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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
ANSWER TO AMICI CURIAE BRIEFS OF MASTER BUILDERS
ASSOCIATION OF KING AND SNOHOMISH COUNTIES,
PACIFIC LEGAL FOUNDATION, WASHINGTON REALTORS,
AND BUILDING INDUSTRY ASSOCIATION OF WASHINGTON

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I. INTRODUCTION

This case involves the regulation of stormwater discharged to waters of the state from municipal storm sewers. The issue in this case is whether developers that discharge stormwater into a municipal storm sewer have a vested right to discharge polluted stormwater in violation of state and federal water pollution laws. No party challenged the Pollution Control Hearings Board's (Board) conclusions that the pollution controls in the Phase I Municipal Stormwater Permit (Permit) constitute the reduction of pollution to the maximum extent practicable under the federal Clean Water Act. Nor does any party contest that the pollution controls constitute all known, available, and reasonable methods to prevent and control pollution under Washington's Water Pollution Control Act. Instead, notwithstanding that the pollution controls are required by federal and state water pollution laws, Respondents and their Amici argue that the pollution controls violate state vesting laws. They are wrong.

It is not necessary for the Court to revisit whether Washington's vesting laws are now statutory or to specify all of the permits that Washington's vesting laws apply to. Nor is it even necessary for the Court to determine whether Washington's vesting statutes are preempted by the Clean Water Act. The Court can resolve this appeal by concluding that vesting does not apply to specific pollution controls that the state directs

local governments to implement, or that any vested right to discharge poorly managed stormwater is extinguished by the exercise of police power authority to protect the public from the significant adverse impacts of poorly managed stormwater.

The Department of Ecology properly exercised its statutory mandate to control and prevent pollution of state waters by establishing a date certain by which developers must implement the pollution controls the Board found were required by state and federal water pollution laws. The date certain established by Ecology not only ensures that development projects in different jurisdictions will be required to use updated pollution controls on the same schedule, but also avoids impermissible self-regulation by municipal permittees and deters speculation in development permits by requiring developers that submitted development applications prior to the effective date of the updated pollution controls to use the updated pollution controls if they do not timely start construction.

Amici incorrectly argue that specific pollution controls the state directs municipalities to implement are subject to Washington's vesting statutes. However, the Court has never extended the vesting statutes to specific pollution controls the state directs municipalities to implement under state and federal water pollution laws, and should not do so in this

case. Expanding the vesting statutes as urged by Respondents and their Amici would allow developers to discharge poorly managed stormwater to waters of the state in violation of state and federal water pollution laws. The impacts of poorly managed stormwater include threats to public health, degradation of salmon habitat, economic threats to the state's shellfish industry, and overall degradation of Washington's waters. The Court should also reject Amici's unfounded claims of the consequences of upholding the pollution controls required by state and federal water pollution statutes, and attempts to inject new issues not necessary to resolution of this case.

If the Court concludes developers do have a vested right to discharge poorly managed stormwater to state waters and that right is not extinguished by the exercise of police power authority, the Court should conclude that Washington's vesting statutes are preempted by the federal Clean Water Act requirement to reduce pollution in municipal stormwater to the maximum extent practicable. Otherwise, Washington's vesting statutes would extend to pollution controls required under the Clean Water Act rather than land use controls. Such an expansion of the vesting statutes should be rejected.

II. ARGUMENT

A. **While the Clean Water Act Provides Some Flexibility in Developing Permit Limits, the Pollution Controls in the Permit Are Not at Issue in This Appeal**

Pacific Legal Foundation (PLF) and the Master Builders

Association of King and Snohomish Counties (MBA) argue that the Clean Water Act gives Ecology flexibility in establishing permit limits to meet the requirement to reduce municipal stormwater pollution to the maximum extent practicable. Brief Amicus Curiae of PLF in Support of Respondents and Affirmance at 8; Brief of Amicus Curiae MBA at 13. However, the flexibility provided under the Clean Water Act is not unlimited. In particular, 33 U.S.C. § 1370 gives states the flexibility to implement pollution controls that are more stringent than controls required under the Clean Water Act, but prohibits states from implementing pollution controls that are less stringent.

Ecology exercised the flexibility provided by the Clean Water Act in developing permit requirements to reduce municipal stormwater pollution to the maximum extent practicable. The Board considered specific challenges to the pollution controls, such as the requirements to use permeable pavement instead of impermeable pavement where feasible and to use bioretention facilities where feasible. Administrative Record

(AR) at 4094–95.¹ The Board concluded that these permit requirements constitute the reduction of municipal stormwater pollution to the maximum extent practicable. AR at 4095 (CL 10), 4098 (CL 17), 4102 (CL 24), 4106 (CL 31). No party appealed the Board’s conclusions that the Permit requirements constitute the reduction of municipal stormwater pollution to the maximum extent practicable. Accordingly, whether Ecology could have implemented the Clean Water Act differently is not at issue in this appeal. Given the Board’s unchallenged conclusions, the preemption issue in this case is limited to whether the Clean Water Act preempts state laws that would allow developers who do not timely start construction to discharge stormwater without reducing pollutants to the maximum extent practicable.²

¹ The Board also considered challenges to the low impact development performance standard, but Appellants failed to present evidence to support their challenge and the Board concluded “Appellants failed to meet their burden of proof on this matter.” AR at 4095.

² PLF’s argument that reducing municipal stormwater pollution to the maximum extent practicable only applies to direct municipal management of storm sewers, PLF Amicus Brief at 9, is not only outside the scope of the issues raised in this appeal, but would also require rewriting the Clean Water Act to add “municipal” to 33 U.S.C. § 1342(p)(3)(B)(iii). Congress wisely elected not to limit stormwater pollution controls in this manner because it is difficult to imagine how one could reduce stormwater pollution to the maximum extent practicable if there is no ability to address development projects that generate the stormwater pollution that is discharged into municipal storm sewers.

B. Washington's Vesting Statutes Do Not Apply to Specific Pollution Controls the State Directs Local Governments to Implement in Order to Comply With State and Federal Water Pollution Laws

MBA argues that the pollution control requirements in the Permit are land use control ordinances subject to state vesting statutes because “the state subdivision statutes specifically require subdivisions to be evaluated under the stormwater regulations to which the project is vested.” MBA Amicus Brief at 9. However, the statute MBA relies on, chapter 58.17 RCW, confirms that the vesting statutes are intended to limit the exercise of municipal discretion and do not limit the ability of the state of Washington to require developers to reduce stormwater pollution to the maximum extent practicable.

Chapter 58.17 RCW establishes a process to divide land that is “administered in a uniform manner by cities, towns, and counties throughout the state.” RCW 58.17.010. There is nothing in RCW 58.17 that suggests the Legislature intended the chapter to apply to water pollution requirements the state directs local governments to implement under state and federal water pollution laws. This is consistent with case law recognizing that the vested rights doctrine “places limits on municipal discretion.” *Erickson & Assoc., Inc. v. McLerran*, 123 Wn.2d 864, 873, 872 P.2d 1090 (1994). No case has ever held that vesting applies to

specific pollution control requirements the state directs local governments to implement under state and federal water pollution control statutes.

Westside Bus. Park, LLC v. Pierce Cty., 100 Wn. App. 599, 601, 5 P.3d 713 (2000) involved storm drainage requirements that Pierce County developed on its own rather than as a requirement imposed by the state through a municipal stormwater permit. In other words, Pierce County exercised its municipal discretion in adopting the requirements at issue in *Westside*. By contrast, the pollution control requirements in this case are imposed by the state to implement federal and state water pollution laws. The local programs adopted by municipalities to implement the pollution control requirements are subject to Ecology's mandatory review and approval before they become effective. AR at 4998. The pollution control requirements are like the shoreline master program (SMP) requirements in *Citizens for Rationale Shoreline Planning v. Whatcom Cty.*, 172 Wn.2d 384, 392–93, 258 P.3d 36 (2011), which were adopted by a Whatcom County ordinance, but were not “a product of local government” because the state “directed Whatcom County to act by a certain date, created the overarching framework with which Whatcom County's SMP must comply, and left final approval of the County's SMP in the hands of Ecology.”

MBA cites the Court of Appeals' mistaken characterization of Ecology's argument, but Ecology's argument does not assume that a regulation can be either an environmental regulation or a land use control regulation, but not both. *Snohomish Cty. v. Pollution Control Hearings Bd.*, 192 Wn. App. 316, 334, 368 P.3d 194 (2016); MBA Amicus Brief at 12. While it is true that the stormwater pollution controls in the Permit are aimed at protecting the environment, what makes the pollution controls distinct from cases where courts have found environmental regulations subject to vesting, is that the regulations at issue in those cases were the product of municipal discretion. By contrast, the stormwater pollution controls in the Permit are the result of state action, not municipal discretion. The state has established the date by which local governments must adopt programs to reduce municipal stormwater pollution to the maximum extent practicable. AR at 4990. The state has created the framework the local programs must comply with, and Ecology must review and approve the local programs. *Id.* This level of state control was not present in the cases the Court of Appeals majority cited to support its holding that environmental regulations can be subject to vesting.

C. MBA's Argument Acknowledges That Application of Washington's Vesting Statutes Will Frustrate Congressional Intent to Reduce Municipal Stormwater Pollution to the Maximum Extent Practicable

As MBA notes, if vesting applies to the stormwater pollution controls in the Permit, developers who filed applications prior to the adoption of updated pollution controls will be allowed to use the old, outdated pollution controls. MBA Amicus Brief at 7. These are the same pollution controls the Board previously held "failed to reduce pollutants to the federal 'maximum extent practicable' (MEP) standard" AR at 4058. MBA goes on to argue that allowing developers to use the outdated and legally deficient pollution controls will somehow "continually bend towards achieving the goals of the Clean Water Act." MBA Amicus Brief at 7. Even if this were true, the Clean Water Act requires more than simply "continually bending" towards compliance with the requirement to reduce municipal stormwater pollution to the maximum extent practicable. The Clean Water Act requires that permits for discharges from municipal storm sewers "shall require controls to reduce the discharge of pollutants to the maximum extent practicable . . ." 33 U.S.C. § 1342(p)(3)(B)(iii). A permitting scheme that continually bends towards compliance with this requirement, but never actually reduces municipal stormwater pollution to

the maximum extent practicable, is clearly an obstacle to accomplishing and executing the full purposes and objectives of Congress.

If developers have a vested right to discharge poorly managed stormwater to waters of the state of Washington, and if that vested right is not extinguished by the exercise of police power authority, the Court should conclude that Washington's vesting statutes are preempted by the Clean Water Act.

D. The Fact That EPA Reviews Permits Issued Under the Clean Water Act Does Not Divest the Court of its Authority to Determine Whether the Clean Water Act Preempts Washington's Vesting Statutes

Washington Realtors (Realtors) argue that if there is a conflict between Washington's vesting statutes and the Clean Water Act, the Environmental Protection Agency (EPA) would be responsible for resolving the conflict rather than "the state." Amended Brief of Amicus Curiae Realtors at 6. They are wrong. Courts, not federal agencies, resolve preemption issues.

The gist of Realtors' argument seems to be that EPA's ability to review permits issued by states under the Clean Water Act somehow divests state courts from their authority to rule on preemption issues that are brought before the courts. However, the Ninth Circuit has rejected the argument that EPA's approval of a state's Clean Water Act permitting

program resolves any legal dispute over whether a state program conflicts with the Clean Water Act.

In *Northern Plains Res. Council v. Fidelity Expl. and Dev. Co.*, 325 F.3d 1155, 1157 (9th Cir. 2003), the court considered a challenge to a Montana State law that exempted the discharge of unaltered groundwater from Montana's water quality requirements. Based on this state law, the Montana Department of Environmental Quality advised Fidelity that it did not need a permit for its discharge of coal bed methane groundwater. *Id.* Northern Plains filed a Clean Water Act citizens suit alleging that Fidelity was unlawfully discharging pollutants without a Clean Water Act permit. *Id.* The district court granted summary judgment to Fidelity, concluding that EPA had implicitly approved Montana's permit exemption because EPA did not revoke Montana's Clean Water Act permitting authority after Montana granted the permit exemption. *Id.* at 1164. The Ninth Circuit rejected the district court's analysis for several reasons.

First, the Ninth Circuit held "EPA does not have the authority to exempt discharges otherwise subject to the [Clean Water Act]." *Id.* Accordingly, EPA could not have approved of Montana's exemption "even if the EPA wanted to do so." *Id.* The court also held that "Montana has no authority to create a permit exemption from the [Clean Water Act] for discharges that would otherwise be subject to the NPDES permitting

process.” *Id.* Finally, the court concluded that “absent statutory authority in the [Clean Water Act] for Montana to create such exemptions, it cannot possibly be urged that Montana state law in itself can contradict or limit the scope of the [Clean Water Act], for that would run squarely afoul of our Constitution’s Supremacy Clause.” *Id.* at 1165.

As Ecology has consistently argued, vesting does not apply to the stormwater pollution controls in the Permit because there is no vested right to discharge polluted stormwater in violation of state and federal water pollution control laws. If there is such a vested right, it is extinguished by the exercise of police power authority to protect the public’s health, safety, and welfare from the significant adverse impacts of polluted stormwater. If the Court concludes there is a vested right to discharge polluted stormwater and that right is not extinguished by the exercise of police power authority, the Court should conclude that Washington’s vesting statutes are preempted by the Clean Water Act. There is no merit to Realtors’ argument that only EPA can resolve conflicts between state law and the Clean Water Act.

Realtors also argue that Ecology’s modification of a permit in 2012 demonstrates that Ecology has previously recognized that in case of a conflict between the Clean Water Act and state law, Ecology must comply with state law. Realtors Amicus Brief at 7. However, the case Realtors

rely on did not involve a conflict. In fact, the Board concluded that Ecology's permit modification complied with both state law and the Clean Water Act: "Not only is Ecology's action consistent with legislative direction requiring a modification of the Permit to reflect a narrative effluent limitation for fecal coliform, under RCW 90.48.555 the narrative limitations are designed to satisfy the technology and water quality based limitations under the [Clean Water Act]." *Puget Soundkeeper Alliance v. Dep't of Ecology*, PCHB No. 12-062c, at 16, Order on Summary Judgment and Motions to Dismiss (Jan. 2, 2013).

E. The Permit Provides Certainty and Predictability and Neither the Record Nor the Law Supports Amici's Speculation That Vesting to Outdated Pollution Controls is Necessary to Control Costs or Avoid Project Redesign

Without any citation to the record, MBA argues there will be "disastrous real world consequences" if developers who do not timely start construction on development projects are required to implement the Permit's updated pollution controls. MBA Amicus Brief at 6. However, the Permit itself provides the certainty and predictability MBA argues is necessary to avoid these consequences. In particular, developers that submitted development applications prior to July 1, 2015, know with certainty that they will be required to use the updated pollution controls if they do not start construction by July 1, 2020. This date certain

requirement not only provides certainty and predictability, but also ensures updated pollution controls required under state and federal water pollution laws will be implemented consistently by different jurisdictions.

This is not a case of Ecology arguing “that the Clean Water Act allows some vesting, but not too much.” PLF Amicus Brief at 7. By establishing a date certain by which developers that submitted applications prior to July 1, 2015 must either start construction or implement the updated pollution controls, Ecology properly balanced developers’ interest in certainty and predictability with the public’s interest in ensuring “the purity of all waters of the state.” RCW 90.48.010.

If the updated pollution controls are subject to Washington’s vesting statutes, municipal permittees could use their local vesting ordinances to extend vesting time periods and allow development projects to proceed without implementing the pollution controls necessary to reduce stormwater pollution to the maximum extent practicable. Such an approach would constitute impermissible self-regulation by the municipal permittees. *See Env’tl. Defense Ctr., Inc. v. U.S. E.P.A.*, 344 F.3d 832, 855–56 (9th Cir. 2003) (allowing municipal permittees to decide what constitutes the reduction of stormwater pollution to the maximum extent practicable constitutes impermissible self-regulation). In addition, by establishing a date certain to start construction, the Permit limits

speculation in development permits. *See Hull v. Hunt*, 53 Wn.2d 125, 130, 331 P.2d 856 (1958) (Seattle building code requirement that made construction permit null and void if construction not started within 180 days addresses concerns regarding speculation in building permits). *See also Abbey Road Group, LLC v. City of Bonney Lake*, 167 Wn.2d 242, 257–58, 218 P.3d 180 (2009) (builder that is not ready to proceed is not entitled to vesting under the very rationale of that doctrine).

The Permit reasonably allows a five year window for developers to start construction, which ensures that developers do not indefinitely delay construction and then apply weaker stormwater protections years down the road. MBA's suggestion that the Permit negates predictability and certainty is simply incorrect.

Without citation to the record, MBA also speculates that implementing the stormwater pollution controls required by the Permit will require developers to redesign their projects and adjust "the number of lots available for building homes or the size of common area recreation tracts." MBA Amicus Brief at 5. As discussed above, the primary pollution controls at issue before the Board involved the use of permeable pavement and bioretention basins where feasible. AR at 4070 (FF 31). Permeable pavement is "paving material intended to allow passage of water through the pavement" AR at 5060. Permeable pavement is

used in lieu of impermeable pavement, which does not allow water to pass through and infiltrate into the ground. A project does not need to be redesigned simply to replace impermeable pavement with permeable pavement. While permeable pavement may be more expensive than impermeable pavement, regulations that simply increase the cost of development are not land use control ordinances that are subject to vesting. *Newcastle Inv. v. City of LaCenter*, 98 Wn. App. 224, 232, 989 P.2d 569 (1999) (while developers have an interest in determining costs early in the process, it does not necessarily follow that cost is a type of expectation the vested rights doctrine was intended to protect).

Bioretention facilities are “shallow landscaped depressions, within a designed ‘imported’ soil mix and plants that receive water from a specified ‘contributing area.’ ” AR at 4070–71 (FF 31). There was no evidence presented to the Board to suggest that bioretention facilities require any more land in a development than traditional stormwater ponds. The evidence did establish that bioretention “has been in use for decades.” AR at 4104 (CL 27). A Clark County developer testified that he “routinely installs [bioretention facilities] in Clark County” and that the facilities are “very effective and easy to maintain.” AR at 4096 (CL 12), 4105 (CL 27). The record does not support MBA’s speculation that the use of updated

stormwater pollution controls will require significant redesign of development projects.

F. The Court Should Decline the Invitation to Use This Case to Revisit the Court's Previous Holding That the Vested Rights Doctrine Is Now Statutory

The Building Industry Association of Washington (BIAW) attempts to inject a new issue regarding whether the vested rights doctrine is grounded in statute or the constitution. There is no need to reach that issue here.

BIAW argues that the Court should use this case to reverse its holding that the vested rights doctrine is now statutory and to hold that vesting applies to all permits. Brief of Amicus Curiae BIAW at 4. However, no party to this case has raised this argument because it is not relevant to the issues presented. The issues in this case are whether developers have a vested right to discharge polluted stormwater to waters of the state in violation of state and federal water pollution laws, whether any such vested right is extinguished by an exercise of police power authority, and whether Washington's vesting laws are preempted by the Clean Water Act. Whether vesting is now statutory or based on constitutional principles, and the scope of permits that are subject to vesting, are not relevant to the Court's consideration of the issues presented.

At any rate, this Court has already definitively answered this question. In *Town of Woodway v. Snohomish Cty.*, 180 Wn.2d 165, 173, 322 P.3d 1219 (2014), this Court held, “[w]hile it originated at common law, the vested rights doctrine is now statutory.” (citing *Erickson & Assoc.*, 123 Wn.2d at 867–68). In *Erickson*, the Court refused to expand the vested rights doctrine to an application for a master use permit. *Id.* at 874. In *Abbey Road Group*, 167 Wn.2d at 260–61, the Court declined Abbey Road’s request to “expand the vesting rights doctrine to all land use applications.” Thus, regardless of whether the doctrine is grounded in constitutional principles, the scope of the doctrine is now determined by the scope of the statutes. Nothing in BIAW’s arguments suggest otherwise. Accordingly, the Court should reject BIAW’s invitation to provide an advisory opinion and reconsider the Court’s prior holdings regarding the basis of Washington’s vesting laws and the permits that are subject to vesting.

III. CONCLUSION

The Court should conclude that vesting does not apply to the stormwater pollution controls in the Permit because there is no vested right to discharge polluted stormwater in violation of state and federal water pollution laws.

If the Court concludes the stormwater pollution controls are subject to vesting, the Court should conclude any vested right is extinguished by an exercise of police power authority to protect the public from the adverse impacts of poorly managed stormwater.

Finally, if the Court concludes the stormwater pollution controls are subject to a vested right that is not extinguished by an exercise of police power authority, the Court should conclude that Washington's vesting laws are preempted by the federal Clean Water Act.

The Amici present no argument that warrants a different conclusion. The Court of Appeals decision should therefore be reversed.

RESPECTFULLY SUBMITTED this 28th day of September, 2016.

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I certify under penalty of perjury under the laws of the state of Washington that on September 28, 2016, I caused to be served the Department of Ecology's Answer to Amici Curiae Briefs in the above-captioned matter upon the parties herein as indicated below:

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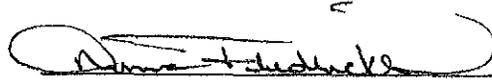
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Subject: RE: Snohomish County, et al. v. Department of Ecology, et al.; Case No. 92805-3

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Subject: Snohomish County, et al. v. Department of Ecology, et al.; Case No. 92805-3

Attached for filing in Case No. 92805-3, *Snohomish County, et al. v. Dept. of Ecology, et al.*, is the Department of Ecology's Answer to Amici Curiae Briefs of Master Builders Association of King and Snohomish Counties, Pacific Legal Foundation, Washington Realtors, and Building Industry Association of Washington, together with an attached Certificate of Service. Thank you for your attention to this matter.

Donna Fredricks

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Document filed on behalf of:

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