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No. 92805-3

**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

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

Respondents,

v.

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

Petitioners,

and

POLLUTION CONTROL HEARINGS BOARD,

Respondent Below.

**AMENDED BRIEF OF AMICUS CURIAE WASHINGTON
REALTORS®**

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 ORIGINAL

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I. INTRODUCTION

In this brief, amicus curiae Washington REALTORS® addresses the issue of whether Washington’s vested rights doctrine is preempted by the federal Clean Water Act (“CWA”), 33 U.S.C. § 1251 et seq. The Court of Appeals correctly held that because the stormwater drainage regulations that municipal permittees must adopt and apply to projects in their jurisdictions pursuant to the 2013 Phase I Municipal Stormwater Permit (“Permit”) constitute development regulations and development standards, Special Condition S5.C.5.a.iii of the Permit conflicts with the vested rights doctrine contained in RCW 19.27.095, RCW 58.17.033, and RCW 36.70B.180. *Snohomish County, et al., v. Pollution Control Hearings Bd., et al.*, 192 Wn. App. 316, 339, 368 P.3d 194 (2016). Noting that the legislature has not provided the state Department of Ecology (“Ecology”) with the authority to compel municipal permittees to violate Washington law, the Court of Appeals held that “[a]n administrative regulation that conflicts with a statute is invalid.” *Id.* (citing *Cannabis Action Coal. v. City of Kent*, 180 Wn. App. 455, 481, 322 P.3d 1246 (2014)). The Court of Appeals accordingly reversed and remanded to the Pollution Control Hearings Board with instructions to direct Ecology to revise Special Condition S5.C.5.a.iii to specify that the Permit applies only to those completed applications submitted after municipalities have adopted the new stormwater regulations required by the Permit. *Snohomish County*, 192 Wn. App. at 340.

The Court of Appeals also correctly rejected the argument put forth by Ecology and Puget Soundkeeper Alliance (“PSA”) that the federal CWA preempts Washington’s vested rights doctrine. *Id.* at 340-41. The Court of Appeals applied the two-part conflict preemption test, analyzing first whether the CWA and state vested rights law directly conflict, and second whether the state law “stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress.” *Id.* at 340-45. After finding no direct conflict between the CWA and state vesting law, the Court of Appeals moved on to the second “obstacle” prong of conflict preemption, and after analyzing both Congress’s *objective* in enacting the CWA and the *method* chosen by Congress to effectuate that objective, concluded that the CWA does not preempt Washington’s vested rights doctrine. *Id.*

This amicus brief focuses on an issue not extensively briefed by the parties: the method chosen by Congress in enacting the CWA, which is to delegate authority to states to administer NPDES programs in accordance with state law, while providing opportunities for EPA to remedy those situations where state law potentially conflicts with the CWA.¹

¹ REALTORS® supports the Court of Appeals ruling and positions taken by respondents before this Court regarding the applicability of the vested rights doctrine to the stormwater regulations adopted pursuant to Special Condition S5.C.5.a.iii. As directed by RAP 10.4(e), in order to avoid repetition of matters contained in other briefs, REALTORS® will restrict itself in this brief to discussion of the preemption issue.

II. IDENTITY AND INTEREST OF AMICUS CURIAE

Washington REALTORS® is described in the REALTORS® Motion for Leave to File Amicus Curiae Brief. REALTORS® represents the interests of those most directly affected by the enactment and implementation of new local stormwater regulations required by the Permit, and the timing of the applicability of those regulations. REALTORS® has a strong interest in maintaining the predictability and certainty created by Washington's strong vested rights doctrine.

III. STATEMENT OF THE CASE

The Court of Appeals' decision sets forth the relevant facts.

IV. ARGUMENT

A. State Agencies Exercising Their Delegated Authority to Administer the NPDES Program Pursuant to the Clean Water Act Must Comply With State Law.

The U.S. Supreme Court has described the CWA as “a program of cooperative federalism.” *New York v. United States*, 505 U.S. 144, 167, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992). The CWA “anticipates a partnership between the States and the Federal Government, animated by a shared objective. . . .” *City of Abilene v. EPA*, 325 F.3d 657, 659 (5th Cir. 2003) (quoting *Arkansas v. Oklahoma*, 503 U.S. 91, 101, 112 S. Ct. 1046, 117 L. Ed. 2d 239 (1992)). The Act thus sets out distinct roles for the federal and state governments. *PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700, 704, 114 S. Ct. 1900, 128 L. Ed. 2d 716 (1994).

EPA, for example, is required to establish and enforce technology-based effluent limitations on individual discharges. *PUD No. 1*, 511 U.S. at 704; *see* 33 U.S.C. §§ 1311, 1314. And the CWA reserves for EPA the authority to approve or disapprove state-adopted water quality standards, to regularly review and approve or disapprove any revisions to those state standards, and under certain circumstances, to promulgate EPA's own water quality standards. 33 U.S.C. § 1313(b), (c).

Congress created the NPDES permitting system in order to enforce the effluent limitations and water quality standards, and expressly provided that authority to administer the NPDES permitting program must be delegated to state authorities upon a showing that the state has met specified criteria. 33 U.S.C. §§ 1311, 1342; *see also* § 1251(b) (“It is the policy of Congress that the Stat[e] . . . implement the permit progra[m] under section[n] 1342. . . of this title”). “If authority is transferred, then state officials – not the federal EPA – have the primary responsibility for reviewing and approving NPDES discharge permits, albeit with continuing EPA oversight.” *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 650, 127 S.Ct. 2518, 168 L. Ed. 2d 467 (2007); *Akiak Native Community v. EPA.*, 625 F.3d 1162 (9th Cir. 2010). As the Court of Appeals held, this delegation of authority “suggests that Congress intended that the implementation of CWA objectives would occur within the framework of

state law, not that it intended to preempt state law.” *Snohomish County*, 192 Wn. App. at 344.

Once EPA has delegated NPDES permitting authority to a state, as it has to the state of Washington, EPA does not have the authority to control specific terms of NPDES permits. *See Snohomish County* at 344. Rather, state agencies administering NPDES programs must do so according to state law. *See* 33 U.S.C. §1251(b) (“It is the policy of the Congress to recognize, preserve and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to *plan the development and use . . .* of land and water resources. . . .”) (emphasis added).

Furthermore, under Washington law a state agency’s authority is limited; it possesses only those powers expressly granted to it and those necessarily implied from its statutory delegation of authority. *Association of Wash. Bus. v. State of Washington, Dept. of Revenue*, 155 Wn.2d 430, 437, 120 P.3d 46 (2005) (quoting *Tuerk v. Dept. of Licensing*, 123 Wn.2d 120, 124-25, 864 P.2d 1382 (1994)). Pursuant to the Administrative Procedure Act, an agency decision or regulation may be reversed where the agency acts outside of its statutory authority or makes decisions based on an erroneous interpretation or application of the law. RCW 34.05.570(3)(b),(d) and (4)(c). Thus, a state agency such as Ecology cannot simply ignore state law, choose not to comply with state law, or conclude that it need not comply with state law because it believes that the law is preempted by federal law.

B. Where There Is a Potential Conflict Between State Law and the Clean Water Act It is Up to EPA to Exercise Its Oversight Authority to Ensure Compliance with the Clean Water Act.

In this case, the Court of Appeals correctly held that no conflict exists between state vesting law and the federal CWA. But if such a conflict were to exist, it would be up to EPA – not the state – to resolve it. Congress in the CWA granted to EPA the authority to resolve conflicts between the CWA and state law. Under the CWA, although EPA cannot dictate the terms of state-administered NPDES permits, it retains oversight over state NPDES programs.² A state must advise EPA of each permit it proposes to issue, and EPA may object to any individual permit that does not comply with the requirements of the CWA. *Nat'l Ass'n of Home Builders*, 551 U.S. at 650 n. 1; *International Paper Co. v. Ouellette*, 479 U.S. 481, 489, 107 S. Ct. 805, 93 L. Ed. 2d 883 (1987); *Akiak Native Community*, 625 F.3d at 1165; 33 U.S.C. § 1342(b), (d); 40 C.F.R. § 123.44. If the state cannot address EPA's concerns, authority over the permit reverts to EPA. *Nat'l Ass'n of Home Builders* at 650 n. 1; 33 U.S.C. § 1342(d)(4). In addition, if a state is not administering its NPDES program in accordance with the CWA, EPA may withdraw its approval of the program as a whole. *Akiak Native Community*,

² The details of Washington's NPDES program and EPA's oversight of that program are contained in an August 15, 1989 Memorandum of Agreement between EPA and Ecology. The Memorandum of Agreement can be found on EPA's website at <https://www.epa.gov/compliance/memorandum-agreements-between-epa-and-states-authorized-implement-national-pollutant>.

625 F.3d at 1165; 33 U.S.C. § 1342(c)(3); 40 C.F.R. §§ 123.63, 123.64.³

The CWA thus provides remedies for those situations where a state's compliance with state law may render its NPDES permit program inconsistent with the CWA.

C. Ecology Has Previously Recognized Its Duty to Comply with State Law While Administering Washington's NPDES Program.

Ecology is in fact well aware of its obligation to adhere to state law while carrying out its duties under the CWA, and has previously recognized that in case of a potential conflict it must comply with state law. The Industrial Stormwater General Permit ("ISGP"), issued by Ecology in 2010 and modified in 2012, is an example of a situation where Ecology took active steps to comply with direction from the state legislature to ensure that it was administering its NPDES program consistent with the requirements of state law.

Water quality-based effluent limitations in Washington NPDES permits may be numeric, narrative or nonnumeric, or a combination of both numeric and narrative. RCW 90.48.555(2). The 2010 ISGP included a numeric effluent limitation for discharges to water bodies that had been listed as impaired under the CWA due to the presence of fecal coliform bacteria.

Puget Soundkeeper Alliance, et al., v. Ecology, PCHB No. 12-062c at 6

³ Under EPA's regulations, citizens may petition EPA to withdraw a state's authority to administer the NPDES program. 40 C.F.R. § 123.64(b)(1).

(Order on Summary Judgment and Motions to Dismiss, January 2, 2013)⁴. Ecology subsequently determined that the fecal coliform numeric effluent limit should be removed and replaced with a narrative effluent limitation, concluding that industrial facilities are not a significant source of bacteria in Washington water bodies, and that industrial facilities subject to the numeric effluent limits “would be unable to comply with the limit regardless of industrial activity or pollution prevention measures.” *Id.* at 7.

Rather than simply modifying the 2010 ISGP to remove the numeric effluent limitations for bacteria, Ecology first went to the state legislature and requested legislation that would require Ecology to replace the ISGP’s numeric effluent limitations for bacteria with nonnumeric narrative effluent limitations. *Puget Soundkeeper Alliance* at 7; H. B. 2651 Env’t Comm. B. Analysis (January 26, 2012); S. B. Rep. H. B. 2651 (February 23, 2012); H. B. Rep. H. B. 2651. As requested by Ecology, the Legislature amended the applicable state statute to require that by July 1, 2012, the ISGP “must require permittees with discharges to water bodies listed as impaired for bacteria to comply with nonnumeric, narrative effluent limitations.” *Puget Soundkeeper Alliance* at 7-8; RCW 90.48.555(7); Laws of 2012, ch. 110, § 1. As a result

⁴ In accordance with Commissioner Narda Pierce’s letter of September 8, 2016, because this PCHB decision may not be readily available for review by the Court, a hard copy of the decision has been mailed to the Washington State Law Library and to all counsel.

of the statutory change, Ecology then modified the 2010 ISGP to replace the numeric effluent limitation for fecal coliform bacteria with a nonnumeric narrative limit. *Puget Soundkeeper Alliance* at 2, 8.

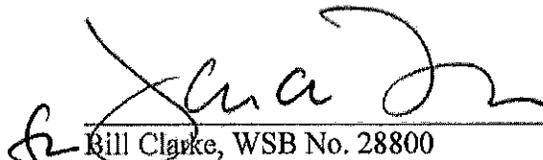
PSA subsequently appealed the modified ISGP to the Pollution Control Hearings Board, asserting that the change from a numeric to narrative effluent limitation violated the CWA's "anti-backsliding" provision requiring that a permit may not be renewed, reissued or modified to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit. *Id.* at 8-9. *See* 33 U.S.C. § 1342(o). On appeal, the Board ruled that Ecology was simply following state law, holding that "the only plausible and reasonable interpretation of the statute is that the Legislature intended that Ecology would modify the ISGP to remove the numeric fecal coliform bacteria limits and replace them with a narrative limit." *Puget Soundkeeper Alliance* at 15.

Ecology's actions with regard to the ISGP demonstrate Ecology's understanding that it must comply with state law while administering its NPDES program pursuant to the CWA. Ecology cannot, as it has attempted to do here, ignore state law by fashioning its own version of a vesting rule for the local stormwater regulations required under the Permit.

V. CONCLUSION

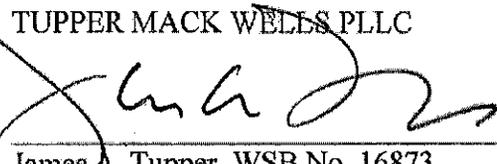
For the foregoing reasons, amicus Washington REALTORS® respectfully requests that this Court affirm the Court of Appeals decision in this case.

Respectfully submitted this 9th day of September, 2016.



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SNOHOMISH COUNTY, KING COUNTY, and BUILDING
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WASHINGTON STATE DEPARTMENT OF ECOLOGY; PUGET
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POLLUTION CONTROL HEARINGS BOARD,

Respondent Below.

DECLARATION OF SERVICE

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I, James A. Tupper, declare as follows:

I am a resident of the State of Washington, employed in Seattle, Washington. I am over the age of 18 years and am not a party to the above-entitled action. My business address is 2025 First Avenue, Suite 1100, Seattle, Washington 98121. On this date, a true copy of AMENDED BRIEF OF AMICUS CURIAE WASHINGTON REALTORS® was served on the following parties via electronic mail:

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Dated at Seattle, WA, this 9th day of September, 2016.

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James A. Tupper, WSB No. 16873

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Sent: Friday, September 09, 2016 11:53 AM
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Subject: Snohomish County v. Washington State Department of Ecology (No. 92805-3) - Amended Amicus Curiae Filing

Dear Clerk of Court:

In accordance with Commissioner Narda Pierce's letter of September 8, 2016, attached are the following documents for filing in *Snohomish County v. Washington State Department of Ecology* (No. 92805-3):

- Amended Brief of Amicus Curiae Washington Realtors®
- Declaration of Service

The amended brief does not contain the appendix that had been attached as Exhibit A to the Brief of Amicus Curiae Washington Realtors®, filed with this Court on August 29, 2016. Because the document attached as Exhibit A may not be readily available for the Court's reference, we are mailing a hard copy to the Washington State Law Library and to all counsel.

These pleadings are respectfully submitted on behalf of:

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