Case No. 92805-3

SUPREME COURT OF THE STATE OF WASHINGTON

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

Respondents,

vs.

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

Petitioners,

and

POLLUTION CONTROL HEARINGS BOARD

Respondent Below

SNOHOMISH COUNTY'S ANSWER TO STATE OF WASHINGTON DEPARTMENT OF ECOLOGY'S AND PUGET SOUNDKEEPER ALLIANCE, WASHINGTON ENVIRONMENTAL COUNCIL, AND ROSEMERE NEIGHBORHOOD ASSOCIATION'S PETITIONS FOR REVIEW

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I. INTRODUCTION

Snohomish County asks this Court to deny the Petitions for Review filed by the Washington State Department of Ecology ("Ecology") and Puget Soundkeeper Alliance, Washington Environmental Council, and Rosemere Neighborhood Association (collectively, PSA) in which Ecology and PSA (collectively, "Petitioners") seek review of the Court of Appeals decision *Snohomish County et al v. Pollution Control Hearings Bd. et al.*, No. 46378-4-II (Division II, Jan. 19, 2016) ("the Decision").

The Decision concerns a single sentence in the Phase I Municipal Stormwater Permit that requires permittees to apply newly adopted stormwater drainage regulations retroactively to pending permit applications and development permits already issued if such projects do not start construction by a certain date. That sentence places Phase I permittees in the difficult position of applying new stormwater drainage regulations to that specific subset of development projects in violation of state law or violating the terms of their Phase I Permit.

The Court of Appeals reversed the Pollution Control Hearings Board ("the Board") and correctly held that the disputed sentence improperly obligates Phase I permittees to apply stormwater drainage

regulations that exert a "restraining or directing influence of land use"[1] and "affect the physical aspects of development"[2] in a manner contrary to vesting statutes – RCW 19.27.095, RCW 58.17.033, and RCW 36.70B.180. The Court of Appeals also held that federal law does not preempt state vesting statutes.

Petitioners' argument that the Decision expanded vesting, resulting in an issue of significant public interest for this Court's resolution under RAP 13.4(b)(4) is unpersuasive. The Decision is firmly in line with controlling precedent and Petitioners do not identify any legislative intent to exclude stormwater drainage regulations from the application of statutory vesting. Petitioners are similarly mistaken that the Court of Appeals erred when it declined to find preemption. There is a strong presumption against preemption under Washington law and the federal-state partnership established by Congress does not justify preemption here. This issue does not merit review under RAP 13.4(b)(3).

The Decision is well-reasoned, thorough, and in line with precedent. Petitioners fail in their burden to convincingly meet the criteria for review in RAP 13.4(b)(3) or RAP 13.4(b)(4). Review by this Court is not warranted.

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[1] *Westside Business Park, LLC v. Pierce County*, 100 Wn. App. 599, 607, 5 P.3d 713, *review denied*, 141 Wn.2d 1023 (2000).
[2] *New Castle Investments v. City of LaCenter*, 98 Wn. App. 224, 237, 989 P.2d 569 (1999), *review denied*, 140 Wn.2d 1019 (2000).

II. IDENTITY OF RESPONDENT

Snohomish County, Respondent, asks that review be denied. If review is granted, the County asks the Court to review the additional issue identified below, which was not addressed by the Court of Appeals.

III. ADDITIONAL ISSUE

Does the challenged sentence in Special Condition S5.C.5.a.iii conflict with the land use doctrine of finality?

IV. STATEMENT OF THE CASE

A. The 2013-2018 Phase I Municipal Stormwater Permit

On August 1, 2012, Ecology issued the Phase I Permit under the Washington Water Pollution Control Law, chapter 90.48 RCW, and the National Pollutant Discharge Elimination System permitting program established by Section 402, 33 U.S.C. § 1342, of the Clean Water Act (CWA), 33 U.S.C. § 1251 *et seq.* The Phase I Permit's duration is August 1, 2013, to July 31, 2018. It authorizes the discharge of stormwater to surface and ground waters of the state from the municipal separate storm sewer systems (MS4s)[3] owned or operated by a permittee.[4]

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[3] Certified Appeal Board Record (CABR) at 003975-003976 ("An MS4 itself can be described as all the conveyances or systems of conveyances that are designed or used for collecting or conveying stormwater including roads with drainage systems, municipal streets, catch basins, curb gutters, ditches, manmade channels or storm drains."). Reference to the "CABR" is to the six digit bates numbered record certified by the Board and designated as clerk's papers. Reference to Clerk's Papers (CP) is to the documents filed with Thurston County Superior Court and designated as clerk's papers. The

The Phase I Permit contains numerous requirements imposed directly on permittees, as well as development standards that permittees must impose within their jurisdictions to regulate and control stormwater runoff from private and public new development, redevelopment, and construction activities, as described in Special Condition S5.C.5.[5] To that end, each Phase I permittee was required to adopt and make effective a local program of regulation, made up of ordinances and other enforceable documents, to meet the specific and detailed requirements for controlling stormwater drainage and runoff to the permittee's MS4 from development activities at the site and subdivision scale of development.[6]

At issue in the Decision, the Phase I Permit, Special Condition S5.C.5.a.iii, read in part as follows:

> No later than June 30, 2015, each Permittee shall adopt and make effective a local program that meets the requirements in S5.C.5.a.i through ii., above. *The local program adopted to meet the requirements of S5.C.5.a.i through ii shall apply to all applications[2] submitted after July 1, 2015 and shall apply to projects approved prior [to] July 1, 2015, which have not started construction[3] by June 30, 2020.*

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numbering of these two sets of documents overlaps and this naming convention is intended to avoid confusion.

[4] CABR at 003975.

[5] CABR at 003978-003979.

[6] CABR at 003982.

(Emphasis added, footnotes omitted.) On summary judgment, the Board directed Ecology to modify the emphasized sentence above by replacing the phrase "projects approved" with "application submitted" as follows:

> The local program adopted to meet the requirements of S5.C.5.a.i through ii shall apply to all applications submitted after July 1, 2015 and shall apply to *application* [sic] *submitted* prior [to] July 1, 2015, which have not started construction by June 30, 2020.[7]

B. Appeals of the 2013 Phase I Permit

Snohomish, King, Pierce and Clark Counties and the Building Industry Association of Clark County, timely appealed certain portions of the Phase I Permit to the Board.[8] The Board consolidated the five separate appeals of the Phase I Permit into one case, PCHB No. 12-093c.[9]

Various parties moved for summary judgment on the legality of the second sentence of Special Condition S5.C.5.a.iii. The Board granted summary judgment to Ecology and PSA.[10] The Board held, in part, that the local program stormwater drainage regulations that permittees must enact and enforce under Special Condition S5.C.5 are not "development regulations" or "land use control ordinances" and are not subject to the Washington land use law doctrines of vested rights and finality.[11]

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[7] CABR at 004011-004012 (emphasis added).
[8] CABR at 000210
[9] CABR at 000223.
[10] CABR at 004012.
[11] CABR at 003998-003999; 004007.

Trial occurred on the remaining issues. On March 21, 2014, the Board issued its final decision and order in the consolidated case.[12]

Snohomish County, King County, and the Building Industry Association of Clark County petitioned for review in Thurston County Superior Court, challenging the Summary Judgment Order.[13] Those appeals were consolidated.[14] Direct review was sought and the Board issued a Certificate of Appealability.[15] The Court of Appeals granted discretionary review on September 5, 2014. It published the Decision at issue here on January 19, 2016.

C. The Decision

The Court of Appeals held that the required stormwater drainage regulations that permittees must adopt and enforce in their jurisdictions for site and subdivision scale development projects are "land use control ordinances" and "development standards" or "development regulations" subject to the vested rights statutes – RCW 19.27.095, RCW 58.17.033, and RCW 36.70B.180. In so holding, the Court of Appeals ruled squarely in line with controlling precedent. The Court of Appeals further held that the CWA does not preempt Washington's vested rights statutes, noting the presumption against preemption and concluding that the application of

[12] CABR at 004046-004137.
[13] CP 12-165; CP 248-402; CP 413-581.
[14] CP 173-174.
[15] *See* CP 166-172; CP 403-410; CP 582-586; CP 175-184.

statutory vesting does not present an obstacle to the achievement of congressional objectives under the CWA.

The Court of Appeals reversed the Board and remanded to direct Ecology to revise Special Condition S5.C.5.a.iii to specify that the stormwater drainage regulations newly adopted by permittees apply only to those completed applications submitted after a permittee adopts the new stormwater drainage regulations, thereby harmonizing the relevant statutory schemes.

Ecology's and PSA's Petitions to this Court followed.

V. ARGUMENT WHY REVIEW SHOULD NOT BE ACCEPTED

The Court of Appeals correctly resolved the issues presented for review by Ecology and PSA. Petitioners fail to demonstrate the need for this Court's review under RAP 13.4(b)(3) or RAP 13.4(b)(4). The Petitions should be denied.

A. The Decision Did Not Expand Vesting and the Petitions Do Not Raise an Issue of Substantial Public Interest that Should be Determined by This Court

Both Ecology and PSA contend that the Decision expanded the vesting doctrine and that, because of this, an issue of significant public interest is presented for this Court's resolution under RAP 13.4(b)(4). Petitioners are mistaken. The Decision did not expand vesting and review by this Court is not warranted.

The analysis here must be informed by the manner in which the Court of Appeals resolved the underlying issue in this case. Because the Court of Appeals correctly resolved the issue raised by Petitioners in a well-reasoned decision within the bounds of existing precedent, the Petitions do not involve an issue of substantial public interest that warrants review by this Court.[16] The Decision did not expand vesting under RCW 19.27.095, RCW 58.17.033, or RCW 36.70B.180. Petitioners' expansion argument is unconvincing for a number of reasons.

First, the Decision is firmly in line with controlling precedent. The Court of Appeals carefully examined relevant case law,[17] applied the definition for the phrase "land use control ordinance" adopted by the courts,[18] and determined that the stormwater drainage regulations at issue here, which must be enforced for site and subdivision scale development projects, are subject to vesting under RCW 19.27.095 and RCW 58.17.033, consistent with stormwater drainage regulations previously

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[16] The parties sought, and the Court of Appeals granted, direct review under RCW 34.05.518. The question before this Court now is whether "*the petition* involves an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(4) (emphasis added). The prior request for, and the Court of Appeals' acceptance of, direct review is not determinative. If they were, any decision accepted for direct review under the Administrative Procedure Act would automatically warrant review by this Court.

[17] *Westside Business Park, LLC v. Pierce County*, 100 Wn. App. 599, 5 P.3d 713, *review denied*, 141 Wn.2d 1023 (2000); *New Castle Investments v. City of LaCenter*, 98 Wn. App. 224, 989 P.2d 569 (1999), *review denied*, 140 Wn.2d 1019 (2000); *Phillips v. King County*, 136 Wn.2d 946, 968 P.2d 871 (1998).

[18] *See New Castle*, 98 Wn. App. at 237; *see also Graham Neighborhood Ass'n v. F.G. Associates*, 162 Wn. App. 98, 115, *review denied*, 172 Wn.2d 1024 (2011).

examined by the courts.[19] The Court of Appeals further concluded that the regulations a Phase I permittee must adopt and enforce for site and subdivision scale development projects are also "development standard[s] or regulation[s]" as contemplated in RCW 36.70B.180 based on the plain language of the statute. Those conclusions are not an expansion of statutory vesting and Petitioners do not cite any cases that compel a different conclusion.[20]

Petitioners' contention that the purpose of a regulation, rather than the test announced in *New Castle*, controls whether it is subject to statutory vesting was appropriately rejected by the Court of Appeals. Petitioners fail to cite any authority in support of the novel proposition that the purpose of a regulation is dispositive and RCW 19.27.095, RCW 58.17.033, RCW 36.70B.180 and *New Castle* make no allowance for this "purpose only" analysis. If the legislature had intended to create an exception for regulations that further a specific purpose it could have done so. It did not. And the Court of Appeals pointed to numerous instances in which a

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[19] *See Westside*, 100 Wn.App. at 607; *Phillips*, 136 Wn.2d at 963.

[20] Ecology suggests that because it determines the types of stormwater drainage regulations that Phase I permittees must adopt, statutory vesting does not apply. First, whether Ecology directs a local jurisdiction to adopt particular stormwater drainage regulations makes no difference as to how those regulations impact the use of land relevant to the *New Castle* inquiry. Second, the Court of Appeals efficiently disposed of this line of reasoning when it distinguished *Citizens for Rational Shoreline Planning v. Whatcom County*, 172 Wn.2d 384, 258 P.3d 36 (2011), and observed that Ecology "cited no authority holding that the vested rights statutes do not apply to local regulations that are state mandated." Decision at 16.

regulation serving an environmental purpose was subject to vesting.[21] The Decision is firmly in line with controlling precedent.

Second, there is no legislative intent to exclude these stormwater drainage regulations from the application of statutory vesting. Petitioners argue that this Court should infer intent to override vesting in the Phase I Permit from a statute concerning the Phase II Permit[22] that does not mention vesting at all – RCW 90.48.260(3)(b)(i).[23] But what that statute provides is that two different provisions of the Phase II Permit must be implemented simultaneously and not before a certain date. It says nothing about curtailing the application of statutory vesting generally or in relation to Phase I Permit stormwater drainage regulations specifically. And if Ecology thought that RCW 90.48.260(3)(b)(i) was direction to disregard vesting, one has to ask why Ecology then ignored that direction and built in a five year period for development projects vested to older regulations to start construction to avoid the application of the new

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[21] *See* Decision at 14 ("Nothing in Washington case law suggests that simply characterizing a land use control ordinance as an environmental ordinance limits the application of the vested rights doctrine").

[22] *See* Ecology's Petition for Review at 15.

[23] RCW 90.48.260(3)(b)(i) provides:

> Provisions of the updated permit issued under (b) of this subsection relating to new requirements for low-impact development and review and revision of local development codes, rules, standards, or other enforceable documents to incorporate low-impact development principles must be implemented simultaneously. These requirements may go into effect no earlier than December 31, 2016, or the time of the scheduled update under RCW 36.70A.130(5), as existing on July 10, 2012, whichever is later.

stormwater drainage regulations so as to be "consistent with the accepted State approach to vesting."[24] Petitioners' assertion that RCW 90.48.260(3)(b)(i) evidences a Legislative directive to disregard vesting is unpersuasive.

Petitioners also contend that this Court should find legislative intent to exclude stormwater drainage regulations from statutory vesting in the Legislature's failure to affirmatively define these stormwater drainage regulations as subject to vesting. This assertion is contrary to the plain language of RCW 19.27.095, RCW 58.17.033, and RCW 36.70B.180, which provide that if a regulation is a "development standard or regulation" or a "land use control ordinance," then statutory vesting applies. Further, "the Legislature is presumed to be aware of judicial interpretation of its enactments and where statutory language remains unchanged after a court decision, the court will not overrule clear precedent interpreting the same statutory language."[25] If legislative silence means anything in this situation, it is that the Legislature found no fault with the decisions in *Westside* and *Phillips*, which control the

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[24] *See* Ecology's Response to Comments on the Municipal Stormwater Permits, dated August 1, 2012, as attached to the Declaration of Bill Moore. CABR at 001274 ("Ecology's permit requirements are consistent with the accepted State approach to vesting. ... Five years to begin construction is generally consistent with state vesting requirements.").

[25] *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 147, 94 P.3d 930 (2004) (*quoting Friends of Snoqualmie Valley v. King County Boundary Review Bd.*, 118 Wn.2d 488, 496-97, 825 P.2d 300 (1992)) (internal quotes omitted).

outcome here. The Washington legislature did not provide Ecology with express or implied authority to compel Phase I permittees to act contrary to clear statutory mandates found elsewhere in the Revised Code of Washington and it is not reasonable or consistent with the requirement to harmonize statutes to read RCW 90.48.260 in that manner.[26] Petitioners do not demonstrate legislative intent to depart from the thorough and well-reasoned conclusion reached by the Court of Appeals regarding the application of statutory vesting to stormwater drainage regulations.

The Court of Appeals did not expand the vesting doctrine and no review is warranted by this Court under RAP 13.4(b)(4).

B. The Decision Correctly Found No Preemption and the Petitions Do Not Identify a Significant Question of Law Under the U.S. Constitution

Petitioners next contend that the Court of Appeals improperly applied the Supremacy Clause when it held that the CWA does not preempt state statutory vesting. Petitioners did not meet their heavy burden of proving preemption before the Court of Appeals.[27] No

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[26] "The construction of two statutes shall be made with the assumption that the Legislature does not intend to create an inconsistency. Statutes are to be read together, whenever possible, to achieve a 'harmonious total statutory scheme... which maintains the integrity of the respective statutes.'" *State ex rel. Peninsula Neighborhood Ass'n v. Washington State Dept. of Transp.*, 142 Wn.2d 328, 342, 12 P.3d 134 (2000).

[27] *Stevedoring Services of America, Inc., v. Eggert*, 129 Wn.2d 17, 24, 914 P.2d 737 (1996) ("There is a strong presumption against preemption and 'state laws are not superseded by federal law unless that is the clear and manifest purpose of Congress.'").

significant question of law under the United States Constitution is presented and this Court should decline review under RAP 13.4(b)(3).

First, Petitioners fail to identify any direct conflict between the CWA and statutory vesting. The second sentence of Special Condition S5.C.5.a.iii is not part of the CWA, nor is it required by it. Instead, the provision is a permit requirement written by Ecology in its attempt to interpret and implement the CWA's mandate to reduce the discharge of pollutants to "the maximum extent practicable."[28] Nothing in the plain language of the CWA addresses applications for land development permits, vested property rights or dates by which property owners must start construction of their development projects. These requirements of the Phase I Permit simply are not contained in or mandated by the CWA.[29]

Second, Petitioners fail to demonstrate that statutory vesting is an obstacle to the CWA objectives. Petitioners contend that state law has no bearing on what is practicable, despite the federal-state partnership that Congress established to implement the CWA.[30] Courts have held that the

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[28] 33 USC § 1342(p)(3)(B)(iii).

[29] This is not the situation presented in *Northern Plains Resource Council v. Fidelity Exploration and Development Co.*, 325 F.3d 1155 (9th Cir. 2003), cited by PSA, wherein Montana attempted to exempt from the requirement to get an NPDES permit a class of dischargers that were obligated, under the plain language of the CWA, to get a permit. The court held that a state cannot create exemptions to the requirement to get an NPDES permit under the CWA. Here, the CWA does not direct the outcome sought by Ecology and PSA.

[30] *PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700, 703-04, 114 S.Ct. 1900 (1994) (discussing the different roles assigned to federal and state

term "maximum extent practicable" was intended by Congress to create a more flexible type of NPDES permit for MS4s, in recognition of the complex nature of MS4s and the difficulty of addressing polluted stormwater.[31] Ecology itself recognized the need for this flexibility by building into Special Condition S5.C.5.a.iii a five year period for development projects vested to older regulations to start construction to avoid the application of the new stormwater drainage regulations required in the Phase I Permit. Neither Ecology nor PSA explain why this five year allowance is practicable and does not frustrate the objectives of Congress under the CWA but simply aligning the second sentence of Special Condition S5.C.5.a.iii with state statutes governing those projects – the only approach that harmonizes the relevant statutes – triggers preemption. Further, courts must reject administrative constructions of a statute that are inconsistent with the statutory mandate or that frustrate legislative policy.[32] Here, that statutory mandate and policy provides that state laws

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agencies under the CWA); *City of Abilene v. U.S. Environmental Protection Agency*, 325 F.3d 657, 659 (5th Cir. 2003) (quoting *Arkansas v. Oklahoma*, 503 U.S. 91, 101, 112 S.Ct. 1046 (1992).

[31] *City of Abilene*, 325 F.3d at 659-660; *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1164-66 (9th Cir. 1999).

[32] *State of Nev. ex rel. Loux v. Herrington*, 777 F.2d 529, 531 (9th Cir. 1985). As the U.S. Supreme Court has cautioned, "[r]egardless of how serious the problem an administrative agency seeks to address...it may not exercise its authority in a manner that is inconsistent with the administrative structure that Congress enacted into law." *Brown & Williamson Tobacco Corp.*, 529 U.S. at 125 (citation omitted).

continue to govern the use and development of land. 33 U.S.C. § 1251(b) reads in pertinent part (emphasis added):

> 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* (including restoration, preservation, and enhancement) *of land* and water resources, and to consult with the Administrator in the exercise of his authority under this chapter.

Third, the cases cited by PSA are either distinguishable or support the conclusion reached in the Decision. *Rybachek v. U.S. EPA*, 904 F.2d 1276 (9th Cir. 1990) is not a municipal NPDES permit case and did not consider the phrase "maximum extent practicable." The court in *Rybachek* examined whether the requirement for settling ponds "are the best practicable control technology currently available (BPT) within the placer mining industry."[33] Whether a technology is BPT required analysis of: (1) the total cost of the technology in relation to effluent reduction benefits; (2) the age of equipment; (3) engineering aspects; (4) non-water quality environmental impacts; and (5) other factors as deemed appropriate.[34] PSA's quotation from *Defenders of Wildlife v. Babbitt*, 130 F.Supp.2d 121 (2001), which examined the phrase "maximum extent practicable" in the context of the Endangered Species Act, supports the Decision. Ecology does not have unbridled discretion in determining

[33] *Rybachek*, 904 F.2d at 1289.
[34] *Id.*

MEP. Ecology has a duty to impose standards "to the extent that it is feasible or possible."[35] As the Court of Appeals reasonably determined, it is not feasible, possible, or practicable for a Phase I permittee to be compelled by its Phase I Permit to regulate real property development in its jurisdiction contrary to state law governing that development.

No significant question of law under the United States Constitution is presented and this Court should decline review under RAP 13.4(b)(3).

VI. ADDITIONAL ISSUE – FINALITY

The issues identified by Petitioners do not merit review by this Court and review should be denied. Should this Court accept review, however, Snohomish County asks it to consider the additional basis in support of the Decision that the Court of Appeals did not reach, consistent with RAP 13.7(b). This additional issue concerns the land use doctrine of finality.[36]

The finality doctrine provides a property right to project applicants upon receipt of a final land use decision on a project permit application. Once a jurisdiction issues a project permit, that project permit becomes irrefutably valid if not challenged under the Land Use Petition Act

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[35] *Defenders of Wildlife*, 130 F.Supp.2d at 131.

[36] Decision at 19 ("Snohomish County also argues that compliance with condition S5.C.5.a.iii could require permittees to violate Washington's doctrine of finality of land use decisions for land use applications actually approved before January 1, 2015. Because we reverse based on the vested rights doctrine, we do not address this issue.").

(LUPA), chapter 36.70C RCW, within 21 days.[37] This strict time limit is a product of Washington's strong public policy favoring finality and certainty in land use decisions.[38] Such high value is placed on this finality and certainty that even if a project permit is issued erroneously or illegally, after LUPA's 21-day statute of limitations has passed, that project permit is deemed valid and cannot be challenged, revoked or amended.[39] The County cannot act as required in the second sentence of Special Condition S5.C.5.a.iii without running afoul of this body of law.

Finality also implicates statutes such as RCW 58.17.170 and RCW 58.17.140, which govern the duration of preliminary and final plat approvals. When a preliminary plat application has been approved, RCW 58.17.140(3)(a) establishes the time period during which the property owner may obtain final plat approval consistent with the approved preliminary plat.[40] A final plat shall be submitted for approval within seven years of the date of preliminary plat approval if the date of

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[37] *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 406, 120 P.3d 56 (2005).
[38] *Twin Bridge Marine Park, L.L.C. v. State Department of Ecology*, 162 Wn.2d 825, 843, 175 P.3d 1050 (2008); *James v. County of Kitsap*, 154 Wn.2d 574, 589, 115 P.3d 286 (2005); *Samuel's Furniture, Inc. v. State Department of Ecology*, 147 Wn.2d 440, 458, 54 P.3d 1194 (2002).
[39] *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 181, 4 P.3d 123 (2000); *Asche v. Bloomquist*, 132 Wn. App. 784, 795-96, 133 P.3d 475 (2006).
[40] *See* RCW 58.17.170 ("When the legislative body of the city, town or county finds that the subdivision proposed for final plat approval conforms to all terms of the preliminary plat approval, and that said subdivision meets the requirements of this chapter, other applicable state laws, and any local ordinances adopted under this chapter which were in effect at the time of preliminary plat approval, it shall suitably inscribe and execute its written approval on the face of the plat").

preliminary plat approval is on or before December 31, 2014; the final plat must be submitted for approval within five years of the date of preliminary plat approval if the date of preliminary plat approval is on or after January 1, 2015. Ecology's requirement in the second sentence of Special Condition S5.C.5.a.iii is inconsistent with this clear statutory language.

For example, a preliminary plat approved on November 6, 2014, would be valid for at least seven years from the date of preliminary plat approval and the project proponent would have until November 5, 2021, to construct infrastructure, such as roads and utilities, as shown on the preliminary plat and obtain final plat approval. This preliminary plat is entitled, by statute,[41] to treatment in a manner different than the Phase I permit directs the County to act in regard to that development approval.[42]

This obligation, as set forth in the second sentence of Special Condition S5.C.5.a.iii, to require approved projects to go back to the drawing board to be redesigned consistent with new stormwater drainage regulations if they have not "started construction" by June 30, 2020,

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[41] *See also* RCW 58.17.030 ("Every subdivision shall comply with the provisions of this chapter") and RCW 58.17.010 ("The legislature finds that the process by which land is divided is a matter of state concern and should be administered in a uniform manner by cities, towns, and counties throughout the state.").

[42] The same conclusion is reached regarding final plat approval given the final plat durations established in RCW 58.17.170(3)(a). RCW 58.17.170(3)(a) establishes the minimum duration for a final plat, which "shall be governed by the terms of approval of the final plat, and the statutes, ordinances, and regulations in effect at the time of approval under RCW 58.17.150(1) and (3)" for a period of seven years, if final plat approval is on or before December 31, 2014, and five years if final plat approval is on or after January 1, 2015.

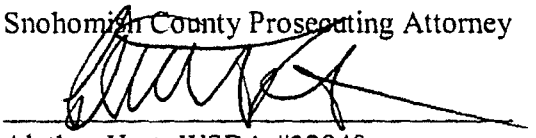
conflicts with specific legislative directives on the duration of approved project permits for preliminary and final plats and more broadly runs afoul of the doctrine of finality of land use decisions.

VII. CONCLUSION

This case does not merit review by the Supreme Court. The Decision of the Court of Appeals was well-reasoned, consistent with precedent, and appropriately harmonized relevant statutes. Petitioners' mischaracterization of the Decision as expanding statutory vesting does not raise any issue of substantial public interest that warrants review by this Court. Similarly, Petitioners fail to demonstrate that statutory vesting is an obstacle to the CWA that triggers preemption and thus fail to identify a significant question for this Court's resolution under the U.S. Constitution. Snohomish County respectfully requests that the Court reject Ecology's and PSA's Petitions for Review and let stand the Decision of the Court of Appeals.

Respectfully submitted this 18th day of March, 2016.

MARK K. ROE
Snohomish County Prosecuting Attorney



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CERTIFICATE OF SERVICE

I, Cindy Ryden, hereby certify that I am an employee of the Civil Division of the Snohomish County Prosecuting Attorney and that on this 18th day of March, 2016, I served a true and correct copy of Snohomish County's Answer to Petitions for Review upon the persons listed herein and by the following method indicated:

Parties of Record

Pollution Control Hearings Board: Diane L. McDaniel Sr. Assistant Attorney General Licensing & Administrative Law Division P.O. Box 40110 Olympia, WA 98504-0110	☒ ***E-Service:*** *dianem@atg.wa.gov* *Amyp4@atg.wa.gov* ☐ Facsimile: ☐ U.S. Mail ☐ Hand Delivery ☐ Messenger Service
Dept. of Ecology: Ronald L. Lavigne Attorney General of Washington Ecology Division P.O. Box 40117 Olympia, WA 98504-0117	☒ ***E-Service:*** *ronaldl@atg.wa.gov* *ecyolyef@atg.wa.gov* *donnaf@atg.wa.gov* ☐ Facsimile: (360) 586-6760 ☐ U.S. Mail ☐ Hand Delivery ☐ Messenger Service
King County: Devon Shannon Darren Carnell Joseph B. Rochelle Deputy Prosecuting Attorneys King County Prosecuting Attorney's Office 516 Third Ave., W400 Seattle, WA 98104	☒ ***E-Service:*** *devon.shannon@kingcounty.gov;* *darren.carnell@kingcounty.gov* *joe.rochelle@kingcounty.gov* *Mary.Livermore@kingcounty.gov* ☐ Facsimile: (206) 296-0191 ☐ U.S. Mail ☐ Hand Delivery ☐ Messenger Service

Pierce County & Coalition of Gov't Entities: Lori Terry Gregory Foster Pepper PLLC 1111 Third Ave., Ste. 3400 Seattle, WA 98101-3922 John Ray Nelson Foster Pepper PLLC U.S. Bank Bldg. West 422 Riverside Ave., Ste. 1310 Spokane, WA 99201-0302	☒ *E-Service: lori.terry@foster.com* ☐ Facsimile: (206) 749-2002 ☒ *U.S. Mail* ☐ Hand Delivery ☐ Messenger Service ☒ *E-Service:* *john.nelson@foster.com* *mccap@foster.com;* *ToveS@foster.com* ☐ Facsimile: (509) 777-1616 ☒ *U.S. Mail* ☐ Hand Delivery ☐ Messenger Service
Clark County: Christine M. Cook Christopher Horne Deputy Prosecuting Attorney Clark County Prosecuting Attorney's Office Civil Division P.O. Box 5000 Vancouver, WA 98666-5000	☒ E-Service: *Christine.cook@clark.wa.gov* *chris horne@clark.wa.gov* *Thelma.kremer@clark.wa.gov* ☐ Facsimile: (360) 397-2184 ☒ *U.S. Mail* ☐ Hand Delivery ☐ Messenger Service
BIA of Clark County: James D. Howsley Jordan Ramis PC 1499 SE Tech Center Pl., #380 Vancouver, WA 98664	☒ *E-Service:* *jamie.howsley@jordanramis.com* *lisa.mckee@jordanramis.com* *joseph.schaefer@jordanramis.com* ☐ Facsimile: (503) 598-7373 ☐ U.S. Mail ☐ Hand Delivery ☐ Messenger Service
Intervenor City of Seattle: Theresa R. Wagner Sr. Assistant City Attorney Seattle City Attorney's Office 701 Fifth Avenue, Suite 2050 Seattle, WA 98104-7097	☒ *E-Service:* *theresa.wagner@seattle.gov* *cynthia.michelena@seattle.gov* ☐ Facsimile: (206) 684-8284 ☒ *U.S. Mail* ☐ Hand Delivery ☐ Messenger Service

Intervenor City of Tacoma: Jon Walker Elizabeth A. Pauli City Attorney Tacoma City Attorney's Office 747 Market Street, Room 1120 Tacoma, WA 98402-3767	☒ ***E-Service:*** *jon.walker@ci.tacoma.wa.us* *epauli@ci.tacoma.wa.us* *tkropelnicki@ci.tacoma.wa.us* ☐ Facsimile: (253) 591-5755 ☒ ***U.S. Mail*** ☐ Hand Delivery ☐ Messenger Service
Puget Soundkeeper Alliance, Washington Environmental Council and Rosemere Neighborhood Association: Jan Hasselman Todd Dale True Janette K. Brimmer Earth Justice 705 Second Ave., Ste. 203 Seattle, WA 98104-1711	☒ ***E-Service:*** *jbrimmer@earthjustice.org* *ttrue@earthjustice.org* *jhasselman@earthjustice.org* *chamborg@earthjustice.org* ☐ Facsimile: (206) 343-1526 ☐ U.S. Mail ☐ Hand Delivery ☐ Messenger Service
Master Builders Association of King and Snohomish County Randall P. Olsen Cairncross & Hemplemann 524 2nd Avenue, Suite 500 Seattle, WA 98104-2323	☒ ***E-Service:*** *rolsen@cairncross.com* ☐ Facsimile: (206) 343-1526 ☐ U.S. Mail ☐ Hand Delivery ☐ Messenger Service

I declare under the penalty of perjury of the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

SIGNED at Everett, Washington, this 18th day of March, 2016.

Cindy Ryden, Legal Assistant

OFFICE RECEPTIONIST, CLERK

To: Ryden, Cynthia; 'McDaniel, Diane (ATG)'; 'Phipps, Amy (ATG)'; 'ronaldl@atg.wa.gov'; 'ecyolyef@atg.wa.gov'; 'donnaf@atg.wa.gov'; 'devon.shannon@kingcounty.gov'; 'darren.carnell@kingcounty.gov'; 'joe.rochelle@kingcounty.gov'; 'Mary.Livermore@kingcounty.gov'; 'lori.terry@foster.com'; 'john.nelson@foster.com'; 'mccap@foster.com'; 'toves@foster.com'; 'christine.cook@clark.wa.gov'; 'chris.horne@clark.wa.gov'; 'thelma.kremer@clark.wa.gov'; 'jamie.howsley@jordanramis.com'; 'lisa.mckee@jordanramis.com'; 'joseph.schaefer@jordanramis.com'; 'Wagner, Theresa'; 'Michelena, Cynthia A'; 'jon.walker@ci.tacoma.wa.us'; 'tkropelnicki@ci.tacoma.wa.us'; 'jbrimmer@earthjustice.org'; 'jhasselman@earthjustice.org'; 'chamborg@earthjustice.org'; 'epauli@ci.tacoma.wa.us'; 'Randall Olsen'; 'ttrue@earthjustice.org'
Cc: Hart, Alethea; Kisielius, Laura
Subject: RE: E-Filing for Supreme Court Case #92805-3; Snohomish County, et al. (Respondents) v. DOE (Petitioners and PCHB

Received 3-18-16

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Ryden, Cynthia [mailto:Cynthia.Ryden@co.snohomish.wa.us]
Sent: Friday, March 18, 2016 3:55 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>; 'McDaniel, Diane (ATG)' <DianeM@ATG.WA.GOV>; 'Phipps, Amy (ATG)' <AmyP4@ATG.WA.GOV>; 'ronaldl@atg.wa.gov' <ronaldl@atg.wa.gov>; 'ecyolyef@atg.wa.gov' <ecyolyef@atg.wa.gov>; 'donnaf@atg.wa.gov' <donnaf@atg.wa.gov>; 'devon.shannon@kingcounty.gov' <devon.shannon@kingcounty.gov>; 'darren.carnell@kingcounty.gov' <darren.carnell@kingcounty.gov>; 'joe.rochelle@kingcounty.gov' <joe.rochelle@kingcounty.gov>; 'Mary.Livermore@kingcounty.gov' <Mary.Livermore@kingcounty.gov>; 'lori.terry@foster.com' <lori.terry@foster.com>; 'john.nelson@foster.com' <john.nelson@foster.com>; 'mccap@foster.com' <mccap@foster.com>; 'toves@foster.com' <toves@foster.com>; 'christine.cook@clark.wa.gov' <christine.cook@clark.wa.gov>; 'chris.horne@clark.wa.gov' <chris.horne@clark.wa.gov>; 'thelma.kremer@clark.wa.gov' <thelma.kremer@clark.wa.gov>; 'jamie.howsley@jordanramis.com' <jamie.howsley@jordanramis.com>; 'lisa.mckee@jordanramis.com' <lisa.mckee@jordanramis.com>; 'joseph.schaefer@jordanramis.com' <joseph.schaefer@jordanramis.com>; 'Wagner, Theresa' <Theresa.Wagner@seattle.gov>; 'Michelena, Cynthia A' <Cynthia.Michelena@seattle.gov>; 'jon.walker@ci.tacoma.wa.us' <jon.walker@ci.tacoma.wa.us>; 'tkropelnicki@ci.tacoma.wa.us' <tkropelnicki@ci.tacoma.wa.us>; 'jbrimmer@earthjustice.org' <jbrimmer@earthjustice.org>; 'jhasselman@earthjustice.org' <jhasselman@earthjustice.org>; 'chamborg@earthjustice.org' <chamborg@earthjustice.org>; 'epauli@ci.tacoma.wa.us' <epauli@ci.tacoma.wa.us>; 'Randall Olsen' <ROlsen@Cairncross.com>; 'ttrue@earthjustice.org' <ttrue@earthjustice.org>
Cc: Hart, Alethea <Alethea.Hart@co.snohomish.wa.us>; Kisielius, Laura <Laura.Kisielius@co.snohomish.wa.us>
Subject: E-Filing for Supreme Court Case #92805-3; Snohomish County, et al. (Respondents) v. DOE (Petitioners and PCHB

Hello,

Attached please find Respondent Snohomish County's Answer to State of Washington Department of Ecology's and Puget Soundkeeper Alliance, Washington Environmental Council, and Rosemere Neighborhood Association's Petitions for Review in the above entitled matter. This document is being presented to the Supreme Court by:

Alethea M. Hart, WSBA #32840
Laura C. Kisielius, WSBA #28255
Deputy Prosecuting Attorneys
Attorneys for Snohomish County
(425) 388-6330

All other parties to this action will be served as indicated in our Declaration of Service as per their prior mutual agreements.

Thank you.

Cindy Ryden, Legal Asst., Civil Div.
Snohomish County Prosecutors
Attorneys for Respondents Snohomish County
3000 Rockefeller Ave., M/S 504, Everett, 98201
Tel: (425) 388-6385 / Fax: (425) 388-6333