance system in one of the municipalities subject to the Permit. Certified Appeal Board Record ("CABR") at 3980 (October 2, 2013 Board Order on Summary

Judgment (“Board Order”) at 10)¹ (permit requires municipalities to demonstrate legal authority to control discharges to and from their municipal separate storm sewer systems (“MS4s”). *See also*, CABR at 4993 (Permit, Condition S5.C at 11) (requirements of a municipality’s Stormwater Management Plan “apply to MS4s, and areas served by MS4s . . .”). In addition, the requirements for new development, redevelopment, and construction sites in Condition S5.C.5 only apply to projects that meet threshold requirements regarding the amount of new or replaced hard surfaces, the amount of land disturbing activity, or the amount of vegetation converted to lawn, landscape areas, or pasture. CABR at 5067 (Permit, App. 1, §§ 3.2, 3.3).

B. The Permit Provides A Number Of Options For Meeting State And Federal Water Pollution Statues For Those Development Projects That Discharge To Publicly Owned Stormwater Conveyance Systems And That Meet The Permit’s Threshold Requirements

If a development project meets the threshold requirements of the Permit, and will discharge stormwater to a publicly owned stormwater conveyance system, the Permit provides a number of options for mitigating the adverse environmental impacts of stormwater discharges from the development. The Permit directs municipal permittees to adopt “local requirements” that protect water quality, reduce the discharge of

¹ Reference to the CABR is the bates numbered record certified by the Board and designated as Clerk’s Papers.

pollutants to the maximum extent practicable, as required by the federal Clean Water Act, and meet the requirements of the state Water Pollution Control Act that pollution discharges be subject to all known, available, and reasonable methods of control and treatment (“AKART”) prior to discharge. CABR at 4997 (Condition S5.C.5.a.ii). A permittee must document how its local requirements “will protect water quality, reduce the discharge of pollutants to the maximum extent practicable, and satisfy the state AKART requirements.” CABR at 4997–98. Permittees that choose to use the requirements, limitations, and criteria in the 2012 Stormwater Management Manual for Western Washington (“Stormwater Manual”) or an equivalent manual approved by Ecology, may cite this choice as their sole documentation to demonstrate that their local requirements will protect water quality, reduce the discharge of pollutants to the maximum extent practicable, and satisfy the state’s AKART requirements. CABR at 4998.

Permittees also have the option of developing local requirements that “provide equal or similar protection of receiving waters and equal or similar levels of pollutant control as compared to Appendix 1.” CABR at 4997 (Condition S5.C.5.a.i). In other words, the Permit gives permittees the option of relying on Appendix 1 and the 2012 Stormwater Manual for their local requirements, or to develop their own local requirements and

demonstrate that the alternative local requirements provide equivalent levels of environmental protection as compared to the requirements in Appendix 1 of the Permit. Both King and Snohomish Counties, and most other Phase I permittees, used this equivalency process under the prior Permit, and the 2012 Permit reflects Ecology's approval of alternative stormwater programs Ecology determined were equivalent. CABR at 5161-63 (App. 10, at 1-4).

In addition to allowing permittees to develop alternative equivalent local stormwater programs, the Permit also provides flexibility regarding the low impact development practices required by the Pollution Control Hearings Board ("Board") in its unappealed decision regarding the prior version of the Permit. In *Puget Soundkeeper Alliance v. Dep't of Ecology*, PCHB Nos. 07-021, 07-026 through -030, and 07-037, at 58 (CL 16), Findings of Fact, Conclusions of Law and Order (Aug. 7, 2008) ("2008 Decision"), the Board concluded that aggressive use of low impact development techniques in combination with conventional stormwater management techniques was necessary in order to meet the requirements of the federal Clean Water Act and state Water Pollution Control Act. No party appealed the Board's 2008 Decision, and in its decision on the current version of the Permit, the Board concluded that the low impact development requirements in the Permit, with limited modifications, are

consistent with its 2008 Decision. CABR 4095 (*Pierce Cnty. v. Dep't of Ecology*, PCHB Nos. 12-093c and 12-097c, at 50 (CL 10), Findings of Fact, Conclusions of Law, and Order (Mar. 21, 2014) (“2014 Decision”). No party appealed the Board’s 2014 Decision.

Under the Permit, smaller projects have the option of using the list of best management practices provided in Appendix 1 of the Permit or to meet the low impact development performance standard. CABR at 5076 (App. 1, at 20). The low impact development standard is a flow-duration standard that requires post-development stormwater flows from a project to match pre-development flows for a range of peak flow stormwater events. CABR at 5077 (App. 1, at 21). Ecology adopted the flow-duration standard because it is easy for permittees to implement. CABR at 4078 (FF 43). In addition, several local governments were already using a flow control standard and were therefore familiar with its application. *Id.* Moreover, hydrology models already being used to model flow control could be readily adjusted to model the performance standard, so projects required to comply with flow control requirements could use the same model to evaluate both flow control and the low impact development performance standard. *Id.* Most larger projects also have the option of using either the list of best management practices in Appendix 1 of the

Permit or the low impact development performance standard. CABR at 5077 (App. 1, at 21).²

MBA incorrectly argues that the option of complying with the low impact development performance standard requires “that land be used in specific ways, such as for infiltration facilities and for detention facilities on the land within a project site. The design, sizing, and placement of such facilities are controlled by the Stormwater Manual.” MBA Brief at 10. In fact, if a project elects to use the low impact development performance standard rather than selecting best management practices from the appropriate list, the only restriction is that the project may not use rain gardens to meet the performance standard. CABR at 5076 (App. 1, at 20). Otherwise, a developer is free to use any technique it chooses to meet the performance standard.

MBA also incorrectly argues that the “requirement” to achieve full dispersion requires land to be set aside and not developed. MBA Brief at 9–10. In fact, full dispersion is not a “requirement.” Full dispersion is one of the options some developments must consider if they elect to use the best management practices list rather than the low impact development performance standard. CABR at 5076–79 (App. 1, at 20–23). In addition,

² New development and redevelopment projects on parcels five acres or greater outside a permittee’s urban growth area are required to comply with the low impact development performance standard. *Id.*

sites used for full dispersion may also be used for other purposes, including utilities and utility easements, but not septic systems. CABR at 5914 (Stormwater Manual at 5–30). Allowed utilities within the full dispersion site include potable and wastewater underground piping, underground wiring, power and telephone poles. *Id.* Full dispersion sites may also be used for passive recreation such as pedestrian and bicycle trails, nature viewing areas, and fishing and camping areas. *Id.*

MBA’s argument regarding the need to devote some land within a development for stormwater control ignores the fact the developers have long been required to set aside land for stormwater control facilities and low impact development techniques are:

less costly, or no more costly, than conventional engineered BMPs [best management practices]. Structural stormwater controls, such as detention ponds, curbs, gutters and pipes, require significant hardware and capital investment. LID [low impact development] techniques eliminate or reduce the need for these structural controls by reducing the volume of water to be managed. LID techniques may also require less space than these traditional methods.

2008 Decision at 43 (FF 61). At the time the Board issued its 2008 Decision, both King and Snohomish Counties already had local ordinances that incorporated low impact development techniques into their stormwater programs. *Id.* at 45–46 (FF 64, 65). There is no evidence in the record to support MBA’s argument that the low impact development

requirements in the Permit will require developers to set aside any more land than they are already required to set aside for conventional stormwater controls.

Despite its doom and gloom arguments, MBA has not identified any changes in either Snohomish or King Counties' development regulations that are required by the Permit and that will adversely impact its members. Rather, MBA speculates that "if" a stormwater plan for a development needs to be changed at a later date, changes "could lead to substantial changes in the design of the project, potentially making the project economically infeasible." MBA Brief at 18.³ MBA's speculation is not supported by any evidence in the record. In fact, as discussed above, in its 2008 Decision, the Board found that in many cases use of low impact development techniques is actually less expensive and requires less land than traditional stormwater control techniques, and that King and Snohomish Counties already had local ordinances that incorporated low impact development techniques into their stormwater programs. Neither King nor Snohomish Counties offered any evidence before the Board regarding what changes may be necessary to incorporate Permit requirements into their local stormwater programs. Consequently, it is

³ MBA fails to mention Section 6 of Appendix 1 of the Permit, which establishes a process for local government permittees to grant an exception or variance to the Permit's minimum requirements if application of the requirements "imposes a severe and unexpected economic hardship on the permit applicant . . ." CABR at 5087.

entirely speculative for MBA to argue that compliance with the Permit's modest and flexible requirements will be either burdensome or unworkable. MBA Brief at 18. Eric Golemo, a Clark County developer who testified on behalf of Petitioner Building Industry Association of Clark County, testified that bioretention is a low impact development technique that he "routinely installs in Clark County." CABR at 4096 (2014 Decision, CL 12). Mr. Golemo also testified that bioretention facilities are "very effective and easy to maintain." *Id.* at 4105 (CL 27). Bioretention is one of the low impact development techniques certain projects need to evaluate and use if feasible. CABR at 5078–79 (App. 1, at 22–23).

Petitioners have the burden of proof in this appeal, and it is not legally sufficient for MBA or Petitioners to simply speculate about what "could" "potentially" happen "if" certain events transpire. MBA's argument is little more than speculation that Condition S5.C.5.a.iii could be implemented in a manner that might require some projects to make some changes to address the adverse environmental impacts of poorly managed stormwater. This speculation is not only unsupported by the record, but is legally insufficient to meet Petitioners' burden of proof in their facial challenge to Condition S5.C.5.a.iii.

C. MBA's Argument Demonstrates That The Timing Requirement In Condition S5.C.5.a.iii Is Unlikely To Have Any Adverse Impact On The Building Industry

While MBA argues that resolution of this case “will have a profound impact on the building industry,” MBA Brief at 1, MBA’s example of a typical subdivision development demonstrates that the challenged Permit condition is unlikely to have any adverse impacts on the building industry.

MBA explains that the subdivision process in King and Snohomish Counties requires approval of a preliminary plat, construction of infrastructure after approval of the preliminary plat, final plat approval, recording of the final plat map, obtaining building permits, and constructing homes. MBA Brief at 5–6. As an example of how this process works, MBA explains that a preliminary plat applied for in November 2013 is vested to November 2013 regulations, remains vested to the November 2013 regulations when the preliminary plat is approved in December 2014, and when infrastructure is built in 2015 and 2016. MBA Brief at 7. According to MBA, if “the final plat were approved in 2017, then the use and development of the lots would be vested through 2022, 2023, or 2027.” *Id.* What MBA fails to explain is that the timing requirement in Condition S5.C.5.a.iii does not change this scenario.

Under Condition S5.C.5.a.iii, permittees are required to adopt and make effective a local stormwater program that meets the requirements of the federal Clean Water Act and state Water Pollution Control Act, by June 30, 2015.⁴ The local program applies to all applications submitted after July 1, 2015, and to applications submitted prior to July 1, 2015, if the project has not “started construction” by June 30, 2020. CABR at 4998 (Condition S5.C.5.a.iii). The Permit defines “started construction” as “site work associated with, and directly related to” the project, which includes “grading the project site to final grade or utility installation.” *Id.* Consequently, if an application is filed prior to July 1, 2015, the project will be vested to pre-July 1, 2015 stormwater requirements as long as the project starts construction by June 30, 2020. A developer that files a complete application on or before June 30, 2015, will have at least five years to start construction if the developer wants to construct its project with outdated stormwater controls.

According to MBA, a subdivision developer constructs “infrastructure (e.g., roads, sidewalks, underground utilities, compressed soil for building pads, etc.)” two to three years after filing a preliminary plat. MBA Brief at 5, 7. In fact, according to MBA, King and Snohomish Counties require the construction of infrastructure prior to final plat

⁴ Permittees were required to submit a draft of their local program to Ecology for review and approval by July 1, 2014. CABR at 4998 (Condition S5.C.5.a.iii).

approval and construction of homes. MBA Brief at 5. As MBA's argument demonstrates, the timing requirement in Condition S5.C.5.a.iii is unlikely to have any impact on the building industry because developers will construct infrastructure (i.e. start construction) two to three years after filing a complete preliminary plat application, well within the five plus years provided by Condition S5.C.5.a.iii to start construction.

D. The Stormwater Requirements In The Permit Are Not Zoning Or Other Land Use Controls.

MBA incorrectly argues that Permit requirements are subject to vesting because, according to MBA, the effect of the Permit "is to control land use through local regulatory programs." MBA Brief at 13. However, as the Board correctly found, the stormwater requirements in the Permit do not resemble a zoning law or other land use control because the stormwater requirements do 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." CABR 4000-01 (Board Order at 30-31). The Board cited *New Castle Inv. v. City of LaCenter*, 98 Wn. App. 224, 989 P.2d 569 (1999), to support its conclusion that the Permit requirements, like the transportation impact fees at issue in *New Castle*, do not dictate how land may be used or otherwise control land use. CABR at 4001. Rather, regardless of how the land is used, the Permit merely requires that

environmental harm be minimized. CABR at 4000. As the Board correctly recognized, the “large menu of pollution-controlling” best management practices in the Permit are necessary to meet state and federal water pollution laws, and applying the vested rights doctrine as requested by the Appellants and MBA “would allow developments to violate the state and federal water quality laws.” *Id.* at 4001–02.

The Permit requirements are not zoning or other land use controls because the requirements do not dictate how land is used, but simply provides developers a wide range of best management practices to use so that however the land is used, adverse impacts to the environment are minimized. Accordingly, the Board properly refused to extend the vesting doctrine to the environmental requirements in the Permit. *Id.* at 4005. The Board properly recognized that the Supreme Court has refused to judicially expand the vested rights doctrine because “[i]f a vested right is too easily granted, the public interest is subverted.” *Id.* at 4002 (quoting *Noble Manor Co. v. Pierce Cnty.*, 133 Wn.2d 269, 280, 943 P.2d 1378 (1977)). The Legislature has never defined the broad array of environmental regulations administered by Ecology as “land use controls” subject to the vested rights doctrine and the Board properly refused to extend the doctrine to the environmental requirements in the Permit.

MBA’s reference to the definition of “ ‘development regulation’ as land use controls” demonstrates that the Board properly refused to extend the vested rights doctrine to encompass environmental requirements Ecology directs local governments to implement. MBA Brief at 14. As MBA notes, development regulations are defined to include “controls placed on development or land use activities *by a county or city . . .*” *Id.* (quoting RCW 36.70A.030(7)) (emphasis added). In *Citizens for Rationale Shoreline Planning v. Whatcom Cnty.*, 172 Wn.2d 384, 393, 258 P.3d 36 (2011), the Supreme Court held that where local government implements requirements that are “subject to Ecology’s mandatory review, revision, and approval” the requirements are not the product of local government and are therefore not subject to RCW 82.02.020, a statute that prohibits local governments from imposing taxes, fees or charges on developments.⁵ The same is true of the stormwater requirements in the Permit. While local government permittees implement the stormwater requirements, the local stormwater program required by Condition S5.C.5.a.iii is subject to Ecology’s mandatory review and approval. CABR at 4998 (Permit Condition S5.C.5.a.iii). The stormwater programs are not the product of “a county or city” and are therefore not “development regulations” subject to the vested rights doctrine.

⁵ Restrictions or conditions on the deployment of land may amount to a prohibited tax, fee, or charge. *Rationale Shoreline Planning*, 172 Wn.2d at 390.

MBA seeks to rely on *Westside Business Park v. Pierce Cnty.*, 100 Wn. App. 599, 5 P.3d 713 (2000), to argue that the Board narrowed the application of vesting. MBA Brief at 14. But *Westside* is not helpful to MBA's argument because this appeal includes the preemption argument that Pierce County failed to timely raise in *Westside*. The *Westside* court held that the federal Clean Water Act would preempt Washington's vested rights doctrine "to the extent that compliance with both laws is physically impossible, or state law would be an obstacle to the accomplishment of the full purposes and objectives of Congress." *Id.* at 608–09 (quoting *Sayles v. Maughan*, 985 F.2d 451, 455 (9th Cir. 1993)). The *Westside* court did not rule on Pierce County's preemption argument because the County failed to raise the issue below. *Id.* at 609. In this case, Puget Soundkeeper Alliance, Washington Environmental Council, and Rosemere Neighborhood Association (collectively "PSA") raised the preemption argument before the Board, and Ecology joined PSA's arguments. CABR at 1086–88, and CABR at 1284–86. Consequently, unlike *Westside*, the preemption argument is properly before the Court in this case.

The Board properly concluded there is no conflict between Washington's vesting laws and the timing requirement in Condition S5.C.5.a.iii of the Permit, and did not need to reach PSA and Ecology's preemption argument. CABR at 4006 (Board Order at 36 n.8). If the

Court concludes there is a conflict between Washington’s vesting laws and the timing requirement in Condition S5.C.5.a.iii of the Permit, the Court should also conclude that Washington’s vesting laws are preempted by the federal Clean Water Act because Washington’s vesting statutes would be an obstacle to accomplishing the full purposes and objectives of Congress under the Clean Water Act. *See* CABR at 4001 (Board Order at 31) (“application of the vested rights doctrine would thwart the public, and legislatively stated interest of enhanced environmental quality.”); CABR at 4002 (Board Order at 32) (“Ultimately, applying the vested rights doctrine as requested by the Appellants would allow developments to violate the state and federal water quality laws.”); CABR at 4002–03 (Board Order at 32–33) (“Indisputably, there are competing and overriding policy concerns embodied in state and federal environmental laws that require the state vested rights doctrine to give way.”); CABR at 4004–05 (Board Order 34–35) (“The positions advanced by Snohomish County, the Coalition, and other municipalities also frustrate the underlying policies and requirements of the CWA [Clean Water Act] and state water pollution control statutes.”).

Unlike the stormwater drainage ordinances at issue in *Westside*, the stormwater requirements in the Permit are environmental requirements imposed on local officials by the state of Washington in order to meet the

requirements of state and federal water pollution laws and to protect waters of the state from the adverse environmental impacts caused by development constructed to outdated environmental requirements. The Board properly concluded that the state imposed environmental requirements in the Permit are not subject to vesting. If the Court concludes the requirements are subject to vesting, the Court should also conclude that Washington's vesting statutes are preempted by the Clean Water Act.

MBA correctly argues that there "is no directive from the Legislature to violate vesting statutes." MBA Brief at 15. Neither Ecology nor the Board have suggested there is a legislative directive to violate vesting statutes. However, the Legislature amended RCW 90.48.260 in April 2012 and directed Ecology to "simultaneously" implement low impact development requirements and "review and revision of local development codes, rules, standards, or other enforceable documents to incorporate low-impact development principles" RCW 90.48.260(3)(b)(i); CABR at 4063 (2014 Decision, FF 16). This legislative directive is significant because Ecology issued the draft Phase I and II Permits on October 6, 2011, and the draft Permits were available when the Legislature amended RCW 90.48.260 to require simultaneous implementation of Permit requirements regarding low impact development

and code review. CABR at 4063 (2014 Decision, FF 14, 16). Consequently, the Legislature was able to review the draft permits, including the timing requirement in Condition S5.C.5.a.iii, and could have directed Ecology to use a different timing requirement if the Legislature believed Ecology was proposing to issue permits that would violate vested rights statutes. The fact that the Legislature did not do so, and instead directed Ecology to simultaneously implement low impact development practices and code review, indicates that the Legislature did not believe the Permit requirements were subject to the vested rights statutes.

MBA does not dispute the Board's holding that municipalities must comply with state water quality laws and require those they regulate to do so as well. MBA Brief at 15. However, MBA cavalierly dismisses the importance of complying with Washington's water quality laws by arguing that developers should be allowed to continue developing to outdated environmental requirements because "[i]n time, the State's water quality objectives will be achieved." *Id.* at 16. The record is devoid of any evidence to support MBA's suggestion that continuing to develop to outdated environmental requirements will lead to compliance with water quality laws "in time" because developers will eventually start using updated environmental controls for stormwater. What the record does

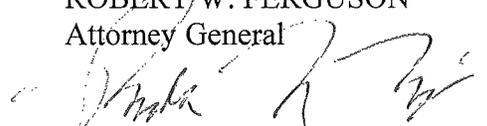
demonstrate is that developing to outdated environmental stormwater requirements has resulted in municipal stormwater being “the leading contributor[] to water quality pollution in the state’s urban waters—pollution that has resulted in loss of habitat, the listing of salmon species under the Endangered Species Act, among other problems.” CABR at 4002 (Board Order at 32). It is illogical to argue that continuing to develop to outdated environmental requirements will reverse this status quo.

III. CONCLUSION

The State of Washington, Department of Ecology, respectfully requests that the Court affirm the Board’s October 2, 2013 Order on Summary Judgment.

RESPECTFULLY SUBMITTED this 19th day of March, 2015.

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March 19, 2015 - 1:36 PM

Transmittal Letter

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