COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Appellant, v. WAHKIAKUM COUNTY, a political subbdivision of Washington State, Respondent.	NO. 44700-2-II RESPONSE TO *AMICUS CURIAE* BRIEF OF NORTHWEST BIOSOLIDS MANAGEMENT ASSOCIATION, *et. al.*

I. BACKGROUND

This response is perhaps presumptuous in that it assumes the success of the County's motion to strike the various factual assertions made by *amici* Northwest Biosolids Management Association, *et. al.* (hereafter, *amici* or Association). In the event the court sees fit to deny the motion, the County first maintains its objection and second requests that, for the reasons given in its motion to strike, the court refuse to take cognizance of any of any of the factual assertions of *amici* that are not made with citation to the clerk's papers. The County, in this response,

will confine itself to answering *amici*'s legal arguments with the exception of this paragraph.

II. RESPONSE

Amici begin legal argument on page 14 of their brief, after lengthy factual discourses dealt with by the County's motion to strike the same.

A. Burden

Amici claim, without citation to any authority and without argument, that "the state's jurisprudence treats preemption analysis as a straight-forward legal question of statutory interpretation." *Amicus* Brief at 15. This is followed by a characterization of the decades-long history to the contrary as a "few cases," and an inaccurate interpretation of just one of them as having consisted of a factual challenge to the purpose of the statute. Id. But the factual burden is addressed separately even in the case of Johnson v. Johnson, 96 Wn.2d 255, 634 P.2d 877 (1981), cited by *amici*:

> To prevail, [challenger] must demonstrate that statute's "invalidity beyond a reasonable doubt" *and* rebut the presumption that all legally necessary facts exist. Bellevue v. State, 92 Wash.2d 717, 720, 600 P.2d 1268 (1979); State v. Primeau, 70 Wash.2d 109, 111, 422 P.2d 302 (1966); Clark v. Dwyer, 56 Wash.2d 425, 353 P.2d 941 (1960). This court will sustain statutes whenever it can conceive any set of facts which support the statute's constitutionality, see State v. J-R Distributors, Inc., 82 Wash.2d 584, 512 P.2d 1049 (1973); Spokane v. Carlson, 73 Wash.2d 76, 80, 436 P.2d 454 (1968), and will accept as a verity any legislative declaration of the statute's public purpose, unless

> arbitrary or unreasonable. See Frach v. Schoettler, 46 Wash.2d 281, 280 P.2d 1038, cert. denied, 350 U.S. 838, 76 S.Ct. 75, 100 L.Ed. 747 (1955); State ex rel. Gray v. Martin, 29 Wash.2d 799, 189 P.2d 637 (1948).

Johnson v. Johnson, 96 Wn.2d 255, 258, 634 P.2d 877, 879 (1981) (emphasis added).

As the court can see, the issue of "invalidity beyond a reasonable doubt" is addressed separately from factual inquiries. But more importantly, *amici* denigrate one of the most basic and important burdens in the history of this state's jurisprudence, as our Supreme Court discussed at length *en banc* in School Districts' Alliance for Adequate Funding of Special Educ. v. State, 170 Wn.2d 599, 605-06, 244 P.3d 1, 4-5 (2010):

> In Washington, it is well established that statutes are presumed constitutional and that a statute's challenger has a heavy burden to overcome that presumption; the challenger must prove that the statute is unconstitutional beyond a reasonable doubt. Wash. Fed'n of State Employees v. State, 127 Wash.2d 544, 558, 901 P.2d 1028 (1995). This standard, that we will not declare a statute unconstitutional "unless its conflict with the constitution is plain beyond a reasonable doubt," stretches all the way back to our holding in Parrott & Co. v. Benson, 114 Wash. 117, 122, 194 P. 986 (1921). This standard has appeared throughout our jurisprudence. See State v. Maciolek, 101 Wash.2d 259, 263, 676 P.2d 996 (1984); see also State v. Aver, 109 Wash.2d 303, 306–07, 745 P.2d 479 (1987). We discussed the reasoning behind the standard in Island County v. State, 135 Wash.2d 141, 147, 955 P.2d 377 (1998):
>
> "[T]he "beyond a reasonable doubt" standard used when a statute is challenged as unconstitutional refers to the fact that one challenging a statute must, by argument and research, convince the court that there is no reasonable doubt that the statute violates the constitution. The reason for this high standard is based on our respect for the legislative branch of government as a co-equal branch of

> government, which, like the court, is sworn to uphold the constitution.... Additionally, the Legislature speaks for the people and we are hesitant to strike a duly enacted statute unless fully convinced, after a searching legal analysis, that the statute violates the constitution."
>
> We later reaffirmed our understanding that a demanding standard is justified because "we assume the Legislature considered the constitutionality of its enactments and afford great deference to its judgment." Tunstall v. Bergeson, 141 Wash.2d 201, 220, 5 P.3d 691 (2000).

School Districts' Alliance for Adequate Funding of Special Educ. v. State, 170 Wn.2d 599, 605-06, 244 P.3d 1, 4-5 (2010).

The School District court went on to explicitly deny it was speaking of a mere factual burden of proof, flatly contradicting *amici*'s dismissive characterization. Id., 170 Wn.2d at 606. Insofar as *amici*, by claiming they do not have to shoulder their massive burden, may be admitting they have not done so, then to that extent *amici* have conceded the case.

B. Deference to Administrative Bodies

Following its massive error regarding the burdens herein, *amici* segue into a minor one, claiming in its brief at 15 that the County "overlooks" that the Department's interpretation of statute is entitled to deference as it is the regulatory agency in charge of effectuating the same. In fact, the County is well aware of this principle, which supports the constitutionality of the Ordinance.

The Association overlooks the County's brief at 17, in which the County cites this principle and notes that the regulations the Department adopted pursuant to the statutory enactments now being scrutinized included WAC 173-308-030(6), providing for local regulation of biosolids pursuant to "local laws, regulations, and ordinances, including zoning and land use requirements." As the County argued at the time, the Department propounded this regulation "much closer to events than the Department's pleadings in this case – and when the Department wrote administrative code provisions enacting its interpretation of legislative intent, it provided for additional regulation of biosolids by local ordinance... Thus, it is the present position of the Department that violates legislative intent, not the Ordinance." County Brief at 17-18. As the County has already argued, the Department's present position opposes not just local ordinance, state legislative enactment, federal regulatory code, and federal law, but also its own regulations, and thus its present position contradicts its own previous position on what all those other laws mean.

C. "Other Laws Do Not Authorize a Biosolids Ban"

The argument that "other laws" have to "authorize" the County's exercise of its own police powers – *Amicus Brief* at 17 – gets things exactly backwards. Referring directly to the constitution of this state, we immediately see —and the County has already cited, at 9 of its brief – that the county derives its power from art. 11 §11: "Any county, city, town, or township may make and enforce within its limits all such local police,

sanitary and other regulations as are not in conflict with general laws." The County need wait for permission from no other entity before it enacts an ordinance. The fulsome and plenary nature of its police power has already been briefed and requires no belaboring here; the County merely notes that the argument of *amici* is based on an understanding of the law that is exactly the opposite of the law's true state.

D. Legislative History

Finally, *amici* err in their analysis of the legislative history of the biosolids statute. They do not dispute the Legislature struck from the bill a provision prohibiting local bans on the application of biosolids. That decision indisputably reflects the legislative intent to permit local bans of biosolids. However, *amici* claim that conclusion is overruled by the following note to the final bill:

> Technical amendments are made to clarify: the intent to maintain state primacy for the sludge management program...

S.B.Rep. on E.S.H.B. 2640, at 3, 52nd Leg. (Wash. 1992).

Focusing on the term "primacy," *amici* claim that the Legislature intended to enshrine the state's "primacy" over the cities and counties.

Amici misunderstand the bill report. Many federal environmental statutes, including the Clean Water Act (CWA), Safe Drinking Water Act (SDWA), and the Surface Mining Control and Reclamation Act (SMCRA), permit a state to achieve "primacy" over federal environmental

programs, meaning the state – rather than the applicable federal agency—administers the program:

> "The main purpose of the CWA is to 'restore and maintain the chemical, physical, and biological integrity of the nations waters' by reducing and eventually eliminating, the discharge of pollutants into these waters." To achieve these goals, the CWA contains a general prohibition on the "discharge of any pollutant," with certain statutorily defined exceptions. One of these exceptions is through compliance with a NPDES permit. NPDES permits are issued either directly by the U.S. EPA or by a state which has been granted ***primacy*** status to administer its own NPDES program. West Virginia has been granted authority to administer its own NPDES program, and permits in this state are issued by the DEP. [Citations omitted.][Emphasis added.]

Ohio Envtl. Coalition, Inc. v. Apogee Coal Co., *LLC*, 531 F.Supp.2d 747, 753 (S.D.W.Va. 2008). See also Southern Ohio Coal Co. v. Office of Surface Mining, Reclamation & Enforcement, 20 F.3d 1418, 1427-28 (6th Cir. 1994)("[The EPA] approved Ohio's NPDES permitting system including its bypass provision; Ohio is thus a primacy state"); Bath Petroleum Storage, Inc. v. Sovas, 309 F.Supp.2d 357, 366 (N.D.N.Y. 2004)("Under the SDWA's UIC program and corresponding regulations, a state may seek "primacy", that is, obtain approval for a UIC program and then oversee the program in that state."); Ohio Envtl. Coalition, Inc. v. Apogee Coal Co., LLC, 555 F.Supp.2d 640 (S.D.W.Va. 2008)(("The scheme under SMCRA is somewhat different [from the CWA]...Once a state receives "primacy" to administer its own program under [SMCRA], federal standards effectively 'drop out' in favor of the state regulations, which become operative law.").

The specific requirements for achieving state primacy in the administration of the Safe Drinking Water Act, for example, are stated at 40 C.F.R. §142, Subp. B, and are summarized in the EPA document "Requirements for State Primacy," maintained on the EPA website at the following link:

http://water.epa.gov/infrastructure/drinkingwater/pws/primacy.cfm

The Washington Legislature's staff is familiar with the use of the term "primacy" in the context of federal environmental legislation and has used it in other environmental bill reports, including the following passage in a report on the adoption of amendments to the Safe Drinking Water Act:

> Some of the proposed changes are necessary for the department to comply with the statutory mandate of "assur(ing) safe and reliable public drinking water and to protect the public health." Other changes will keep Washington state regulations consistent with federal law. Consistency is necessary for Washington state to retain ***primacy*** – state rather than federal oversight of drinking water systems. ...

WSR 98-20-108, Proposed Rules Department of Health (filed October 7, 1998), http://apps.leg.wa.gov/documents/laws/wsr/1998/20/98-20-108.htm (Emphasis added).

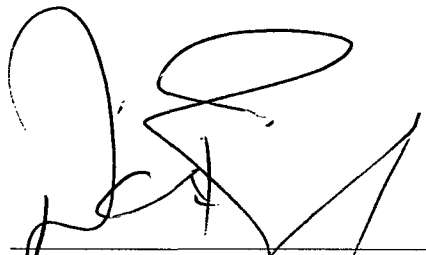
Thus, the reference in the final Washington biosolids bill report "to maintain[ing] state primacy for the sludge management program...," reflected the legislature's intent for state (Ecology) – rather than federal (EPA) – oversight of the biosolids portion of the Clean Water Act. The reference says nothing about Ecology's authority vis-à-vis local government. To the contrary, what we know about the Washington legislature's intent as to local government was the Legislature's clear and unequivocal striking from the bill of a provision prohibiting local bans on the application of biosolids. H.B. Rep. on HB 2640, 52nd Leg. Reg. Sess. (Wash. 1992), at 3. From that decision we know that the Legislature did ***not*** intend to restrict local government authority to regulate or even ban the application of Class B biosolids.

III. CONCLUSION

Amici herein misstate the burden of a challenger to a duly enacted ordinance, then go on to make arguments that would not sustain the lower burden they claim to have. The Department's own regulatory scheme shows that its contemporaneous interpretation of the law accords with the County's own interpretation and does not conflict with the Ordinance; the County need not wait for any other law to "authorize" it to exercise its own constitutionally-derived police power; and *amici*'s attempt to build a new jurisprudence out of the word "primacy" runs afoul of that term's own history and ends up only further bolstering the County's case. The argument surrounding the Association's brief leaves the court, if anything, with fewer cognizable reasons to invalidate the Ordinance than it had previously.

The County respectfully requests that the duly enacted County ordinance be upheld.

Respectfully submitted this 11th day of June, 2014.



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STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Appellant, v. WAHKIAKUM COUNTY, a political Subdivision of Washington State, Respondent.	NO. 44700-2-II CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, I certify that on the 10th day of June, 2014, I caused to be served a true and correct copy of the Motion to Strike Impermissible Additions to the Record in *Amicus Curiae* Brief of Northwest Biosolids Management Association, *et. al.*, and the Response to *Amicus Curiae* Brief of Northwest Biosolids Management Association, *et. al.*, in the above captioned matter upon the parties herein as indicated below, by U.S. Express Mail:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 10th day of June, 2014, at Cathlamet, Washington.

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