

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON  
CLERK'S OFFICE

Apr 04, 2016, 2:40 pm

RECEIVED ELECTRONICALLY

NO. 92805-3

---

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; and  
PUGET SOUNDKEEPER ALLIANCE, WASHINGTON  
ENVIRONMENTAL COUNCIL, and ROSEMERE NEIGHBORHOOD  
ASSOCIATION

Petitioners,

and

POLLUTION CONTROL HEARINGS BOARD,

Respondent Below.

---

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY'S  
REPLY TO SNOHOMISH COUNTY'S ANSWER TO PETITION  
FOR REVIEW

---

ROBERT W. FERGUSON  
Attorney General

Ronald L. Lavigne  
Senior Counsel  
WSBA # 18550  
P.O. Box 40117  
Olympia, WA 98504-0117  
OID #91024



ORIGINAL

FILED AS  
ATTACHMENT TO EMAIL

**TABLE OF CONTENTS**

I. INTRODUCTION.....1  
II. ARGUMENT .....2  
III. CONCLUSION .....4

**TABLE OF AUTHORITIES**

**Cases**

*Puget Soundkeeper Alliance v. Dep't of Ecology*,  
Pollution Control Hearings Bd. (PCHB) Phase 1 Nos. 07-021,  
07-026 through -030, and 07-037, and Phase II Nos. 07-022, -023,  
Findings of Fact, Conclusions of Law and Order, Condition S4  
(Aug. 7, 2008)..... 4

**Statutes**

RCW 90.48.010 ..... 3  
RCW 90.48.260(3)(b)(i) ..... 4

**Rules**

RAP 13.4(b)..... 3  
RAP 13.4(b)(4) ..... 3  
RAP 13.4(d)..... 1

## I. INTRODUCTION

The Court of Appeals majority improperly expanded Washington's vested rights statutes to prevent the state of Washington from requiring municipalities to implement stormwater pollution controls necessary to meet state and federal water pollution control statutes. Despite the fact that no other reported case has ever held that Washington's vesting statutes dictate the timing of water pollution controls the state of Washington directs municipalities to implement, and despite legislative intent indicating that the timing of the stormwater pollution controls at issue in this case are not subject to the vesting statutes, Snohomish County argues that the divided Court of Appeals decision does not merit review by this Court. However, the County also requests that if this Court accepts review, it also consider Snohomish County's argument that the "finality doctrine" prevents Snohomish County from implementing stormwater controls necessary to meet state and federal water pollution control statutes. Pursuant to RAP 13.4(d), the State of Washington, Department of Ecology ("Ecology") files this reply.

As discussed below, Snohomish County's finality argument is simply an extension of its vested rights argument. The Court should accept review to reverse the divided opinion of the Court of Appeals that erroneously expanded Washington's vesting statutes to prevent the state of Washington from requiring local governments to manage municipal stormwater in a manner that protects Washington's waters from the adverse impacts of poorly managed municipal stormwater. Because Snohomish

County's argument regarding finality relies entirely on its arguments regarding vesting, it is not necessary for the Court to accept review of this additional issue. However, Ecology does not object to the Court accepting review of Snohomish County's additional issue because the same analysis that demonstrates the vesting statutes do not prevent the State from requiring local governments to implement stormwater pollution control requirements necessary to protect Washington's waters from the adverse impacts of poorly managed municipal stormwater, also demonstrates that the "finality doctrine" does not prevent local governments from implementing these necessary stormwater pollution control requirements.

## II. ARGUMENT

In its Court of Appeals briefing, Snohomish County argued the "doctrine of finality" prevented the County from requiring some development projects to implement stormwater controls necessary to protect Washington's waters from the adverse environmental impacts of poorly managed municipal stormwater. In particular, Snohomish County argued it would violate the "doctrine of finality" to require a development project to comply with updated stormwater controls if the developer applied for a development permit prior to July 1, 2015, but did not start construction by June 30, 2020, because the County "has no authority to unilaterally amend, alter or revoke an approved project permit." Snohomish County's Opening Brief at 31. Ecology responded to the County's argument by noting that the County would not need to amend, alter, or revoke a project permit if the County simply

conditioned the permit to require use of the updated stormwater controls unless the developer started construction by June 30, 2020. State of Washington, Department of Ecology's Response Brief at 28–30. In its reply, the County circled back to its vesting argument and argued it could not condition a permit in a manner that would be inconsistent with the vesting statutes. Snohomish County's Reply Brief at 22–23. In essence, the County conceded that its finality argument depended entirely on the validity of its vesting argument. The Court of Appeals did not address the County's finality argument. *Snohomish Cty. v. Pollution Control Hearings Bd.*, No. 46378-4-II at 19 n.10 (Wash. Ct. App. Jan. 19, 2016).

The County's finality argument is part of its vesting argument and is not an independent basis for review under RAP 13.4(b). However, the County's argument demonstrates that the interaction of Washington's water pollution control statute and land use laws, whether it be vesting or finality, is an issue of substantial public interest that should be determined by this Court. RAP 13.4(b)(4). According to Snohomish County, Washington's vesting statutes prevent the County from requiring developers that plan to discharge stormwater into the County's stormwater infrastructure from using stormwater controls necessary to protect Washington's waters from the adverse impacts of poorly managed municipal stormwater. If the County and Court of Appeals majority are correct, the Legislature's declared public policy to "insure the purity of all waters of the state" will not be met. RCW 90.48.010. Poorly managed municipal stormwater will continue to impair

Washington's waters and will continue to adversely impact "human health, salmon habitat, drinking water, and the shellfish industry."<sup>1</sup> In addition, the Legislature's directive that low impact development practices in municipal stormwater permits be "implemented simultaneously" with review and revision of local development codes will not be met. RCW 90.48.260(3)(b)(i).

This Court should accept review and reverse the erroneous conclusion by the Court of Appeals majority that expanded Washington's vesting statutes to prevent the state of Washington from requiring controls on municipal stormwater that are necessary to protect waters of the state from poorly managed municipal stormwater. Snohomish County's finality argument will be addressed by a ruling from this Court that Washington's vesting statutes do not control the timing of stormwater controls the state directs local governments to implement in order to comply with state and federal water pollution control statutes.

### III. CONCLUSION

The State of Washington, Department of Ecology respectfully requests that this Court accept review to clarify that Washington's vesting statutes do not apply to environmental requirements that the state directs local governments to implement in order to protect waters of the state, and meet the requirements of state and federal water pollution control laws. Because the vesting statutes do not apply to these state

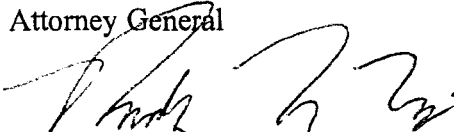
---

<sup>1</sup>*Puget Soundkeeper Alliance v. Dep't of Ecology*, Pollution Control Hearings Bd. (PCHB) Phase I Nos. 07-021, 07-026 through -030, and 07-037, and Phase II Nos. 07-022, -023, at 25 (FF 30), Findings of Fact (FF), Conclusions of Law (CL) and Order, Condition S4 (Aug. 7, 2008).

mandated water pollution controls, the “finality doctrine” does not prevent Snohomish County from issuing development permits with the conditions necessary to protect waters of the state from the adverse impacts of poorly managed municipal stormwater.

RESPECTFULLY SUBMITTED this 4<sup>th</sup> day of April, 2016.

ROBERT W. FERGUSON  
Attorney General



RONALD L. LAVIGNE, WSBA #18550  
Senior Counsel

Attorneys for Petitioner  
State of Washington,  
Department of Ecology  
P.O. Box 40117  
Olympia, WA 98504-0117  
(360) 586-6751  
*RonaldL@atg.wa.gov*



CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the state of Washington that on April 4, 2016, I caused to be served the Department of Ecology's Reply to Snohomish County's Answer to Petition for Review in the above-captioned matter upon the parties herein as indicated below:

ALETHEA HART  
LAURA KISIELIUS  
DEPUTY PROSECUTING ATTORNEYS  
SHONOMISH COUNTY PROSECUTING  
ATTORNEY'S OFFICE  
3000 ROCKEFELLER AVENUE, M/S 504  
EVERETT WA 98201-4046

[x] By Email:  
laura.kisielius@snoco.org;  
ahart@snoco.org  
cryden@snoco.org

JOSEPH B. ROCHELLE  
DEVON SHANNON  
DARREN CARNELL  
KING COUNTY PROSECUTING ATTORNEY'S  
OFFICE  
516 3RD AVENUE, ROOM W400  
SEATTLE, WA 98104

[x] By Email:  
Joe.rochelle@kingcounty.gov;  
Devon.shannon@kingcounty.gov;  
Darren.carnell@kingcounty.gov;  
Diana.cherberg@kingcounty.gov

JAMES HOWSLEY  
JORDAN RAMIS PC  
1499 SE TECH CENTER PL., SUITE 380  
VANCOUVER, WA 98683-9575

[x] By Email:  
Jamie.howsley@jordanramis.com  
Lisa.mckee@jordanramis.com  
Joseph.schaefer@jordanramis.com

JAN HASSELMAN  
JANETTE K. BRIMMER  
EARTHJUSTICE  
705 SECOND AVENUE, SUITE 203  
SEATTLE, WA 98104

[x] By Email:  
jhasselman@earthjustice.org;  
jbrimmer@earthjustice.org  
chamborg@earthjustice.org

DIONNE PADILLA-HUDDLESTON  
ASSISTANT ATTORNEY GENERAL  
LICENSING & ADMINISTRATIVE LAW DIVISION  
800 FIFTH AVENUE, STE. 2000,  
TB-14  
SEATTLE, WA 98104

[x] By Email:  
dionnep@atg.wa.gov  
katieb2@atg.wa.gov

Courtesy copies provided via email to:

Nancy Bainbridge Rogers  
Randall P. Olsen  
Attorneys for MBA

nrogers@cairncross.com  
rolsen@cairncross.com

Theresa Wagner  
Attorney for City of Seattle

Theresa.wagner@seattle.gov

Christopher D. Bacha  
Attorney for City of Tacoma

cbacha@ci.tacoma.wa.us  
tkropelnicki@ci.tacoma.wa.us

Lori Terry Gregory  
Attorney for Pierce County/Coalition

terrl@foster.com  
pricm@foster.com

Christine Cook  
Attorney for Clark County

Christine.cook@clark.wa.gov  
Thelma.kremer@clark.wa.gov

DATED this 4<sup>th</sup> day of April, 2016, at Olympia, Washington.

  
DONNA FREDRICKS, Legal Assistant

## OFFICE RECEPTIONIST, CLERK

---

**To:** Fredricks, Donna (ATG)  
**Cc:** Laura Kisielius; Althea Hart (ahart@snoco.org); Cindy Ryden; Joe Rochelle; Devon Shannon; Darren Carnell; Diana Cherberg; James Howsley (jamie.howsley@jordanramis.com); Lisa McKee; Joseph Schaefer; Jan Hasselman; Janette Brimmer; C. Hamborg; Padilla-Huddleston, Dionne (ATG); Mocer, Katie (ATG); nrogers@cairncross.com; rolsen@cairncross.com; Theresa Wagner (Theresa.wagner@seattle.gov); Chris Bacha; Tina Kropelnicki; lori.terry@foster.com; Molly Price (molly.price@foster.com); Christine M. Cook (Christine.cook@clark.wa.gov); Thelma Kremer (Thelma.Kremer@clark.wa.gov); Lavigne, Ronald (ATG)  
**Subject:** RE: Supreme Court No. 92805-3; Snohomish County, et al. v. Washington State Dept. of Ecology, et al.

Received 4-4-2016

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:** Fredricks, Donna (ATG) [mailto:DonnaF@ATG.WA.GOV]  
**Sent:** Monday, April 04, 2016 2:31 PM  
**To:** OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>  
**Cc:** Laura Kisielius <laura.kisielius@snoco.org>; Althea Hart (ahart@snoco.org) <ahart@snoco.org>; Cindy Ryden <cryden@snoco.org>; Joe Rochelle <joe.rochelle@kingcounty.gov>; Devon Shannon <devon.shannon@kingcounty.gov>; Darren Carnell <darren.carnell@kingcounty.gov>; Diana Cherberg <diana.cherberg@kingcounty.gov>; James Howsley (jamie.howsley@jordanramis.com) <jamie.howsley@jordanramis.com>; Lisa McKee <lisa.mckee@jordanramis.com>; Joseph Schaefer <joseph.schaefer@jordanramis.com>; Jan Hasselman <jhasselman@earthjustice.org>; Janette Brimmer <jbrimmer@earthjustice.org>; C. Hamborg <chamborg@earthjustice.org>; Padilla-Huddleston, Dionne (ATG) <DionneP@ATG.WA.GOV>; Mocer, Katie (ATG) <KatieB2@ATG.WA.GOV>; nrogers@cairncross.com; rolsen@cairncross.com; Theresa Wagner (Theresa.wagner@seattle.gov) <Theresa.wagner@seattle.gov>; Chris Bacha <cbacha@ci.tacoma.wa.us>; Tina Kropelnicki <tkropelnicki@ci.tacoma.wa.us>; lori.terry@foster.com; Molly Price (molly.price@foster.com) <molly.price@foster.com>; Christine M. Cook (Christine.cook@clark.wa.gov) <Christine.cook@clark.wa.gov>; Thelma Kremer (Thelma.Kremer@clark.wa.gov) <Thelma.Kremer@clark.wa.gov>; Lavigne, Ronald (ATG) <RonaldL@ATG.WA.GOV>  
**Subject:** Supreme Court No. 92805-3; Snohomish County, et al. v. Washington State Dept. of Ecology, et al.

Attached for filing in Case No. 92805-3, *Snohomish Cty., et al. v. Dep't of Ecology, et al.*, is the Department of Ecology's Reply to Snohomish County's Answer to Petition for Review, together with an attached Certificate of Service. Thank you for your attention to this matter.

*Donna Fredricks*

Legal Assistant  
[donnaF@atg.wa.gov](mailto:donnaF@atg.wa.gov)  
(360) 586-4617

Document filed on behalf of  
Ronald L. Lavigne, Senior Counsel, WSBA #18550 ([ronaldl@atg.wa.gov](mailto:ronaldl@atg.wa.gov))

Office of the Attorney General  
Ecology Division  
P.O. Box 40117  
Olympia, WA 98504-0117  
(360) 586-6751