

No. 92805-3

Case No. 46378-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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

Petitioners/Appellants Below

vs.

POLLUTION CONTROL HEARINGS BOARD and
WASHINGTON STATE DEPARTMENT OF ECOLOGY, PUGET
SOUNDKEEPER ALLIANCE, WASHINGTON ENVIRONMENTAL
COUNCIL, ROSEMERE NEIGHBORHOOD ASSOCIATION

Respondents/Respondents Below

SNOHOMISH COUNTY'S REPLY BRIEF

MARK K. ROE

Snohomish County Prosecuting Attorney

Alethea Hart, WSBA #32840

Laura C. Kisielius, WSBA #28255

Deputy Prosecuting Attorneys

Robert J. Drewel Bldg., 8th Floor, M/S 504

3000 Rockefeller Avenue

Everett, Washington 98201-4046

(425)388-6330 Fax: (425)388-6333

ahart@snoco.org

laura.kisielius@snoco.org

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I. INTRODUCTION

Both the Washington State Department of Ecology (“Ecology”) and the Puget Soundkeeper Alliance, Washington Environmental Council, and Rosemere Neighborhood Association (collectively, PSA) assert that Snohomish County seeks expansion of the vesting doctrine. This is not true. The County describes existing statutory vesting law and articulates the conflict between that law and the second sentence of Special Condition S5.C.5.a.iii of the Phase I Municipal Stormwater Permit (“Phase I Permit”), as well as conflict with the land use doctrine of finality. Although Ecology and PSA amass a number of arguments for why vesting is inapplicable, all suffer from legal and/or logical flaws.

The underpinning of Ecology’s and PSA’s arguments is that the stormwater regulations the County is required by Ecology to adopt can either satisfy the Phase I Permit requirements or constitute land use control ordinances, but not both. That underpinning is a legal fallacy. Here, the County is required to comply with two regulatory frameworks, one under the federal Clean Water Act, 33 USC § 1251 *et seq.* (CWA) and the Washington Pollution Control Act, chapter 90.48 RCW (WPCA), and one under statutory vested rights provisions. It is possible for the County to regulate development consistent with both regulatory frameworks by eliminating language from Special Condition S5.C.5.a.iii that directs the

County to violate the clear language of state statutes. This is the only outcome that harmonizes the statutes by which the County must abide.

II. ARGUMENT

A. Purpose is Not Controlling

If a regulation constitutes a “land use control ordinance” or “development regulation” as provided in RCW 58.17.033, RCW 19.27.095, or RCW 36.70B.180, vesting applies. The purpose of the regulation is not controlling. The County does not disagree with Ecology and PSA that the purpose of the CWA and the WPCA is to control water pollution. However, the purpose of those laws is not at issue here. What is at issue are the methods being employed to further that purpose.

The method Ecology utilizes in Special Condition S5.C.5 of the Phase I Permit is to require permittees to use their police power to regulate the use and development of land on the individual permit application level. Permittees must revise their local development regulations to, among other things, mandate the use of low impact development (LID) in development projects. The Phase I Permit defines LID as “a stormwater and land use management strategy...”¹ Regardless of the Phase I Permit’s ultimate purpose or objective (or the purposes of its authorizing statutes), the Phase I Permit clearly requires permittees to adopt land use regulations.

¹ CABR at 005052 (emphasis added).

Both Ecology and PSA rely on this Court's decision in New Castle Investments v. City of LaCenter, 98 Wn.App. 224, 989 P.2d 569 (1999), review denied, 140 Wn.2d 1019 (2000), to support their contention that the stormwater regulations Phase I permittees must adopt and enforce are not land use controls subject to vesting. Both contend that it is the "source" or "purpose" of a regulation that governs whether something is a "land use control ordinance" and that the actual effect on the use and development of land from the regulations to be adopted by permittees must simply be ignored. New Castle does not stand for that proposition.

New Castle held that RCW 58.17.033 does not apply to transportation impact fees (TIFs) because those do not fall within the definition of a "land use control ordinance."² In so holding, this Court examined the statutory language, definitions, legislative intent, the nature of the vested rights doctrine, and the nature of the impact fee. In particular, this Court noted,

The TIFs do not affect the physical aspects of development (i.e., building height, setbacks, or sidewalk widths) or the type of uses allowed (i.e., residential, commercial, or industrial). If they did, then TIFs would be subject to the vested rights doctrine. In other words, "[the developer] is not being forced to use its land or build differently from that which [the developer] was able to do at the time its plans were approved.... Instead, the cost is increased."³

² New Castle, 98 Wn. App. at 226.

³ Id. at 237 (quoting Lincoln Shiloh Assoc. LTD v. Mukilteo Water District, 45 Wn. App. 123, 128, 724 P.2d 1083, review denied, 107 Wn.2d 1014 (1986)).

Far from ignoring the effect of the TIFs on the use and development of land, this Court attached particular importance to that consideration. Clearly significant was the fact that impact fees had no discernable impact on the use of land, were revenue raising devices, and were “not intended to regulate the particular development.”⁴

But that is precisely what is intended here. Phase I permittees must use their police power authority to adopt regulations specifically designed to regulate particular developments to control the use and development of land in a way that will decrease water pollution.⁵ PSA concedes that there is “of course” some effect on physical aspects of development,⁶ but asks this Court to simply disregard this reality in favor of a strict “purpose only” test that is not consistent with New Castle or this

⁴ Id. at 236.

⁵ One “physical aspect of development” particularly noted by this Court in New Castle – setbacks – is addressed numerous times in the Phase I Permit, as incorporated by reference through the Stormwater Management Manual for Western Washington (Manual). For example, the design criteria for dispersion trenches state: “maintain a setback of at least 5 feet between any edge of the trench and any structure or property line.” CABR at 005661. Concerning detention ponds, the Manual provides: “[a]ll facilities must be a minimum of 50 feet from the top of any steep (greater than 15%) slope.” CABR at 005675. Landscaping in stormwater tracts must follow these guidelines: “[t]he landscaped islands should be a minimum of six feet apart, and if set back from fences or other barriers, the setback distance should also be a minimum of 6 feet. Where tree foliage extends low to the ground, the six feet setback should be counted from the outer drip line (estimated at maturity).” CABR at 005676-77. Setbacks for presettling basins for pretreatment are as follows: “[a]ll facilities shall be a minimum of 20 feet from any structure, property line, and any vegetative buffer required by the local government. All facilities shall be 100 feet from any septic tank/drainfield (except wet vaults shall be a minimum of 20 feet).” CABR at 005927-28; see also CABR 006031 (similar requirements for basic and large wetponds).

⁶ PSA’s Opening Brief at 15, 1 and 19.

Court's decision in Westside Business Park, LLC v. Pierce County, 100 Wn. App. 599, 607, 5 P.3d 713, review denied, 141 Wn.2d 1023 (2000), a decision both PSA and Ecology mischaracterize.

PSA's and Ecology's assertion that Westside neither controls nor informs this matter is without merit. Westside, in holding that the developer did vest its intended use to the storm water drainage ordinances in effect at the time of application,⁷ held that "[s]torm water drainage ordinances are land use control ordinances."⁸

PSA and Ecology attempt to limit the holding of Westside to an inquiry into the adequacy of a development application only. But this Court in Westside would not have reached the issue of application adequacy without first determining that the storm water drainage ordinance was a land use control to which one could vest – an essential component of the controversy in that case.⁹ So, although it is correct to state that this Court in Westside was looking ultimately at the adequacy of the application, had this Court determined that the storm water drainage code was not a land use control ordinance, it would have followed that one could not vest to it and this Court would not have reached the adequacy

⁷ Westside, 100 Wn. App. at 609.

⁸ Id. at 607; see also Phillips v. King County, 136 Wn.2d 946, 963, 968 P.2d 871 (1998).

⁹ Westside, 100 Wn. App. at 606-608 ("The County further argues that storm water drainage ordinances are not land use control ordinances because they are not zoning ordinances and do not regulate the 'division of land, such as density and minimum lot size restrictions.' ... Storm water drainage ordinances are land use control ordinances.")

question. This Court should reject attempts to narrow the holding in Westside.

B. Citizens for Rationale Shoreline Planning Does Not Mention Vested Rights

The County's development regulations are subject to Washington's vested rights doctrine, regardless of the mandate under which they are adopted. Ecology asserts that any development regulations adopted by the County pursuant to Special Condition S5.C.5 constitute a state program not subject to the vested rights doctrine. It relies on Citizens for Rational Shoreline Planning v. Whatcom County, 172 Wn.2d 384, 258 P.3d 36 (2011), for support. But Citizens for Rational Shoreline Planning does not even mention the vested rights doctrine, and cannot reasonably be interpreted to exempt stormwater drainage regulations from vesting.

In Citizens for Rational Shoreline Planning, property owners argued that Whatcom County's Shoreline Master Program (SMP) contained regulations that violated RCW 82.02.020's prohibition on taxes, fees or charges imposed on certain types of development. Ecology intervened on behalf of Whatcom County, arguing that RCW 82.02.020 only applied to local regulations, and not state regulations. Ecology asserted that an SMP adopted under the Shoreline Management Act, chapter 90.58 RCW (SMA), constitutes a "product of state action" not

subject to RCW 82.02.020 because “the SMA governs nearly every aspect of the adoption and amendment of SMPs.” The Court agreed, finding the SMA “creates a comprehensive statutory framework dictating that Ecology retains control over the final contents and approval of SMPs.”¹⁰ Therefore, an SMP consists of state regulations and not local regulations to which the RCW 82.02.020 prohibition on taxes, fees or charges applies.

Ecology argues that stormwater regulations adopted by a local jurisdiction to comply with Special Condition S5.C.5.a of the Phase I Permit similarly are the product of state action.¹¹ It then makes an inferential leap that just because the County’s stormwater regulations are developed with state oversight, they cannot be a land use control or subject to the statutory vesting doctrine. Ecology’s argument stretches the holding of Citizens for Rational Shoreline Planning beyond reason.

The holding of Citizens for Rational Shoreline Planning turned on the specific statutory language of RCW 82.02.020¹² and whether shoreline regulations adopted under the SMA were subject to that statute. Looking at the plain language of RCW 58.17.033, RCW 19.27.095, and RCW 36.70B.180, those statutes do not turn on whether a land use control

¹⁰ Citizens for Rational Shoreline Planning, 172 Wn.2d at 391.

¹¹ If the County’s stormwater regulations are deemed a “product of state action,” Orion Corporation v. State applies. 109 Wn.2d 621, 747 P.2d 1062 (1987). Under Orion, the State will be liable for state-imposed violations of the vested rights doctrine.

¹² RCW 82.02.020 (“... no county, city, town, or other municipal corporation shall impose any tax, fee, or charge, either direct or indirect ...”).

ordinance or development standard or regulation was adopted by local initiative or at the direction of the state. Ecology cites no case law to the contrary. Further, local development regulations that are the product of state action are subject to Washington's vested rights doctrine.¹³ Ecology's reliance on Citizens for Rational Shoreline Planning is misplaced.

C. Police Power Cannot Unsettle Statutory Vesting

Ecology and PSA suggest that Phase I permittees need only employ police power authority under article XI, section 11 of the Washington State Constitution¹⁴ to render vesting inapplicable (and newly enacted stormwater regulations applicable) to certain development applications submitted prior to the effective date of the updated regulations. Ecology and PSA misapprehend the scope of police power.

A local regulation that conflicts with state law fails in its entirety.¹⁵ An ordinance conflicts with state law and is unconstitutional if "it (1) prohibits what the state law permits, (2) thwarts the legislative purpose of the statutory scheme, or (3) exercises power that the statutory scheme did

¹³ See Buechel v. State Dept. of Ecology, 125 Wn.2d 196, 206-207 n.35, 884 P.2d 910 (1994), overruled on other grounds by Potala Village Kirkland, LLC v. City of Kirkland, 183Wn. App. 191, 334 P.3d 1143 (2014) and Talbot v. Gray, 11 Wn. App. 807, 525 P.2d 801 (1974), overruled on other grounds by Potala Village, 183Wn. App. 191.

¹⁴ "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."

¹⁵ Adams v. Thurston County, 70 Wn.App. 471, 482, 855 P.2d 284 (1993).

not confer on local governments.”¹⁶ Were the County to adopt regulations negating the intended operation of RCW 58.17.033, RCW 19.27.095, RCW 36.70B.180, RCW 58.17.140 or RCW 58.17.170, those regulations would be contrary to state law and therefore unconstitutional because they would be in conflict with general laws of the state by prohibiting that which state law permits.

Ecology’s citation to Hass v. City of Kirkland, 78 Wn.2d 929, 481 P.2d 9 (1971) for the test for evaluating the reasonableness of police power fails to recognize that Court’s clear reference to the rule that a local regulation that conflicts with state law must fail.¹⁷ In fact, neither Ecology nor PSA address the clear statutory scheme applicable to the County in their police power arguments.

Ecology cites Rhod-A-Zalea & 35th, Inc. v. Snohomish County, 136 Wn.2d 1, 959 P.2d 1024 (1998) for the proposition that Phase I permittees have police power authority to require compliance with newly adopted stormwater regulations regardless of vesting. Rhod-A-Zalea does not stand for this proposition. The vested rights doctrine, which is applicable only to permit applications, had nothing to do with the question before the Court in Rhod-A-Zalea.

¹⁶ Dep’t of Ecology v. Wahkiakum County, 337 P.3d 364, 367, 2014 WL 5652318 (2014).

¹⁷ Ecology’s Response Brief at 24; Hass, 78 Wn.2d at 932.

This immunity from regulations adopted subsequent to the time of vesting pertains *only* to the right to establish the development. Thus, pursuant to the ‘vested rights doctrine’ a permit is considered under the rules in effect at the time of the permit application. This situation is not before the court.^[18]

Further, the matter before this Court does not deal with nonconforming uses. A nonconforming use is “a use which lawfully existed prior to the enactment of a zoning ordinance, and which is maintained after the effective date of the ordinance, although it does not comply with the zoning restrictions applicable to the district in which it is situated.”¹⁹ The vesting issue here pertains to development applications, not established uses in zones that no longer allow such uses. Rhod-A-Zalea is not relevant to the vested rights issues here. The Westside Court similarly determined that Rhod-A-Zalea has no impact on a case involving statutory vesting.²⁰

Similarly off point, PSA suggests that Ecology “could require jurisdictions to establish standards for completion of a permit application such that vesting would not even be triggered under state law unless certain conditions were met.”²¹ PSA fails to address case law that suggests such an approach is legally problematic.

¹⁸ Rhod-A-Zalea, 136 Wn.2d at 16 (citation omitted; emphasis in original).

¹⁹ Rhod-A-Zalea, 136 Wn.2d at 6.

²⁰ Westside, 100 Wn. App. at 608.

²¹ PSA’s Opening Brief at 20.

In Adams v. Thurston County, 70 Wn.App. 471, 855 P.2d 284 (1993), this Court addressed whether Thurston County’s interpretation of its ordinance impermissibly conflicted with RCW 58.17.033. Thurston County asserted that an application was not complete for purposes of vesting until completion of a final environmental impact statement (EIS) under the State Environmental Policy Act, chapter 43.21C RCW (SEPA).²² This Court found impermissible conflict, noting that RCW 58.17.033 “requires vesting, in all cases, when the application is filed” and further noting that RCW 58.17.033 “does not permit Thurston County to define ... a fully completed application as including a final EIS.”²³

It is clear that the Legislature in granting authority to local government to define the requirements for a completed application did not intend for local governments to add contingent requirements, not determinable at the time the application is filed and not within the control of the proponent of the project.^[24]

Similarly, West Main Associates v. City of Bellevue, 106 Wn.2d 47, 720 P.2d 782 (1986), held that Bellevue acted contrary to law when it adopted an ordinance requiring the accomplishment of eight separate steps, including approval of variances and issuance of shoreline substantial development permits, before a developer could file a building permit

²² Adams, 70 Wn.App. at 478.

²³ Id. at 479.

²⁴ Id.

application and vest.²⁵ The Court concluded that “Bellevue has misused its power by denying developers the ability to determine the ordinances that will control their land use.”²⁶

The County cannot use its police power authority to deliberately undermine the applicability of controlling state statutes. Ecology’s and PSA’s suggestions to the contrary are without merit.

D. Ecology Does Not Have Complete Authority over Timing

Ecology asserts that RCW 90.48.260(1)(a)(i) gives it complete authority over “timing.” RCW 90.48.260(1)(a)(i) provides that Ecology shall have complete authority to establish and administer a comprehensive waste discharge or pollution discharge elimination permit program and that program elements may include “effluent treatment and limitation requirements together with timing requirements related thereto...” Assuming *arguendo* that the “timing” referenced in RCW 90.48.260(1)(a)(i) encompasses the issue presented here, Ecology’s assertion of complete authority in this regard fails in light of statutory construction rules.

²⁵ West Main, 106 Wn.2d at 49, 53 (“The City delays the vesting point until well after a developer first applies for City approval of a project, and reserves for itself the almost unfettered ability to change its ordinances in response to our vesting doctrine’s protection of a citizen’s constitutional right to develop property free of the ‘fluctuating policy’ of legislative bodies.”).

²⁶ Id. at 53.

A specific statute prevails over a general one where the two cannot be harmonized.²⁷

It is a fundamental rule that where the general statute, if standing alone, would include the same matter as the special act and thus conflict with it, the special act will be considered as an exception to, or qualification of, the general statute, whether it was passed before or after such general enactment.^[28]

Ecology's generic control over "timing" must yield in the face of conflicting and specific laws regarding vesting set forth in RCW 58.17.033, RCW 19.27.095, and RCW 36.70B.180 and, for example, the duration of subdivision approvals in RCW 58.17.140 and RCW 58.17.170. To the extent the subject matter of these statutes overlaps with that of RCW 90.48.260(1)(a)(i), which is precisely Ecology's contention (and is made clear in the language of the Phase I Permit)²⁹ the rules of statutory

²⁷ Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council, 165 Wn.2d 275, 309, 197 P.3d 1153 (2008).

²⁸ Residents Opposed, 165 Wn.2d at 309 (quoting Wark v. Wash. Nat'l Guard, 87 Wn.2d 864, 867, 557 P.2d 844 (1976)). See also Parkland Light & Water Co. v. Tacoma-Pierce County Board of Health, 151 Wn.2d 428, 433, 90 P.3d 37 (2004) (holding that "broad" statutory authority of local boards of health over all matters pertaining to the preservation of life and health of the people in its jurisdiction did not authorize the local board of health "to act in areas where the legislature has made a more specific delegation of authority to another agency.").

²⁹ See e.g., Section 3.2 of Appendix 1 of the Phase I Permit (regulating "new development") (CABR at 005067) and the definition of "new development," (CABR at 005053 and 005060) ("New Development" means land disturbing activities, including Class IV-General Forest Practices that are conversions from timber land to other uses; structural development, including construction or installation of a building or other structure; creation of hard surfaces; and subdivision, short subdivision and binding site plans, as defined and applied in chapter 58.17 RCW") (emphasis added).

construction require that the specific statutes, such as RCW 58.17.033 or RCW 58.17.140, control over the general one, RCW 90.48.260(1)(a)(i).

E. SEPA Substantive Authority to Impose Conditions is Limited

Both Ecology and PSA appear to suggest that SEPA authority provides a mechanism for bypassing vesting and imposing stormwater regulations consistent with the second sentence of Special Condition S5.C.5.a.iii. While the County does not dispute that RCW 58.17.033 and RCW 19.27.095 specifically exempt conditions imposed under SEPA, the means by which such conditions may be imposed preclude their use as suggested by Ecology and PSA.

“Both SEPA conditioning and denial of proposed action must be based upon formally designated agency SEPA policies.”³⁰ The County has designated such SEPA policies.³¹ While the County can use its SEPA authority to condition development approvals to designated regulations in effect when the development application vests, the County cannot use SEPA as a back-door means to uniformly apply yet-to-be adopted stormwater regulations to development applications without identifying specific adverse environmental impacts from each development.

³⁰ THE WASHINGTON STATE ENVIRONMENTAL POLICY ACT: A LEGAL AND POLICY ANALYSIS, Richard L. Settle, § 18.01[2] (2012) at pg. 18-11; RCW 43.21C.060; WAC 197-11-660(1)(a); see also Adams, 70 Wn. App. at 481, n. 11 and Victoria Tower Partnership v. City of Seattle, 49 Wn. App. 755, 761, 745 P.2d 1328 (1987) (any condition would have to be based on SEPA policies adopted at the time of vesting).

³¹ See Snohomish County Code Section 30.61.230.

F. There is No Preemption Here

Ecology and PSA both assert that state land use laws are preempted and must give way because those state laws stand as obstacles to accomplishing the purposes and objectives of Congress under the CWA.³² PSA and Ecology argue that because the second sentence of Special Condition S5.C.5.a.iii is mandated by the CWA, the doctrine of federal preemption requires that any conflict between Washington land use law and the second sentence of Special Condition S5.C.5.a.iii must be resolved in favor of the second sentence of Special Condition S5.C.5.a.iii. This argument fails because it rests on an inaccurate premise. Namely, PSA and Ecology incorrectly assume the second sentence of Special Condition S5.C.5.a.iii is required by the CWA. That is not true. What the CWA requires of Phase I permits is that discharges of pollutants be reduced to the “maximum extent practicable.”³³ The undefined statutory term “maximum extent practicable” does not require Ecology to issue a Phase I Permit that conflicts with Washington land use law. Instead, the “maximum extent practicable” (MEP) standard of the CWA can and should be interpreted to harmonize with Washington land use law. Where there is no conflict, there is no preemption.

³² PSA’s Opening Brief at 28-30; Ecology’s Response Brief at 26-28.

³³ 33 USC § 1342(p)(3)(B)(iii).

1. The CWA Does Not Preempt the Field of Land Use Law

As discussed above, land use regulations are police power regulations. The federal government does not have general police powers; police power is instead a province of the states.³⁴ The default position for a court analyzing questions of federal preemption is “the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”³⁵ Thus, there is a strong presumption that Congress did not intend to preempt state land use law. This presumption is confirmed by the structure and language of the CWA and related federal case law.

Congress established a federal-state partnership for implementing the CWA.³⁶ The U.S. Supreme Court has described the CWA as “a program of cooperative federalism,” pursuant to which Congress offers states the choice of regulating activity according to federal standards or of having state law pre-empted by direct federal regulation.³⁷ Congress expressed a strong preference for state implementation of the CWA. 33 USC § 1251(b) provides that “[i]t is the policy of Congress that the

³⁴ U.S. v. Lopez, 514 U.S. 549, 564 & 566, 115 S.Ct. 1624 (1995).

³⁵ City of Milwaukee v. Illinois and Michigan, 451 U.S. 304, 316, 101 S.Ct. 1784 (1981) (citations omitted).

³⁶ 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 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)).

³⁷ New York v. U.S., 505 U.S. 144, 167, 112 S.Ct. 2408 (1992).

States...implement the [NPDES] permit progra[m].”³⁸ States implementing the NPDES permit program do so using authority established in state law.³⁹ Thus, far from preempting state law, the CWA expressly contemplates that state law will play a significant role in implementing the NPDES permitting program.⁴⁰ The U.S. Supreme Court instructs that “[w]here the Government has provided for collaboration the courts should not find conflict.”⁴¹

Further, the plain text of the CWA provides that state laws regarding the development and use of land are not preempted. 33 USC § 1251(b) reads, in pertinent part, as follows (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.

Thus, by the plain language of the CWA, Congress provided that state laws continue to govern the use and development of land. This

³⁸ National Ass’n of Homebuilders v. Defenders of Wildlife, 551 U.S. 644, 650, 127 S.Ct. 2518 (2007).

³⁹ Akiak Native Community v. U.S. Environmental Protection Agency, 625 F.3d 1162, 1164-65 (9th Cir. 2010) (discussing the State of Alaska’s application to administer the NPDES permit program); see also Russian River Watershed Protection Committee v. City of Santa Rosa, 142 F.3d 1136 (9th Cir. 1999) (evaluating claimed violation of NPDES permit issued under California’s Porter-Cologne Water Control Act); 33 USC § 1342(b).

⁴⁰ National Ass’n of Homebuilders, 551 U.S. at 650.

⁴¹ Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117, 137, 94 S.Ct. 383 (1973) (quoting Union Brokerage Co. v. Jensen, 322 U.S. 202, 209, 64 S.Ct. 967 (1944)).

Congressional policy is in accord with general principles of federalism, pursuant to which states have long been given primacy in the area of land use and real property law. There is no field preemption here.

2. There Is No Conflict Between Land Use Law and the CWA

PSA and Ecology argue that conflict preemption requires Washington land use law to yield to the second sentence of Special Condition S5.C.5.a.iii. Conflict preemption would apply if Washington land use law stood “as an obstacle to the accomplishment and execution of the full purposes and objectives” of the CWA.⁴² But Washington land use law does not frustrate the objectives of the CWA. No provision of Washington statutes or case law makes compliance with both the CWA and Washington law impossible. Instead, the conflict at issue in this appeal is between Washington land use statutes and the second sentence of Special Condition S5.C.5.a.iii, an administrative regulation that is not a part of federal law.

The second sentence of Special Condition S5.C.5.a.iii is not part of the CWA, nor is it required by the CWA. 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

⁴² Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 477, 109 S.Ct. 1246 (1989) (quoting Hines v. Davidowitz, 312 U.S. 52, 67, 61 S.Ct. 399 (1941)).

“the maximum extent practicable.”⁴³ The second sentence of Special Condition S5.C.5.a.iii does not appear anywhere in the CWA. 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. The text of the CWA does not state a deadline by which Phase I permittees must apply newly enacted development regulations to approved development permits. These requirements of the Phase I Permit simply are not contained in or mandated by the CWA.⁴⁴ They are instead interpretive choices made by Ecology.

When a statute is silent or ambiguous regarding a particular issue, the implementing agency has significant discretion to interpret the statute to effect Congressional intent.⁴⁵ In such event, “the question for the court is whether the agency’s answer is based upon a permissible construction of the statute.”⁴⁶ If the agency’s interpretation is reasonable and consistent

⁴³ 33 USC § 1342(p)(3)(B)(iii).

⁴⁴ 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 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.

⁴⁵ Food and Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132, 120 S.Ct. 1291 (2000) (“if Congress has not specifically addressed the question, a reviewing court must respect the agency’s construction of the statute so long as it is permissible”).

⁴⁶ National Ass’n of HomeBuilders, 551 U.S. at 665 (quoting Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43, 104 S.Ct. 2778 (1984)).

with Congressional intent, then courts give deference to the agency's interpretation.⁴⁷ Here, Ecology's interpretation is neither reasonable nor consistent with Congressional intent.

The term "maximum extent practicable" is not defined by the CWA. Because the term "maximum extent practicable" is "neither defined in the statute, nor a term of art" it must be construed "in accordance with its ordinary or natural meaning."⁴⁸ Black's Law Dictionary defines the word "practicable" to mean "reasonably capable of being accomplished; feasible."⁴⁹ This plain meaning suggests that Congress did not intend for Phase I permits to require extraordinary measures such as preempting state police power regulations. Instead, "feasible" and "reasonably capable of being accomplished" warrant an interpretation of MEP that can be achieved within the bounds of state law.

It is a basic principle of statutory construction that statutes should be interpreted harmoniously where possible.⁵⁰ Thus, if a statute may be construed in multiple ways, one of which would cause the statute to conflict with other laws, the interpreting agency may not adopt the

⁴⁷ Brown & Williamson Tobacco Corp., 529 U.S. at 125-26 ("although agencies are generally entitled to deference in the interpretation of statutes that they administer, a reviewing court, as well as the agency, must give effect to the unambiguously expressed intent of Congress"); Chevron, 467 U.S. at 843.

⁴⁸ BP America Production Co. v. Burton, 549 U.S. 84, 91, 127 S.Ct. 638 (2006) (citations omitted).

⁴⁹ Black's Law Dictionary 1191 (7th ed. 1999).

⁵⁰ Morton v. Mancari, 417 U.S. 535, 551, 94 S.Ct. 2472 (1974); Alpine Lakes Protection Soc. v. Washington State Dept. of Ecology, 135 Wn. App. 376, 396, 144 P.3d 385 (2006)

construction that causes conflict, but must instead interpret the statute to harmonize with other laws. Further, courts must reject administrative constructions of a statute that are inconsistent with the statutory mandate or that frustrate legislative policy.⁵¹

Courts have held that the term “maximum extent practicable,” which is unique to municipal separate storm sewer system (MS4) permits, 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.⁵² Thus, Ecology has flexibility in interpreting the term “maximum extent practicable.” It must exercise that discretion in a manner that harmonizes the term with other laws.

Ecology has noted that its five year “started construction” deadline in the second sentence of Special Condition S5.C.5.a.iii is “generally consistent with state vesting requirements.”⁵³ It is unclear to the County why making the Phase I Permit “generally consistent” with state vesting

⁵¹ 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).

⁵² City of Abilene, 325 F.3d at 659-660; Defenders of Wildlife v. Browner, 191 F.3d 1159, 1164-66 (9th Cir. 1999).

⁵³ See Ecology’s Response to Comments on the Municipal Stormwater Permits, dated August 1, 2012, as attached to the Declaration of Bill Moore in Support of State of Washington Department of Ecology’s Response in Opposition to Snohomish County’s Motion for Partial Summary Judgment Regarding Phase 1 Issue No. 3. 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.”).

requirements is MEP but making the Phase I Permit specifically consistent with state vesting requirements is not. The County is asking this Court to make the Phase I Permit specifically consistent with state vesting requirements by directing the removal of a single sentence (not required under the CWA) so that the County can apply its soon to be updated stormwater regulations consistent with state law.

G. The County Cannot Accomplish through Conditions that which it Cannot Accomplish by Ordinance

Ecology continues to insist that the clear discord between the requirements in the second sentence of Special Condition S5.C.5.a.iii and applicable state statutes is easily resolved by Phase I permittees conditioning certain development approvals in such a way as to render the state statutes inoperative or inapplicable.⁵⁴ PSA, on the other hand, appears to believe that as long as project proponents are given enough notice, Phase I permittees can do anything they like with their police power, including regulating inconsistent with state law.⁵⁵ This is simply not the case, as discussed above. The County cannot accomplish by project approval conditions that which it is prohibited from accomplishing by ordinance. When state law provides that an applicant has up to seven years to get final plat approval, consistent with the approved preliminary

⁵⁴ Ecology's Response Brief at 28-30.

⁵⁵ PSA's Opening Brief at 23-24.

plat, on preliminary plats approved prior to January 1, 2015,⁵⁶ that is a standard to which the County must adhere.⁵⁷ Conditioning approvals to the contrary or providing sufficient notice of intent to contradict state law does not resolve or excuse the resulting state law violations. If the County thought that it could legally “condition away” the problems identified in this appeal, it would have done so. But the solution is not so simple.

III. CONCLUSION

For the foregoing reasons, the County respectfully requests that this Court set aside the Board’s October 2, 2013, decision on summary judgment and remand to the Board with direction to modify its ruling in accordance with this Court’s opinion striking the second sentence of Special Condition S5.C.5.a.iii.

Respectfully submitted this 20th day of January, 2015.

MARK K. ROE

Snohomish County Prosecuting Attorney



Alethea Hart, WSBA #32840

Laura C. Kisielius, WSBA #28255

Deputy Prosecuting Attorneys

Attorneys for Snohomish County

⁵⁶ RCW 58.17.140.

⁵⁷ See 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.”).

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 20th day of January, 2015, I served a true and correct copy of Snohomish County's Reply Brief upon the persons listed herein and by the following method indicated:

Parties of Record

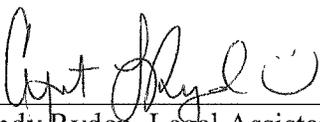
<p><i>Pollution Control Hearings Board:</i></p> <p>Diane L. McDaniel Sr. Assistant Attorney General Licensing & Administrative Law Division P.O. Box 40110 Olympia, WA 98504-0110</p>	<p><input checked="" type="checkbox"/> <i>E-Service: dianem@atg.wa.gov Amyp4@atg.wa.gov</i></p> <p><input type="checkbox"/>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

<p><i>Pierce County & Coalition of Gov'l Entities:</i></p> <p>Lori Terry Gregory Foster Pepper PLLC 1111 Third Ave., Ste. 3400 Seattle, WA 98101-3922</p> <p>John Ray Nelson Foster Pepper PLLC U.S. Bank Bldg. West 422 Riverside Ave., Ste. 1310 Spokane, WA 99201-0302</p>	<p><input checked="" type="checkbox"/> <i>E-Service:</i> terrl@foster.com <input type="checkbox"/> Facsimile: (206) 749-2002 <input checked="" type="checkbox"/> <i>U.S. Mail</i> <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Messenger Service</p> <p><input checked="" type="checkbox"/> <i>E-Service:</i> nelsj@foster.com mccap@foster.com; ToveS@foster.com <input type="checkbox"/> Facsimile: (509) 777-1616 <input checked="" type="checkbox"/> <i>U.S. Mail</i> <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Messenger Service</p>
<p><i>Clark County:</i></p> <p>Christine M. Cook Christopher Horne Deputy Prosecuting Attorney Clark County Prosecuting Attorney's Office Civil Division P.O. Box 5000 Vancouver, WA 98666-5000</p>	<p><input checked="" type="checkbox"/> <i>E-Service:</i> Christine.cook@clark.wa.gov chris_horne@clark.wa.gov Thelma.kremer@clark.wa.gov <input type="checkbox"/> Facsimile: (360) 397-2184 <input checked="" type="checkbox"/> <i>U.S. Mail</i> <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Messenger Service</p>
<p><i>BIA of Clark County:</i></p> <p>James D. Howsley Jordan Ramis PC 1499 SE Tech Center Pl., #380 Vancouver, WA 98664</p>	<p><input checked="" type="checkbox"/> <i>E-Service:</i> jamie.howsley@jordanramis.com lisa.mckee@jordanramis.com joseph.schaefer@jordanramis.com <input type="checkbox"/> Facsimile: (503) 598-7373 <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Messenger Service</p>
<p><i>Intervenor City of Seattle:</i></p> <p>Theresa R. Wagner Sr. Assistant City Attorney Seattle City Attorney's Office 600 Fourth Ave., 4th Fl. P.O. Box 94769 Seattle, WA 98124-4769</p>	<p><input checked="" type="checkbox"/> <i>E-Service:</i> theresa.wagner@seattle.gov cynthia.michelena@seattle.gov <input type="checkbox"/> Facsimile: (206) 684-8284 <input checked="" type="checkbox"/> <i>U.S. Mail</i> <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Messenger Service</p>

<p><i>Intervenor City of Tacoma:</i></p> <p>Jon Walker City Attorney Tacoma City Attorney's Office 747 Market Street, Room 1120 Tacoma, WA 98402-3767</p>	<p><input checked="" type="checkbox"/> <i>E-Service:</i> <i>jon.walker@ci.tacoma.wa.us</i> <i>tkropelnicki@ci.tacoma.wa.us</i></p> <p><input type="checkbox"/> Facsimile: (253) 591-5755</p> <p><input checked="" type="checkbox"/> <i>U.S. Mail</i></p> <p><input type="checkbox"/> Hand Delivery</p> <p><input type="checkbox"/> Messenger Service</p>
<p><i>Puget Soundkeeper Alliance, Washington Environmental Council and Rosemere Neighborhood Association:</i></p> <p>Jan Hasselman Janette K. Brimmer Earth Justice 705 Second Ave., Ste. 203 Seattle, WA 98104-1711</p>	<p><input checked="" type="checkbox"/> <i>E-Service:</i> <i>jbrimmer@earthjustice.org</i> <i>jhasselman@earthjustice.org</i> <i>chamborg@earthjustice.org</i></p> <p><input type="checkbox"/> Facsimile: (206) 343-1526</p> <p><input type="checkbox"/> U.S. Mail</p> <p><input type="checkbox"/> Hand Delivery</p> <p><input type="checkbox"/> Messenger Service</p>

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 20th day of January, 2015.



Cindy Ryden, Legal Assistant

SNOHOMISH COUNTY PROSECUTOR

January 20, 2015 - 3:37 PM

Transmittal Letter

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Comments:

Snohomish County's Reply Brief

Sender Name: Cynthia L Ryden - Email: cryden@snoco.org