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Court of Appeals, Div. II Case No. 46378-4-II

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SUPREME COURT OF THE STATE OF WASHINGTON

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

Respondents,

v.

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

Petitioners,

and

POLLUTION CONTROL HEARINGS BOARD, and WASHINGTON
STATE DEPARTMENT OF ECOLOGY,

Respondents below.

**PETITIONERS PUGET SOUNDKEEPER ALLIANCE,
WASHINGTON ENVIRONMENTAL COUNCIL AND ROSEMERE
NEIGHBORHOOD ASSOCIATION'S SUPPLEMENTAL BRIEF**

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 ORIGINAL

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INTRODUCTION

Puget Soundkeeper Alliance (“Soundkeeper”) respectfully submits this supplemental brief in accordance with the Court’s June 1, 2016 order.

There are three reasons why the Court of Appeals majority erred in finding that the pollution control requirements of the Phase I stormwater permit (the “Permit”) were subservient to the state’s vesting statutes. The majority opinion should be overturned and the underlying Pollution Control Hearings Board (“PCHB”) decision affirmed.

First, the requirements in the Permit are not “land use” ordinances. While achievement of the Permit’s water quality-based pollution limits likely has an impact on the landscape, not every government action that affects land is subject to vesting. Interpreting the statutes in this way would upset the careful balance struck by the legislature and undermine the goals of pollution control laws. Second, the majority incorrectly concluded that the Permit’s directive to apply updated standards to projects that don’t begin construction within five years would “violate” permittees’ vested rights. To the contrary, there is ample discretion under the vesting statutes to require municipalities to meet Permit requirements. Finally, while the collision between vesting law and the Clean Water Act (“CWA”) is an illusory one, the only possible outcome of such a collision is that state vesting law would be federally preempted. Any one of these

reasons provides a sufficient basis on which to overturn the majority opinion.

STATEMENT OF THE CASE

Soundkeeper devoted almost half of its petition for review to laying out the factual background to this dispute. Rather than repeat it here, Soundkeeper provides the following brief summary.

- Stormwater pollution has long been recognized as among the greatest threats to the health of Washington's rivers and marine waters. Preventing pollution, protecting water quality standards, and recovering Puget Sound are priority goals of the state.
- The Washington Department of Ecology ("Ecology") administers a permit program for municipal separate storm sewer systems (known as "MS4s") under both state law and the CWA. The core standard under both statutes is similar: Ecology must impose controls on jurisdictions that operate MS4s that reduce pollution to the "maximum extent practicable" (the federal "MEP" requirement) and apply "all known, available, and reasonable" methods of pollution control (the state "AKART" standard).
- In 2008, the PCHB found unlawful the previous version of the Permit because it did not meet MEP and AKART standards. The focus of that decision was the permit's failure to require "low impact development" ("LID"). LID is an approach to controlling runoff that strives to mimic natural hydrology by emphasizing infiltration, storage, and evaporation of stormwater onsite. No party appealed that decision. Accordingly, Ecology must require jurisdictions to impose LID order to meet MEP and AKART.
- In 2012, after extensive outreach and input from permittees and others, Ecology issued a revised Permit that incorporated the LID requirements directed by the PCHB. The Permit requires permittees to have a "program" for new and re-development to control runoff that meets various technical criteria. Permit (CR 4938) at 15. These technical standards needed to be included in "ordinances or other enforceable documents adopted by the local

government.” *Id.*

- Permittees may use the Ecology technical manual to meet Permit requirements. Permit S.5.C.5.a.ii. Permittees may also adopt their own standards as long as they provide an “equivalent” level of pollution control as Ecology’s manual, as reviewed and approved by Ecology. *Id.* S.5.C.5.a.i. Many parts of the Permit give permittees flexibility to craft a stormwater program that satisfies local conditions. *See, e.g., id.* (authorizing requirements to “be tailored to local circumstances through the use of Ecology-approved basin plans or other similar water quality and quantity planning efforts”); App. 1 at 4.7 (authorizing “alternative” flow control standards); *id.* at § 6 (authorizing exceptions and variances to minimum standards); *id.* at § 7 (authorizing tailoring of minimum requirements based on basin planning).
- The Permit, issued on August 1, 2012, gave permittees until June 30, 2015 to adopt compliant programs. (That date was later extended for all Phase I permittees.) Under the Permit, any development project for which a complete application is submitted prior to the adoption of the new rules may still be built under the jurisdiction’s old standards. The exception is that the new standards would apply to projects that don’t start construction by June 30, 2020—five years after the deadline for adopting updated stormwater controls. This last provision is the focus of this case.

The question in this case is whether Ecology has the authority to impose the updated stormwater controls of the Permit—which primarily consist of the LID requirements needed to meet the MEP and AKART standards—on projects that submit applications before the 2015 deadline for adoption of compliant stormwater programs, but which do not start construction within five years of permit issuance. According to the Court of Appeals majority, state vesting law compels the outcome that any project that submits an application prior to the Permit’s deadline is vested

to pre-Permit standards *for all time*. That decision represents an unprecedented expansion of state vesting law, far beyond what the statutes direct, and would allow state vesting statutes to trump federal and state clean water statutes.

ARGUMENT

I. OVERVIEW OF WASHINGTON VESTING LAW

A. The Washington Vesting Statutes Seek to Balance Certainty for Developers with the Public's Interest.

In Washington, building permits and proposed divisions of land are considered under the zoning and other “land use control” ordinances in effect at the time a complete application is filed. RCW 58.17.033 (subdivision code); RCW 19.27.095 (building permits).¹ Although initially a product of common law, the legislature “codified the traditional common law vested rights doctrine” in 1987, *Noble Manor v. Pierce County*, 133 Wn.2d 269, 275 (1997), and today vesting applies only as directed by statute. *Town of Woodway v Snohomish County*, 180 Wn.2d 165, 173 (2014); *Potala Village v. Kirkland v. City of Kirkland*, 183 Wn. App. 191, 203 (2014). Under the vesting statutes, “developers who file a timely and complete building permit application obtain a vested right to

¹ The Court of Appeals identified a third statute, RCW 36.70B.180, which includes a vesting standard for “development agreements.” Development agreements were not mentioned by the PCHB in its decision, and hence are not addressed further in this brief.

have their application processed according to the zoning and building ordinances in effect at the time of the application.” *West Main Assocs. v. City of Bellevue*, 106 Wn.2d 47, 50-51 (1986). Where a use for property is properly disclosed in a subdivision application, all of the permits required in the future vest at that time. *See Noble Manor Co.*, 133 Wn.2d at 278.

The Washington vesting doctrine strives to balance competing objectives: on the one hand, the law to some extent favors property owners that seek certainty in planning development projects. *Abbey Rd. Grp. v. City of Bonney Lake*, 167 Wn.2d 242, 251 (2009). On the other, vesting creates conflicts with public policy, and hence this Court has been careful not to expand the doctrine. *Erickson & Assocs., Inc. v. McLerran*, 123 Wn.2d 864, 873 (1994) (“A proposed development which does not conform to newly adopted laws is, by definition, inimical to the public interest embodied in those laws.”); *Noble Manor Co.*, 133 Wn.2d at 280 (“If a vested right is too easily granted, the public interest is subverted.”). The Courts have declined repeatedly to extend the vesting doctrine beyond the strict terms of the statutes, finding that the policy and fairness considerations embodied therein are better suited to legislative rather than judicial balancing. *See, e.g., Abbey Rd. Grp.*, 167 Wn.2d at 251.

B. Even Within the Vesting Statutes, Municipalities Have Substantial Discretion to Protect the Public and the Environment.

Although generally more favorable to development interests than in most other states, the rights created by the Washington vesting statutes are limited. “[V]ested rights merely provide a developer the right to have an application considered under the rules and regulations in effect at the time he submitted his application—no more, no less.” G. Overstreet & D. Kirschheim, *The Quest for the Best Test to Vest: Washington’s Vested Rights Doctrine Beats the Rest*, 23 Seattle U. L. Rev. 1043, 1058 (2000). There are several well-recognized limits on vested rights.

First, the vesting statutes impose only modest constraints on local jurisdictions’ discretion to impose time limits on vested rights. If issued permits are not acted on within a given time, the permits—and any vested rights associated with them—expire. The building permit statute, RCW 19.27.095, provides no time limits at all, leaving it to jurisdictions’ discretion how long an issued building permit remains active. In Snohomish County, building permits expire automatically after 18 months, and only one additional 18-month extension can be granted for cause. Snohomish Co. Code § 30.50.144. Similarly, in King County, building permits expire one year after issuance, with limits on extensions. King Co. Code § 16.02.290. Once a permit expires, any vested rights are lost.

The core subdivision vesting statute, which vests subdivision applications to the “subdivision or short subdivision ordinance, and zoning or other land use control ordinances” at the time of application, contains no limits on a jurisdiction’s ability to place time limits on vested rights. RCW 58.17.033. A separate provision mandates that “any lots in a final plat filed for record shall be a valid land use notwithstanding *any change in zoning laws* for” either five or seven years, depending on date of filing. RCW 58.17.170 (emphasis added). This restriction on jurisdictions’ discretion to place temporal limits on vested rights is limited to “zoning laws,” a narrower category than the kinds of ordinances which vest under RCW 58.17.033. Accordingly, jurisdictions have discretion over how long plats vest for, except for the five- or seven-year standard imposed as to changes in “zoning laws.” While some jurisdictions provide for extensions of these statutory limits, *see, e.g.*, Snohomish County Code § 30.70.140, such extensions are not compelled by the subdivision statute.

In short, if developers do not act on their vested rights within the time allotted by local law, nothing prohibits the municipality from extinguishing those rights, or otherwise conditioning a permit to reflect the updated land use standards that have been adopted in the meantime.

Second, in enacting the state vesting statutes, the legislature exempted conditions imposed under the State Environmental Policy Act

(“SEPA”). *See* RCW 58.17.033(3) (“The limitations imposed by this section shall not restrict conditions imposed under chapter 43.21C.”); 19.27.095(6). Jurisdictions retain broad authority to condition or deny permits where they present environmental risks, even where those permits are vested to older ordinances. *See* RCW 43.21C.060; WAC 197-11-660(1); *West Main*, 106 Wn.2d at 53; *see also Adams v. Thurston Cnty.*, 70 Wn. App. 471 (1993) (“vesting of development rights at the time of submittal does not defeat the County’s discretionary ability to condition or deny any plat based on environmental impacts.”).

Finally, it is well settled that “[m]unicipalities can regulate or even extinguish vested rights by exercising the police power reasonably and in furtherance of a legitimate public goal.” *West Main*, 106 Wn.2d at 53; *Hass v. City of Kirkland*, 78 Wn.2d 929, 931 (1971) (recognizing ability to “extinguish” a vested right via exercise of police powers); *City of Seattle v. Hinkley*, 40 Wash. 468, 471 (1905) (“no such thing” as a vested right to “imperil the health or impair the safety of the community”).

In sum, a vested right is not some immutable right that lasts forever. Instead, vesting statutes impose a limited constraint on local legislative discretion, with a restricted shelf life, that can be overridden either under local government’s SEPA authorities or their police powers to protect the public health, safety, and welfare.

II. LOCAL PROGRAMS TO COMPLY WITH A STATE/
FEDERAL WATER POLLUTION PERMIT ARE NOT “LAND
USE CONTROL” ORDINANCES

Under RCW 19.27.095, a building permit application shall be considered under the “building permit ordinance” and “zoning and other land use control ordinances” in effect on the date of application. Under RCW 58.17.033, a proposed division of land shall be considered under the “subdivision or short subdivision ordinance, and zoning or other land use control ordinances” in effect at the time of application. The critical question is whether steps taken by a jurisdiction to comply with the Permit are the kind of ordinances subject to these statutes in the first instance.

S.5.C.5 of the Permit is aimed at “controlling runoff from new development, redevelopment, and construction sites.” It does not prescribe which of the permittees’ ordinances need to be amended. In fact, nothing requires permittees to adopt “ordinances” at all if they can achieve Permit standards through other means. *See* Permit S.5.C.5.a.i. Rather, the Permit requires permittees to adopt a “program” that limits water pollution. *Id.* Nonetheless, the majority found that local actions taken to comply with the Permit were “land use control ordinances” and hence subject to the vesting statutes.² This conclusion was wrong.

² Stormwater controls on new and redevelopment are not “zoning” laws (which concern the designation of land where specific uses are either

The legislature has not defined the term “land use control ordinances,” nor has the term been the subject of close analysis by this Court. In *New Castle Investments v. City of LaCenter*, 98 Wn. App. 224, 229 (1999), Division II applied the dictionary definition of “control” to find that transportation impact fees, while they “increase the cost” of development, do not “exercise a restraining or directing influence over land use.” Local actions are not land use control ordinances where they “do not limit the use of land” or “resemble a zoning law.” *Id.* at 232.

Applying a similar approach here, local actions to comply with the Permit are not “land use control” ordinances because they are not intended to “control,” “restrain,” or “direct” the use of land. Instead, they serve the purpose of controlling pollution. The Permit seeks to achieve water quality goals, not control how land is developed. It is agnostic about what happens on the land but requires that, however the land is developed, stormwater discharges meet certain criteria to reduce pollution.

Moreover, permit standards are imposed *on* local communities by operation of state and federal law, not *by* local communities as an exercise of their political discretion. To the extent that the vesting statutes seek to protect some measure of certainty for developers from fluctuations in local

permitted or prohibited) or “subdivision ordinances” (which concern the division of land). The Permit says nothing about zoning or subdivision ordinances, nor did any party (or the majority) argue that it did.

land use policy, these state and federal water pollution statutes are simply not the kind of “land use controls” that the legislature intended to restrain in enacting the vesting statutes. *See West Main*, 106 Wash.2d at 51 (“citizens should be protected from the ‘fluctuating policy’ of the legislature”); *Town of Woodway*, 180 Wash.2d at 185 (C. Johnson, dissenting) (“The doctrine is meant to protect the land owner/developer from the municipality.”). Indeed, the Permit’s pollution standards are uniform, as the state regulates evenhandedly across all jurisdictions.

Finally, Permit standards are not “land use control” ordinances because they are focused on environmental outcomes, not particular land uses. Permittees can authorize development of land using virtually limitless different approaches, as long as the downstream water quality result is achieved. As noted above, there are numerous mechanisms in the Permit by which permittees can craft their own approaches to meeting the Permit’s water quality outcomes, and give developers flexibility to plan projects. *See* Permit S.5.C.5.a.i. and App. 1.

No one disputes that the use of land is implicated in meeting the environmental goals of the Permit. While there is flexibility in meeting the Permit’s goals, compliance presumably means that there are some limits on what a permittee can authorize on any given site. But it has never been the law that anything that affects the use of property is a “land

use control” ordinance. By way of comparison, air quality standards presumably affect the height of factory smokestacks. That doesn’t make them “land use control ordinances,” because the goal of such standards is to protect people from pollution, not dictate smokestack heights.

The purpose of the Permit, and the programs enacted to comply with it, is to control pollution—not control land use. While complying with the Permit may have an effect on land use, not everything that effects development is subject to vesting. A contrary ruling would upset the careful balance struck by the legislature in the vesting statutes.

III. S.5.C.5.A DOES NOT “VIOLATE” ANYONE’S STATUTORY VESTED RIGHTS

The majority also concluded that compliance with the Permit “would violate the statutory vested rights of developers” who submit applications before July 1, 2015 but who do not begin construction by June 30, 2020. Opinion, at 2. This aspect of the decision ignores the extensive discretion available under the vesting statutes to harmonize permittees’ obligations under the clean water laws with the vesting statutes. Even if the vesting statutes apply— and they do not – the majority was wrong that compliance with the Permit would “violate” vested rights.

The vesting statutes simply do not impose the rigid framework portrayed by the majority. For example, given the enormous priority

placed by state and federal governments on protecting water quality and restoring Puget Sound, permittees could exercise their police powers to condition vested rights that threaten those goals. *Supra*, § I.B. Similarly, jurisdictions could use their SEPA authority to condition projects that risk damaging water quality—even if the project is vested to an older ordinance. *See Adams*, 70 Wn. App. at 291.³

Similarly, the majority opinion fails to recognize that jurisdictions have considerable discretion over the lifetime of vested rights and that they can, and do, extinguish vested rights if permit holders do not act on their permits within a given amount of time—*precisely as S.5.C.5 directs*. Developers have a right to have proposals processed under the regulations in effect at the time a complete permit application is filed. *Town of Woodway*, 180 Wash.2d at 169. Once a permit is granted, however, they do not have a statutory right to sit on that permit for all time. The building permit statute does not contain any minimum vesting period at all, and hence nothing prevents jurisdictions from extinguishing a building permit that is not acted on within a given period. RCW 19.27.095. Accordingly,

³ The majority refused to consider either the police power or the SEPA arguments because, it concluded, they had not been argued below. Decision at 17. But the majority was mistaken—Soundkeeper discussed the SEPA exemption extensively in its brief, which was joined by Ecology. CR 1061 at 8-12; CR 1284. Both parties discussed the *Hinkley* exception. CR 1061 at 12; CR 1238 at 12. *See also* CR 4047 at 20.

a permit requirement that directs permittees to impose updated standards on permits that are not acted on within five years is perfectly lawful.

With respect to subdivisions, the answer is mostly similar. The subdivision statute does not impose any particular restraint on vested rights. RCW 58.17.033(1). A separate provision imposes a statutory five-to seven-year vesting period but only with respect to a “change in zoning laws,” which, for the reasons discussed above, is not affected by the S.5.C.5. RCW 58.17.170. Jurisdictions have flexibility to make changes to stormwater codes without running afoul of these time limits, even if they applied. The majority ignored this flexibility, opting instead for a rigid approach under which vested permits can be maintained for all time.

Moreover, the majority failed to acknowledge that the generous timelines in the Permit track the statutory deadlines in RCW 58.17.170. To the extent that the vesting doctrine is “supported by notions of fundamental fairness,” *West Main*, 106 Wn.2d at 51, there is nothing unfair about developers being put on notice in 2012 that they would have to start construction by 2020. *Id.* (“Persons should be able to plan their conduct with *reasonable certainty* of the legal consequences”) (emphasis added). This Court has recognized the evils of “permit speculation.” *Erickson*, 123 Wash.2d at 874; *Noble Manor*, 133 Wn.2d at 284. The permit protects reasonable expectations and due process limits by

providing a generous timeframe in which to start construction, but also prevents “permit speculation” by putting a limit on the time in which someone can sit on a permit without taking action.

Indeed, with respect to development applications submitted after July 1, 2012, it is impossible to see how the Permit offends the “reasonable certainty” the statutes seek to protect. When issuing permits after that date, municipalities can simply alert applicants to the updated stormwater standards as part of the permitting process, or condition development permits, and sidestep any concerns over vesting altogether. For applications submitted prior to July 1, 2012, there is also no legitimate vesting concern, as the most generous possible reading of the vesting statutes would give developers a theoretical maximum of seven years in which to act before being subject to updated standards. Seven years after July 1, 2012, is before the Permit’s construction cutoff of July 2020. In other words, developers who filed applications prior to July 2012 would not have any entitlement to vested standards by 2020, even if vesting applied, if they have not started construction.

In sum, the state vesting laws fundamentally represent a balance between competing objectives: fairness to developers, and the public’s interest in updating development standards to reflect changing science and values. The federal and state clean water statutes call for the most

effective water pollution controls that are technically and economically feasible. While Permit conditions are not subject to vesting statutes, Ecology nonetheless sought to maintain the balance between certainty and clean water act goals by allowing a significant amount of time before new standards would apply. The majority disrupted this balance in favor of allowing developers to lock in outdated standards, effectively forever.

IV. THE MAJORITY OPINION CREATES A CONFLICT BETWEEN STATE AND FEDERAL LAW IN WHICH STATE LAW IS PREEMPTED

“It is a general rule that statutes are construed to avoid constitutional difficulties when such construction is consistent with the purposes of the statute.” *In the Matter of Williams*, 121 Wn.2d 655, 665 (1993). The majority’s rigid interpretation of the vesting statutes created just such a “constitutional difficulty” by interpreting the vesting statutes in a way that frustrates implementation of federal law. Assessing that conflict, the majority found no preemption problem with applying the vesting statutes to the Permit. This conclusion was also in error.

Conflict preemption occurs when state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Hillman v. Maretta*, 133 S. Ct. 1943, 1950 (2013). In Washington, there is a presumption against finding that preemption applies, requiring evidence of Congress’s “clear and manifest purpose” in

enacting the federal statute. *Department of Labor and Indus. v. Lanier Brugh*, 135 Wn. App. 808 (2006). In the CWA context, it is well settled that state-delegated permit programs may not impose less stringent requirements than those mandated by Congress. 33 U.S.C. § 1370(1); 40 C.F.R. § 123.25(a); *N. Plains Res. Council v. Fid. Exploration & Dev. Co.*, 325 F.3d 1155 (9th Cir. 2003) (finding state exemption not specifically authorized by CWA to be federally preempted).

By interpreting state vesting law to override the CWA command to reduce discharges to the “maximum extent practicable,” the majority created an exemption from the CWA in violation of preemption principles. *See* CR 4047 at 32 (“applying the vested rights doctrine as requested by the Appellants would allow developments to violate the state and federal water quality laws”). As the dissent correctly concluded, the exemption is an obstacle to the fulfillment of the CWA’s objectives. Congress was explicit in the CWA that its goals were to restore and maintain the “chemical, physical, and biological integrity of the Nation’s waters.” In fact, it was the goal of the statute to completely prohibit discharges of pollutants by 1985. 33 U.S.C. § 1251(a)(1).

The majority relied on the term “practicable” in § 402(p) of the CWA and reasoned that “a state may legitimately determine that it is not ‘practicable’ to impose new NPDES permit requirements” on vested

projects. Opinion at 23. The majority also relied on the absence of a firm statutory deadline for adopting pollution controls. Its reasoning is flawed.

First, “practicable” in the CWA is not some empty term that the state legislature can define however it chooses. “Practicable” is a legal term of art under federal environmental law, and means the most effective technology available unless costs are “wholly disproportionate” to pollution reduction benefits. *See Rybachek v. U.S. EPA*, 904 F.2d 1276, 1289 (9th Cir. 1990); *Defenders of Wildlife v. Babbitt*, 130 F. Supp. 2d 121, 131 (D.D.C. 2001) (“[T]he phrase ‘to the maximum extent practicable’ does not permit an agency unbridled discretion. It imposes a clear duty on the agency to fulfill the statutory command to the extent that it is feasible or possible.”). It is a *technical* standard, not a legal one. If the majority were correct that “practicable” simply means whatever the legislature says it means, a state could simply declare stormwater controls on projects in a particular area or above a certain cost threshold as “impracticable,” and thereby exempt them from the CWA. That’s plainly not what Congress intended.

While it is true that the state has some discretion in defining what is “practicable,” the majority ignores the fact that Ecology did precisely that in setting the standards of this permit. It found that achievement of the Permit’s standards was necessary to comply with MEP, and it defined

a fair timeline by which those standards needed to be achieved. Its findings were challenged, upheld by the PCHB, and not appealed. Accordingly, they constitute the law in Washington State. But the majority ignored Ecology's exercise of technical discretion, and created a sweeping rule that a state *legislature* can place an entire class of developments out of the reach of updated standards.⁴

While the majority is correct that the CWA envisions a federal-state partnership, Ecology is only delegated authority to implement the NPDES program pursuant to clear statutory factors and minimums, including clear authority to issue permits that meet all the statute's requirements. 33 U.S.C. § 1342(b); 40 C.F.R. § 122.4(a), (d) (prohibiting state issuance of permits that do not comply with CWA and ensure compliance with water quality standards). If Ecology lacks authority to require implementation of "practicable" approaches to stormwater pollution like LID because of the state vesting statutes, it is not entitled to implement the program. 33 U.S.C. § 1342(c).

The easiest way to resolve the potential preemption problem is to hold that vesting statutes are inapplicable to the Permit (§ I above), or,

⁴ Whether or not the majority's belief that only a small number of projects would be affected by its decision is correct, the issue here is much larger. The majority, in effect, determined that the legislature can define practicability however it wants, regardless of the frustration of the CWA.

alternatively, that Ecology can direct permittees to exercise their discretion and authorities in a way that meets Permit requirements without violating the vesting statutes (§ II above). However, the reasoning adopted by the Court of Appeals majority—that the standards in the Permit must forever be subservient to the vesting statutes—creates an obstacle to the achievement of the CWA’s goals. If the majority’s interpretation of state vesting statutes is correct, then they are preempted by the CWA.

CONCLUSION

While developers may have a limited vested right to have applications considered under land use control standards in place at the time of their applications, they do not have a vested right to discharge pollution into the state’s waters without meeting the requirements of clean water laws. Nor do developers have a vested right to speculate on permits by “locking in” unlawful and inadequate stormwater controls for all time by vesting to such standards and then sitting on them indefinitely. No party disputes that the Permit’s updated LID standards are required to meet the standards of federal and state law. No party disputes that Ecology was in fact extraordinarily generous to development interests in allowing them to be phased in over time. Soundkeeper respectfully requests that this Court reverse the Court of Appeals majority decision and uphold the underlying PCHB decision affirming the Permit.

Respectfully submitted this August 1, 2016.



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*Attorneys for Petitioners Puget Soundkeeper
Alliance, Washington Environmental
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Association*

DECLARATION OF SERVICE

I declare that on August 1, 2016, I served a true and copy of the foregoing *Petitioners Puget Soundkeeper Alliance, Washington Environmental Council, and Rosemere Neighborhood Association's Supplemental Brief* on the following parties via email:

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I declare under penalty of perjury under the laws of the State of
Washington that the foregoing is true and correct. Executed this 1st day of
August, 2016, at Seattle, Washington.


Cathy Hendrickson, Litigation Assistant

OFFICE RECEPTIONIST, CLERK

From: Cathy Hendrickson <chendrickson@earthjustice.org>
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Attachments: Petitioners Supplemental Brief.pdf

Attached is *Petitioners Puget Soundkeeper Alliance, Washington Environmental Council and Rosemere Neighborhood Association's Supplemental Brief* for filing in *Snohomish County, et al., v. Pollution Control Hearings Board, et al., Supreme Court No. 92805-3*, submitted by Jan Hasselman, (206) 343-7340 ext. 1025, WSBA # 29107. Thank you.

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