No. 92805-3

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

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

Respondents,

v.

WASHINGTON STATE DEPARTMENT OF ECOLOGY,

Petitioner,

And

POLLUTION CONTROL HEARINGS BOARD, PUGET SOUNDKEEPER ALLIANCE, WASHINGTON ENVIRONMENTAL COUNCIL, and ROSEMERE NEIGHBORHOOD ASSOCIATION,

Respondents Below.

Court of Appeals Case No. 46378-4-II

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS AND AFFIRMANCE

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ISSUE STATEMENT

Whether the Clean Water Act—which grants states wide latitude in implementing water quality standards—demonstrates a clear and manifest purpose to preempt Washington's vested rights statutes.

IDENTITY AND INTEREST OF AMICUS

Founded in 1973, Pacific Legal Foundation is widely recognized as the most experienced nonprofit legal foundation of its kind. PLF attorneys litigate matters affecting the public interest at all levels of state and federal courts and represent the views of thousands of supporters nationwide who believe in limited government and property rights. PLF attorneys have extensive experience litigating Clean Water Act issues. *See, e.g.*, *United States Army Corps of Engineers v. Hawkes Co.*, __ U.S. __, 136 S. Ct. 1807, 195 L. Ed. 2d 77 (2016) (holding that Clean Water Act jurisdictional determinations are subject to judicial review); *Rapanos v. United States*, 547 U.S. 715, 126 S. Ct. 2208, 165 L. Ed. 2d 159 (2006) (defining "navigable waters" under the Clean Water Act). PLF's familiarity with the Clean Water Act will assist this Court in determining whether the Clean Water Act preempts Washington state law.

INTRODUCTION AND SUMMARY OF ARGUMENT

States enjoy broad discretion in managing federal permits under the National Pollutant Discharge Elimination System (NPDES). If a state's program satisfies the baseline requirements of the Clean Water Act, the Environmental Protection Agency (EPA) administrator must approve it and transfer exclusive jurisdiction of NPDES permitting to the state. 33 U.S.C. § 1342(b), (c)(1). The EPA retains only limited authority to object to proposed permits or withdraw its approval of the state program. *See id.* § 1342(d)(2), (3); 40 C.F.R. § 123.44.

In general, a state need not require a permit for stormwater discharges. *Id.* § 1342(p)(1). The Act carves out an exception, however, for municipal storm sewers of a certain size. *Id.* § 1342(p)(2). Washington's NPDES program offers a general permit for these storm sewers.

The Washington Department of Ecology's 2013 general permit requires municipalities to regulate stormwater runoff from development projects. *Snohomish Cnty. v. Pollution Control Hearings Bd.*, 192 Wn. App. 316, 322, 368 P.3d 194 (2016). These permit requirements do not apply to projects that received county approval before 2015. *Id.* Developers who have not started to build by June 30, 2020, however, are deprived of the otherwise vested rights to develop contained in their permits. *Id.*

Ecology's vesting rule is more limited than Washington's vested rights statutes. The statutory rule provides that developers remain subject to the land-use-control ordinances in effect at the time they applied for an eligible permit. *E.g.*, RCW 19.27.095. Unlike Ecology's rule, these statutory vested rights do not expire if developers delay construction.

The plaintiff Counties argued that the delayed-construction exception to Ecology's own vesting rule would force municipalities to violate statutory vested rights. Ecology presents two defenses: (1) The stormwater regulations are not subject to the vested-rights statutes; and (2) if the vested-rights statutes do apply here, the Clean Water Act preempts them. The court of appeals correctly rejected both arguments. This brief addresses the latter defense.

Ecology asks this Court to hold that Washington's vested rights statutes presents an obstacle to a clear and manifest purpose of the Clean Water Act. This Court should refuse. Nothing in the Clean Water Act reveals congressional intent to micromanage state storm sewer permits. Indeed, the Clean Water Act's broad delegation of authority to the states indicates that the details of Ecology's water management are not mandated by the Clean Water Act. Vested rights do not stand as an obstacle to any Clean Water Act objective. The decision below should be affirmed.

ARGUMENT

Any federal preemption claim faces an uphill battle—only a clear showing of congressional intent to override state law will do. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 864, 93 P.3d 108 (2004). As its sole evidence of preemption, Ecology points to the Clean Water Act requirement that storm sewer managers reduce pollutant discharge to the "maximum extent practicable." 33 U.S.C. § 1342(p)(3)(B)(iii). These three words do not preempt Washington's vested rights doctrine because:

1. This Court exercises a strong presumption against preemption absent a clear congressional purpose;

2. The "maximum extent practicable" provision only requires reasonable efforts to manage storm sewers and does not demand close control of third party developers;

3. Congress's intention to leave water management details to the states refutes Ecology's position that the Clean Water Act micromanages the proper balance of vested rights.

I

THIS COURT EXERCISES A PRESUMPTION AGAINST PREEMPTION

This case raises a question of obstacle preemption, where state law poses an obstacle to a federal objective. *Hillman v. Maretta*, __ U.S. __, 133 S. Ct. 1943, 1950, 186 L. Ed. 2d 43 (2013). Here, Ecology argues that granting certain developers a vested right exempting them from Ecology's

newest stormwater regulations poses an obstacle to Congress's purposes in enacting the Clean Water Act. PFR at 17-19.

This Court presumes that federal law does not supersede a state's "historic police powers." *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992). Only a "clear and manifest purpose of Congress" to override state law can shake this presumption. *Id.*

The presumption against preemption is key to the structure of our federal system of government. As Alexander Hamilton observed, ratification of the Constitution would not result in the "entire consolidation of the States into one complete national sovereignty," as this "would imply an entire subordination of the parts." The Federalist No. 32 (Alexander Hamilton). The constitutional framework assures that states retain "all the rights of sovereignty which they had" that had not been "exclusively delegated to the United States." *Id.* A robust presumption against preemption respects this fundamental compact. Under the Federal constitution, preemption would only arise when the state law is "absolutely and totally contradictory and repugnant" to the federal one. *Id.*; *see also Goldstein v. California*, 412 U.S. 546, 552-53, 93 S. Ct 2303, 37 L. Ed. 2d 163 (1973) (adopting the preemption language from Federalist No. 32). That's a high bar, and Ecology has not passed it.

II

THE "MAXIMUM EXTENT PRACTICABLE" REQUIREMENT DOES NOT DEMONSTRATE A CLEAR PURPOSE TO PREEMPT THE VESTED RIGHTS OF DEVELOPERS

A. Ecology Must Show That Congress Had a Clear and Manifest Purpose To Allow the Vesting Permitted by Ecology, but Not the Broader Vesting Granted by Statute

Ecology's NPDES regulations grant vested rights to many developers. Only those who have an existing permit yet choose to begin construction after June, 2020, cannot vest their development rights. *Snohomish Cnty.*, 192 Wn. App. at 322. Ecology now argues that federal law forbids vesting, even though the EPA already approved Ecology's own vesting rule.

The EPA must approve all state NPDES programs before turning over permitting jurisdiction to the state. 33 U.S.C. § 1342(a)(5), (c)(1). That approval hinges on whether the program complies with the Clean Water Act. *Id.* § 1342(b). If the state program later slips into non-compliance, the EPA must withdraw its delegated authority. *Id.* § 1342(c)(3). Moreover, EPA vets proposed general permits. *See* 40 § C.F.R. 123.44(a)(2). If it does not object to the proposed permit, the permit is deemed to meet with EPA's approval. *See id.*

Here, the EPA approved of Ecology's vesting rule by allowing the

2013 storm sewer permit to move forward without objection. Under the Memorandum of Agreement between the EPA and Ecology, EPA vets all general permits, including the permit here. *See* Memorandum of Agreement Between the Washington Department of Ecology and the United States EPA Region 10, 4-6 (Aug. 15, 1989). That permit went into effect without objection. *Cf. Snohomish Cnty.*, 192 Wn. App. at 324-25. EPA's approval indicates that Ecology's vesting rule satisfies Clean Water Act standards. In any case, Ecology surely does not mean to suggest that its own vesting rule defies federal objectives.

Ecology can only escape this conundrum by arguing that the Clean Water Act allows some vesting, but not too much. That is, allowing some developers to vest their rights prior to the start of the general permit does not go too far, but giving vested rights to developers who wait until after June 30, 2020, to build would violate the Clean Water Act. Yet the Clean Water Act says nothing about vesting, much less demonstrates the extraordinary level of congressional control needed to show obstacle preemption.

B. The Requirement That Storm Sewers Reduce Runoff to the "Maximum Extent Practicable" Does Not Prove Obstacle Preemption

1. The Plain Language of "Maximum Extent Practicable" Does Not Evince Congressional Intent To Exercise Close Control of Vested Rights

Preemption analysis centers on legislative intent. The plain language of a statute presents the best expression of that intent. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). Here, the plain language relied on by Ecology fails to demonstrate a legislative intent to override vested rights.

Ecology's preemption argument turns on a single statutory provision about the management of storm sewers:

> Permits for discharges from municipal storm sewers shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system design, and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.

Id. § 1342(p)(3)(B)(iii).

The plain language refutes Ecology's argument that this provision evinces a purpose to micromanage an exact level of vested rights. The word "practicable" suggests both flexibility of implementation and reasonableness of demand. This Court has defined "practicable" as "a practice that is feasible, or a procedure capable of being put into practice." *Miller v. State*, 73 Wn.2d 790, 794, 440 P.2d 840 (1968). Black's Law Dictionary defines it as "reasonably capable of being accomplished; feasible in a particular situation." Black's Law Dictionary (10th ed. 2014). The word conveys

flexibility based on circumstance and reasonableness. An EPA final rule affirms this reading: "EPA has intentionally not provided a precise definition of ['maximum extent practicable'] to allow maximum flexibility in [storm sewer] permitting." NPDES—Regulations for Revision of the Water Pollution Control Program Addressing Stormwater Discharges, 64 Fed. Reg. 68722, 68754 (1999). The word "practicable" cannot reasonably be interpreted to mean an inflexible and controlling approach to state vested rights that allow for Ecology's vested rights but deny the full breadth offered by statute.

2. Context Indicates That the "Maximum Extent Practicable" Rule Has No Bearing on How Municipalities Regulate Developers

Contextual clues also undermine Ecology's preemption argument. When interpreting a statute, courts must consider words in light of surrounding context. *State v. Lilyblad*, 163 Wn.2d 1, 9, 177 P.3d 686 (2008).

The language surrounding the phrase "maximum extent practicable" focuses on direct municipal management of storm sewers—not third-party developers who create runoff. The statute offers an illustrative list of actions subject to the "maximum extent practicable" language: "management practices, control techniques and system design, and engineering methods."

§ 1342(p)(3)(B)(iii). It then adds the catch-all phrase, "and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants." *Id.* The listed items all involve the County's direct management, construction, and maintenance of the sewer system—not controls local governments must impose on private-property owners that may affect stormwater runoff.

When listed items share a common trait, courts interpret the passage as limited to the category with the shared characteristic. *See* Antonin Scalia & Bryan A. Garner, *Reading Law* § 32 (2013) ("The rationale for the *ejusdem generis* canon is twofold: When the initial terms all belong to an obvious and readily identifiable genus, one presumes that the speaker or writer has that category in mind for the entire passage. . . . And second, when the tagalong general term is given its broadest application, it renders the prior enumeration superfluous."). For example, in *State v. Larson*, a retail theft statute targeted theft with tools "designed to overcome security systems including, but not limited to, lined bags or tag removers." 184 Wn.2d 843, 849, 365 P.3d 740 (2015). This Court held that the statute did not apply to retail theft performed using wire cutters. *Id.* at 849-50. Unlike wire cutters, lined bags and tag removers were only used for retail theft. *Id.* at 850. The Court limited the range of items covered by the statute to that characteristic. *Id.* at 851. It

reasoned, "general terms, when used in conjunction with specific terms in a statute, should be deemed only to incorporate those things similar in nature or 'comparable to' the specific items." *Id.* at 849 (quoting *Simpson Inv. Co. v. Dep't of Revenue*, 141 Wn.2d 139, 151, 3 P.3d 741 (2000). If the enumerated list did not limit the kind of items covered by the statute, the Court said, the listed items would become superfluous. *Id.* at 850-51.

Here, the passage requiring municipalities to limit pollutant discharges "to the maximum extent possible" lists only municipal actions related to the direct management and care of the sewer system. These listed items do not relate to municipal control of land-use actions by third parties. Just as the *Larson* court used the enumerated list to limit the statute's scope to tools used only for retail theft, this Court should limit the "maximum extent practicable" requirement with a view toward the enumerated list of municipal actions. That list indicates that the provision only applies to the direct management of the storm sewer itself.

This reading also accords with the section of the Clean Water Act in which it arises; the section directly regulates municipalities, not third parties such as developers. 33 U.S.C. § 1342(p)(3)(B). The "maximum extent practicable" language remains limited to the context of direct municipal management of storm sewers. It does not present a clear and manifest

purpose to override the vested rights doctrine.

3. Congress Intended To Give States Wide Latitude in Managing Water Quality

The Supreme Court has consistently declined to hold state laws preempted in the context of cooperative-federalism statutes, even where state law created some friction with federal law. This Court should follow the same course.

For example, in *New York State Department of Social Services v. Dublino*, 413 U.S. 405, 93 S. Ct. 2507, 37 L. Ed. 2d 688 (1973), New York's welfare work rules added an extra hurdle for parents seeking help under the federal program Aid to Families with Dependent Children. *Id.* at 406-09. New York's work rules conflicted with the Federal Work Incentive Program, a separate work-eligibility rule. *Id.* The New York work rules excluded some people from being eligible for benefits that would be eligible under the federal rules. *Id.* at 424 (Marshall, J., dissenting). The Court upheld the state requirement because when the state works in tandem with the federal government, it must be given "considerable latitude" regarding its own laws. *Id.* at 413.

A similar scenario arose in the context of Medicaid—another system of cooperative federalism—in *Pharmaceutical Research and Manufacturers of America v. Walsh*. 538 U.S. 644, 650, 123 S. Ct. 1855, 155 L. Ed. 2d 889

(2003). There, Maine required prior authorization before dispensing Medicaid-approved prescriptions. *Id.* This made it more difficult for Medicaid recipients to receive federally approved benefits. *Id.* at 667. The Court held that a "modest impediment" to accessing prescription drugs under Medicaid did not cause obstacle preemption. *Id.*; *see also Planned Parenthood of Houston and Se. Tex. v. Sanchez*, 403 F.3d 324, 336-37 (5th Cir. 2005) (state restriction on use of federal funds by clinics that performed abortions did not preempt federal law because "[t]he mere fact that a state program imposes an additional 'modest impediment' to eligibility for federal funds does not provide a sufficient basis for preemption"). Other courts have drawn similar conclusions in preemption cases involving federal-state cooperation. *See, e.g.*, *Resident Action Council v. Seattle Hous. Auth.*, 177 Wn.2d 417, 444-45, 327 P.3d 600 (2013) (in the context of a cooperative federal-state program of affordable housing, state disclosure laws were not preempted by federal regulations); *Deel v. Jackson*, 862 F.2d 1079, 1088 (4th Cir. 1988) (an active approach to preemption in the Social Security Act's context "would impair the cooperative role of the states"); *State of Washington v. Bowen*, 815 F.2d 549, 556 (9th Cir. 1987) (conflicting state and federal income calculations for Medicaid benefits did not result in preemption: "The Secretary's contention that there is a compelling federal

interest in the Medicaid program's being a unified national program . . . must be heard against the background of express language in the Medicaid statute providing that states should have flexibility in operating their Medicaid programs.").

These cases recognize that preemption claims weaken when Congress has already expressed its will regarding the federal-state balance. Courts must respect congressional intent to delegate authority to the states and honor the balance that Congress thereby creates. In short, a state law can rarely if ever be an obstacle to a clear congressional purpose when one of Congress's primary purposes is to grant broad discretion to the states.

The Clean Water Act, like other schemes of cooperative federalism, assigns the states considerable latitude. *See New York v. United States*, 505 U.S. 144, 167, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992) (referring to the Clean Water Act as a "program of cooperative federalism"). Congress intended states to take the lead on water pollution—demonstrating a clear purpose to relinquish tight federal control. *See* 33 U.S.C. § 1251(b). Congress does not engage in the kind of micromanagement necessary to show a clear purpose to allow vested rights only to a defined point and not beyond. Quite the opposite.

The Clean Water Act is committed to local control. The Act says: "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. . . ." 33 U.S.C. § 1251(b). The grant of exclusive permitting authority to the states with only limited supervision attests to that policy.

The legislative history regarding the NPDES system affirms congressional deference to state decisions. *Save the Bay, Inc. v. EPA*, 556 F.2d 1282, 1294 (5th Cir. 1977) ("The primacy of state and local enforcement of water pollution controls is a theme that resounds throughout the legislative history of the Amendments."). Congress expected that states would "assume more and more of the responsibilities of the water pollution program." S. Rep. 95-370 (1977). Congress intended to offer states broad leeway: "[T]he States must play a prominent part in making the water pollution law work. Why should we believe their conviction is any less than ours?" 118 Cong. Rec. 10209 (1972) (statement by Rep. Kluczynski). This theme of state management does not fit with the tight control Ecology imputes to Congress.

This Court should read any supposed obstacle to a congressional purpose in light of this clear intent to grant states discretion. Like with

Dublino and *Walsh*, this scheme of cooperative federalism already addresses the roles of the state and federal governments and casts the state as the lead. As this Court said three years ago: "[T]he case for federal preemption becomes a less persuasive one within a system of cooperative federalism, where coordinated state and federal efforts exist within a complementary administrative framework." *Resident Action Council*, 177 Wn.2d at 445 (internal quotation marks omitted). This is especially true here, where the federal government grants the state exclusive jurisdiction over NPDES permits.

In the face of this clear intent to leave permitting details to the states, Ecology must prove that Congress also wanted to control state vested rights with a fine-toothed comb—even though vested rights receive zero treatment in the NDPES language and legislative history. Nothing in the Clean Water Act evinces such an objective.

CONCLUSION

This Court should affirm the court of appeals' holding that the Clean Water Act does not preempt state-vested rights.

DATED: August 25, 2016.

Respectfully submitted,

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