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DIVISION II

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STATE OF WASHINGTON
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**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,

Appellant,

v.

WAHKIAKUM COUNTY, a political subdivision of Washington State,

Respondent.

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

Biosolids are an organic, nutrient-rich material derived from the treatment of municipal wastewater. As biosolids, such material meets U.S. Environmental Protection Agency standards for protection of human health and the environment, developed to ensure a biosolids product that can safely be applied to land as fertilizer.

In Washington's biosolids statute, the Legislature has directed the Department of Ecology (Ecology) to ensure "to the maximum extent possible" that wastewater sludge is treated and reused as fertilizer on farms, forests, and land reclamation sites, in a manner that protects public health. The statute is explicit on the method for attaining this goal: Ecology will adopt rules incorporating federal standards for treating wastewater sludge to biosolids quality, allowing it to be applied to land with minimal risk to public health; and Ecology will implement a statewide biosolids management and permitting program to ensure its beneficial use on land. The Legislature further promoted this maximum reuse policy by authorizing Ecology under a companion solid waste statute to prohibit the disposal of sewage sludge in landfills, the primary alternative to reuse.

To implement this maximum reuse policy, Ecology established the biosolids management program, adopting the federal standards for

producing four kinds of biosolids product and applying them to land under a permit system. Each of these four products, together with its land application regime, has a role within the program. This program, adopted by legislative mandate, is the method by which the statute is designed to achieve its goal.

Wahkiakum County has enacted an ordinance prohibiting the land application of two of the program's four biosolids products—the two whose production and reuse, as a matter of fact and economic necessity, make up most of the program. The ordinance conflicts with the biosolids program and thwarts its statutory purpose. Each of the County's prohibitions by itself constitutes an impermissible total ban on an activity that state law promotes in the strongest terms possible, to the extent of virtually requiring it. By prohibiting the land application of these two biosolids products, the County impermissibly interferes with, and thwarts, the method by which the statute is designed to reach its goal. Because article XI, section 11 of the Washington Constitution prohibits local governments from adopting ordinances that prohibit what the state permits or requires, or that thwart the State's policy, the County's ordinance is preempted under the Washington Constitution.

The County argued below, and the trial court accepted, that because its ordinance does not prohibit the land application of all biosolids

products, it is merely a more stringent regulation within the county's authority rather than a total ban, making it permissible under the constitution. The argument fails for the reasons stated above, but it also fails on its own terms: the ordinance operates as a de facto ban of virtually all land application of biosolids in the county. As a matter of fact and as a matter of economic necessity, the two types of biosolids product whose land application is prohibited by the ordinance are used so pervasively on farms, forests, and land reclamation sites across the state that a ban on their use would undermine the reuse mission of the biosolids program. The current use of these products cannot be changed without enormously costly conversions of wastewater treatment system infrastructure and operations. If Wahkiakum County were empowered to impose such a ban, this would imply that all counties and cities are empowered to do the same, essentially authorizing all local governments to say "not here." This cannot be reconciled with the Legislature's goal of maximum reuse. For the Legislature's intent to be realized, biosolids have to go somewhere.

Because the County's ordinance is an obstacle to the full implementation of state law, it is conflict preempted. The February 22, 2013, decision of the Cowlitz County Superior Court upholding the ordinance should be reversed.

II. ASSIGNMENT OF ERROR

The trial court erred when it held that Wahkiakum County Ordinance No. 151-11 is constitutional because it can be harmonized with the state biosolids law and Ecology's biosolids regulation.

III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Do Wahkiakum County's prohibitions on the land application of septage and Class B biosolids amount to total bans on activities authorized and promoted by statute?
2. Do Wahkiakum County's prohibitions on the land application of septage and Class B biosolids amount to a de facto total ban of virtually all land application of biosolids?

IV. STATEMENT OF THE CASE

A. Regulatory Background

1. Municipal Sewage Sludge, Septage, Biosolids, and Land Application

Wastewater is generated in homes, businesses, industries, and runoff from various sources. CP 132 (58 Fed. Reg. at 9249). Much of it is collected in municipal sewer systems and carried to publicly owned wastewater treatment plants, where it is treated to meet federal Clean Water Act requirements before being released into the environment. *Id.* This wastewater treatment produces two end products: an effluent which is sent back to surface or ground water after treatment, and sewage sludge, which is a solid, semi-solid, or liquid residue. *Id.*

Sewage sludge is valuable as a source of fertilizer and as a soil conditioner. CP 132 (58 Fed. Reg. at 9249); RCW 70.95J.005(1)(d). When it meets pollutant concentration limits and has been properly treated to reduce pathogens and the potential to attract vectors,¹ it qualifies as biosolids and may, under a permit, be applied to land. RCW 70.95J.010(1); WAC 173-308-160, -170, -180. Places it can be applied include agricultural land, forests, land reclamation sites, public fields, lawns, and home gardens. WAC 173-308-210, -250. Land application practices include spraying or spreading sewage sludge onto the land surface, injecting it below the land surface, or incorporating it into the soil to either condition the soil or fertilize crops or vegetation. WAC 173-308-080. In liquid form, it can be applied with tractors, tank wagons, or irrigation systems, or it can be injected under the surface layer of the soil. CP 142 (58 Fed. Reg. at 9259). Dewatered or dried, it can be applied to the surface and then incorporated into the soil by plowing or disking. *Id.*

Treating wastewater to federal Clean Water Act standards generates immense quantities of residual sewage sludge, and its proper management has become increasingly important. CP 132 (58 Fed. Reg. at 9249). In 1993, the Environmental Protection Agency (EPA) reported that the quantity of municipal sewage sludge in the United States had

¹ Vectors are rodents, flies, etc.

almost doubled in the 20 years since the passage of the Clean Water Act. *Id.* In 1992, the Washington State Legislature found that the amount of sludge was expected to double again within the next 10 years. RCW 70.95J.005(1)(b). The ability to effectively treat and return wastewater and sewage sludge to the environment in a protective manner is of paramount importance from both a public health and an environmental perspective. CP 132 (58 Fed. Reg. at 9249). Recognizing that sewage sludge production will continue to increase and that sewage sludge has great potential as a fertilizer, federal agencies and our state Legislature have advocated recycling it as biosolids through land application. *See* CP 134 (58 Fed. Reg. at 9251); RCW 70.95J.005.²

2. The Biosolids Statute

The Legislature enacted the biosolids statute, Chapter 70.95J RCW, in 1992. The Legislature's express purpose was to authorize and direct Ecology to implement the policy of maximum reuse of sewage sludge with minimal public health risk. RCW 70.95J.005(2).

First, the Legislature authorized Ecology to administer a biosolids management and permitting program, and gave Ecology discretion to

² The other options for dealing with sewage sludge are to incinerate it or bury it in a landfill. CP 141 (58 Fed. Reg. at 9258). Incineration is wasteful, costly, and heavily regulated under federal and state clean air laws. CP 143 (58 Fed. Reg. at 9260). Landfill disposal is expressly discouraged by state law and regulations, in order to encourage beneficial use. RCW 70.95.255; WAC 173-308-300(9).

delegate permitting authority to local health departments. RCW 70.95J.007. Prior to passage of Chapter 70.95J RCW, the regulation of sewage sludge fell under county jurisdiction, and Ecology had no authority to issue or enforce biosolids permits, issue penalties, or delegate permitting authority to counties. CP 51–65. The Legislature intended to change the law by granting Ecology that authority and withdrawing local authority to regulate biosolids under the solid waste law. RCW 70.95J.020(4); *see also* WAC 173-308-060 (“Biosolids are not solid waste and are not subject to regulation under solid waste laws”).

Second, the Legislature anticipated forthcoming federal rules that were to provide the technical standards for treating and land applying biosolids, at 40 C.F.R. § 503. The Legislature directed Ecology to adopt rules that would, at a minimum, conform to those federal rules, forming the basis for the state biosolids management and permitting program. RCW 70.95J.020(1).

The state statute goes further than the federal minimum standards, in at least two ways. First, although the federal regulations encourage the beneficial reuse of biosolids, the statute promotes this reuse in the strongest possible terms, virtually requiring it. The Legislature declared that “a program shall be established to manage municipal sewage sludge” and that “the program shall, *to the maximum extent possible*, ensure that

municipal sewage sludge is *reused as a beneficial commodity*” RCW 70.95J.005(2) (emphasis added). In a corresponding change to the state’s solid waste management law, the Legislature gave Ecology the authority to prohibit the disposal of sewage and septic tank sludge in landfills, with any exemptions to be based on “the economic infeasibility of using or disposing of the sludge . . . other than in a landfill.” RCW 70.95.255. Ecology has adopted this landfill prohibition in its biosolids regulations, together with its limited “economic infeasibility” exemption. See WAC 173-308-300(9). As a result, absent a showing of economic infeasibility, municipalities must dispose of sewage sludge either through biosolids land application or by incinerating it in compliance with Clean Air Act standards.

Second, the Legislature did not grant local governments authority to prescribe the terms of the biosolids program. Instead, it required Ecology to implement the program by developing standards that define the various types of biosolids and the applicable management criteria. Once those program requirements were adopted by rule, the Legislature expected Ecology to issue biosolids permits to facilities seeking to apply biosolids to the land. The Legislature gave Ecology the authority to delegate to local governments, at its sole discretion, the authority to issue and enforce such permits; and to withdraw any such delegation if it “finds

that a local health department is not effectively administering the permit program.”³ RCW 70.95J.080.

3. Washington’s Biosolids Program

Ecology adopted the biosolids management regulation, Chapter 173-308 WAC, in 1998. Its stated purpose echoes that of the statute: to protect human health when biosolids are managed, to encourage the maximum beneficial use of biosolids, and to establish the standards that allow sewage sludge and septage to be managed as biosolids and applied to the land. WAC 173-308-010(2); RCW 70.95J.005(2).

The biosolids quality standards are threefold, consisting of pollutant concentration limits, vector attraction reduction standards, and standards for pathogen reduction. WAC 173-308-160, -170, -180. These standards are used to define four types of biosolids quality product. Depending on the pathogen reduction standards to which they have been treated, biosolids are classified as a Class A or Class B product. WAC 173-308-170. Class A biosolids are produced through a treatment process that kills pathogens to undetectable levels. CP 147–148. Class B biosolids are produced by a process that kills at least 99 percent of

³ Following enactment of the biosolids law, local health departments continue to have primary permitting and enforcement authority over solid waste handling and disposal. RCW 70.95.020(1), .160. Sewage sludge not treated to biosolids standards is considered solid waste and is regulated as such. RCW 70.95.030(20). But because biosolids are not considered solid waste, they are not subject to local authority granted by the state solid waste law. RCW 70.95J.020(4); WAC 173-308-060.

pathogen indicators, or have actually been tested to confirm the elimination of at least 99 percent of pathogen indicators. CP 147. Class A biosolids that meet an additional, heightened pollutant concentration standard qualify as Exceptional Quality, or EQ, biosolids. *See* WAC 173-308-080. Finally, septage is also a form of biosolids. RCW 70.95J.010(1). It comes from septic systems rather than wastewater treatment plants. WAC 173-308-080. Because of its long residence in septic tanks before being pumped out, domestic septage is considered to be sufficiently stabilized with respect to pathogens that it requires no further pathogen treatment prior to land application. CP 147.

Each of these biosolids products has a land application regime appropriate to it. WAC 173-308-210, -250, -260, -270. Biosolids that meet Class A pathogen reduction standards require no further pathogen reduction at the land application site. CP 146. As a result, they can be applied to land with no pathogen-related restrictions. WAC 173-308-210. Treatment to Class A standards is necessary when public access or waiting periods cannot be controlled. When Class A biosolids also meet EQ standards for pollutant concentrations they can be used to fertilize lawns and home gardens. CP 147; WAC 173-308-250, -260.

Class B biosolids and septage receive their final pathogen reduction after being applied to the land. CP 147. Because both Class B

biosolids and septage may still contain some pathogens, the regulations impose periods of restrictions on crop harvesting, domestic animal grazing, and site access for certain periods following their application to land. CP 148; WAC 173-308-210, -270. For example, harvesting of food crops, feed crops, and fiber crops must wait at least 30 days beyond land application of Class B biosolids. WAC 173-308-210(5)(a). Public access to land with low potential for public exposure must be restricted for at least 30 days. *Id.* And WAC 173-308-270(4)(a) provides similarly for septage. The rationale for the additional restrictions for Class B biosolids and septage is to ensure that the land application of Class B biosolids is equally protective of human health and the environment as the land application of Class A biosolids. CP 148.

While Class A biosolids may be used anywhere that Class B biosolids and septage may be used, they are typically used only where access restrictions are impractical, such as lawns and home gardens, and thus account for only 12 percent of biosolids managed in the state. CP 148. Class B biosolids and septage are used much more extensively, on farms, forests, and land reclamation sites, where access restrictions are practical. *Id.*

B. Undisputed Costs of Maintaining a Biosolids Program Deprived of Class B Biosolids and Septage

About 88 percent of biosolids managed in the state are Class B biosolids or septage, used on farms, forests, and land reclamation sites. CP 148. About 12 percent, presumably all Class A, goes to the remaining uses, on public contact sites, lawns, or home gardens. *Id.*

The superior court invited additions to the record relating to the costs and burdens imposed by a prohibition of Class B and septage. CP 475. Many treatment facilities in Washington with an existing Class B biosolids production program have at some point considered acquiring new equipment and changing operations in order to convert to Class A biosolids production. CP 149. In response to the court's invitation, Ecology sought information from these facilities on what it would cost for a facility that currently produces Class B biosolids to convert to Class A production. CP 149. The results of Ecology's efforts to gather this information are captured in undisputed declarations submitted by Ecology. CP 196–456. *See especially*, CP 151–161 (summarizing results). The surveyed facilities range from the small facility serving the town of Cathlamet in Wahkiakum County to the enormous facilities serving metropolitan King County. *Id.*

Facilities that considered converting typically evaluated several alternatives for producing Class A biosolids. CP 150. The technologies for treating sludge to Class A standards involve different equipment than is used for treating it to Class B standards. *Id.* For some technologies, such as composting, the purchase of real property might be necessary. *Id.* In every case where a facility compared continuing an existing Class B program to converting to a Class A program, the cost of converting was significant. *Id.* Ecology obtained cost comparisons from 12 representative facilities. CP 151. Of these 12, only one decided to make the conversion. CP 151.

King County found that converting its South Treatment Plant to the least expensive Class A biosolids program would have cost \$29,140,000 more than continuing with its existing Class B program. CP 243, 297, 306. King County's West Point Treatment Plant found that conversion would have cost \$27,940,000 more than continuing with its existing Class B program. CP 244, 262, 271. Together, the costs of converting these two facilities would have approached \$60,000,000. Central Kitsap County Wastewater Facility found that converting to Class A would cost in the range of \$3,000,000 to \$7,000,000 more than continuing with its existing Class B program. CP 153, 163–165, 168, 179. The City of Kennewick Wastewater Treatment Facility found that conversion would

cost \$5,500,000 more than continuing with its existing Class B program. CP 197. The City of Everett found that the cost of converting ranged from \$9,000,000 to almost \$35,000,000 more than the cost of continuing the existing Class B program. CP 155, 237.

Most of the facilities compared the cost of continuing an ongoing Class B process with the costs of converting to a Class A process. CP 150. However, in some cases, the facility considering a conversion could not continue with its existing Class B operation because that operation had become obsolete or inadequate. *Id.* These cases were more akin to considering alternatives for an entirely new facility: there were substantial equipment or real estate costs no matter whether the facility converted to a Class A operation or selected a new Class B operation. CP 150–151. However, even in such cases, it was still more costly to convert to Class A than to improve the Class B capacity because the methods and equipment for producing Class A biosolids are much more expensive. CP 151. The one representative facility that did choose to convert fell into this category. CP 159–160.

In addition to the significant costs of conversion, it also takes a considerable amount of time for generators of biosolids to change their treatment system. Professionals knowledgeable about the timeframes necessary to implement significant changes at biosolids treatment facilities

estimate that it takes five to seven years to fully implement a change from a Class B to a Class A biosolids treatment system. CP 160.

C. Statement of Procedural Facts

In April 2011, the Board of Wahkiakum County Commissioners adopted Ordinance No. 151-11, entitled “An Ordinance Regarding the Regulation of the Use of Biosolids.” The Ordinance provides that “No Class B biosolids, septage, or sewage sludge may be applied to any land within the County of Wahkiakum.” CP 48–49.

In May 2011, Ecology filed a civil action in Cowlitz County Superior Court against Wahkiakum County, requesting, under the Uniform Declaratory Judgments Act, Chapter 7.24 RCW, that the court declare Wahkiakum County Ordinance No. 151-11 invalid because it violates the Washington State Constitution, article XI, section 11.

In August 2011, Ecology filed a motion for summary judgment requesting that the Cowlitz County Superior Court declare Wahkiakum County Ordinance No. 151-11 invalid. Wahkiakum County filed a cross-motion for summary judgment, seeking dismissal of all causes of action. After hearing arguments in September 2011, the court denied summary judgment, but invited Ecology to seek a rehearing after the parties submitted an undisputed factual record relating to whether the costs were

prohibitive for wastewater treatment facilities in the state to convert to Class A biosolids production and management. CP 475.

In September 2012, Ecology filed a motion for rehearing on summary judgment and submitted undisputed declarations and reports from 12 facilities in the state that had evaluated the costs of converting from Class B biosolids production to Class A production. After considering this additional information, the court denied Ecology's motion and granted summary judgment to Wahkiakum County, concluding the ordinance did not violate the Washington Constitution and dismissing the case with prejudice. This appeal followed.

V. ARGUMENT

A. Standard of Review

On appeal from summary judgment, an appellate court engages in the same inquiry as the trial court. RAP 9.12; *Parkland Light & Water Co. v. Tacoma-Pierce Cnty Bd. of Health*, 151 Wn.2d 428, 432, 90 P.3d 37 (2004). After considering all evidence and reasonable inferences in the light most favorable to the nonmoving party, summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). Interpreting a statute presents a question of law subject to de novo review. *Waste Mgmt. of Seattle, Inc. v. Utils. & Transp. Comm'n*, 123 Wn.2d 621,

627, 869 P.2d 1034 (1994). While an ordinance is presumed constitutional and the party challenging its validity bears the burden of proof, *Brown v. City of Yakima*, 116 Wn.2d 556, 559, 807 P.2d 353 (1991), whether a statute preempts an ordinance is a question of law subject to de novo review. *Parkland Light & Water*, 151 Wn.2d at 432. Similarly, whether an ordinance is reasonable, local, or conflicts with a general law for purposes of article XI, section 11 of the Washington Constitution is purely a question of law subject to de novo review. *Weden v. San Juan Cnty.*, 135 Wn.2d 678, 693, 958 P.2d 273 (1998).

B. Wahkiakum County Ordinance No. 151-11 Conflicts With State Law and Is Therefore Unconstitutional

1. A local ordinance may not prohibit what state law permits and may not thwart state policy

Article XI, section 11 of the Washington Constitution empowers local governments to “make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws.” An ordinance conflicts with the general laws when it “prohibits what state law permits,” *Entm’t Indus. Coal. v. Tacoma-Pierce Cnty. Health Dep’t*, 153 Wn.2d 657, 663, 105 P.3d 985 (2005), or when it thwarts the state’s policy or the Legislature’s purpose. *Biggers v. City of Bainbridge Island*, 162 Wn.2d 683, 694, 169 P.3d 14 (2007); *Ritchie v. Markley*, 23 Wn. App. 569, 574, 597 P.2d 449 (1979); *Diamond Parking*,

Inc. v. City of Seattle, 78 Wn.2d 778, 781, 479 P.2d 47 (1971). The general laws referred to in article XI, section 11, include not only statutes, but also regulations promulgated by state agencies with delegated rule-making authority and direction to adopt rules implementing the laws they enforce. *Gen. Tel. Co. v. City of Bothell*, 105 Wn.2d 579, 585, 716 P.2d 879 (1986).

These state conflict-preemption principles mirror U.S. Supreme Court holdings that federal law preempts state law when compliance with both “is a physical impossibility” or when state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Gade v. Nat’l Solid Wastes Mgmt. Assoc’n*, 505 U.S. 88, 98, 112 S. Ct. 2374, 120 L. Ed. 2d 73 (1992). While not binding, federal courts’ preemption analyses should be persuasive here because the same underlying principles apply.⁴

A local ordinance may not entirely prohibit an activity authorized under state law. *Second Amendment Found. v. City of Renton*, 35 Wn. App. 583, 589, 668 P.2d 596 (1983) (holding that local governments may

⁴ While not binding on state courts, federal precedent in areas addressed by similar provisions in our state constitution can be meaningful and instructive. *State v. Gunwall*, 106 Wn.2d 54, 60–61, 720 P.2d 808, 812 (1986) (“The opinions of the Supreme Court, while not controlling on state courts construing their own constitutions, are nevertheless important guides on the subjects which they squarely address.”); *Sanders v. City of Seattle*, 160 Wn.2d 198, 208, 156 P.3d 874 (2007) (“when interpreting our state constitution, we have held that federal case law interpreting federal constitutional provisions is persuasive, though not binding, precedent.”).

enact reasonable regulations of state licensed activities within their borders but they may not prohibit them outright); *Yarrow First Assocs. v. Town of Clyde Hill*, 66 Wn.2d 371, 376, 403 P.2d 49 (1965) (holding that cities may regulate roads within their boundaries but may not entirely prohibit their use); *see also*, *Blanton v. Amelia Cnty.*, 261 Va. 55, 540 S.E.2d 869 (2001) (Supreme Court of Virginia's holding that local ordinance banning biosolids land application conflicted with state statute and regulations that expressly authorize the land application of biosolids conditioned upon the issuance of a permit). This principle applies equally to a local ordinance that amounts to a de facto total ban of a state authorized activity. *Blue Circle Cement, Inc. v. Bd. of Cnty. Comm'rs of the Cnty. of Rogers*, 27 F.3d 1499, 1508 (10th Cir. 1994) (holding that an ordinance amounting to an explicit or de facto total ban of an activity encouraged by statute is ordinarily preempted).

The Washington Supreme Court has held that where a local ordinance thwarts or interferes with the "coordinated system" established by statute, it is in direct conflict with article XI, section 11 of the state constitution. *Biggers*, 162 Wn.2d at 699; *Diamond Parking*, 78 Wn.2d at 781; *Parkland Light & Water*, 151 Wn.2d at 434. Similarly, the U.S. Supreme Court has also held: "In determining whether state law stands as an obstacle to the full implementation of a federal law, it is not enough to

say that the ultimate goal of both federal and state law is the same. A state law also is pre-empted if it interferes with the *methods* by which the federal statute was designed to reach th[at] goal.” *Gade*, 505 U.S. at 103 (quoting *Int’l Paper Co. v. Ouellette*, 479 U.S. 481, 494, 107 S. Ct. 805, 93 L. Ed. 2d 883 (1987)) (emphasis added) (citations and internal quotation marks omitted).

Under these principles, the Wahkiakum ordinance is preempted.

2. State law authorizes and promotes in the strongest possible terms the land application of sewage sludge that meets biosolids quality standards

Washington’s biosolids statute authorizes and promotes in the strongest possible terms the land application of all sewage sludge that meets biosolids quality standards. RCW 70.95J.005(2); *see also* WAC 173-308-010(2)(a), (c). It directs Ecology to ensure “to the maximum extent possible” that sewage sludge is reused as fertilizer on farms, forests, and land reclamation sites, in a manner that minimizes risk to public health. *Id.* To minimize such risk, the statute provides that sewage sludge may be applied to land only after it is brought to the federal biosolids standards to be incorporated into rule by Ecology. The statute deems biosolids a valuable product and directs Ecology to implement a statewide biosolids management and permitting program to ensure its application to land. RCW 70.95J.005(2).

In a corresponding change to the state's solid waste management law, the Legislature gave Ecology the authority to prohibit the disposal of municipal sewage sludge and septage in landfills, with any exemptions to be based on "the economic infeasibility of using or disposing of the sludge . . . other than in a landfill." RCW 70.95.255. Ecology's biosolids regulations have adopted this landfill prohibition, together with its limited "economic infeasibility" exemption. *See* WAC 173-308-300(9).

To carry out these mandates and policies, Ecology has established the program, at Chapter 173-308 WAC, to promote and regulate the production and use of biosolids. The program establishes processes for producing four kinds of biosolids: septage, Class B biosolids, Class A biosolids, and Exceptional Quality (EQ) biosolids. WAC 173-308-080, -160, -170, -180. Each of these products qualifies as biosolids because it meets regulatory limits on pollutant concentrations and standards for minimizing or eliminating vector attraction and pathogens. *Id.* Septage meets these standards through the process of stabilization from long residence in a septic tank. Class B and Class A biosolids meet the standards through secondary treatment at public wastewater treatment facilities, differing only in the degree of pathogen reduction treatment they receive, with Class B biosolids treated to eliminate 99 percent of pathogens, and Class A biosolids treated to eliminate all trace of

pathogens. CP 147-148; WAC 173-308-170. EQ biosolids are Class A biosolids that meet a more stringent pollution concentration limit. WAC 173-308-080.

The program provides for a land application regime appropriate to each of these biosolids products. WAC 173-308-210, -250, -260, -270. EQ biosolids may be land applied with no restrictions and no permit; it can be sold or given away in bags for use on lawns and home gardens. WAC 173-308-250, -260. The other products require a permit and a site-specific land application plan. WAC 173-308-210, -270. A permit for land applying Class B biosolids or septage must include periods of restricted public access, grazing, and crop harvesting. *Id.* During this period, pathogen elimination is completed through exposure to environmental and biological conditions. CP 147. A permit for land applying Class A biosolids does not require such restrictions. WAC 173-308-210. Each of these products, together with its land application regime, has a role within the statutorily mandated program.

3. Wahkiakum County's prohibitions are total bans of activities authorized and encouraged by state law and regulation

Class B biosolids, because it meets biosolids standards, is deemed by law to be a valuable biosolids product. WAC 173-308-210 specifically addresses the management requirements for land applying Class B

biosolids to farms, forests, and land reclamation sites with minimal risk to public health. Under WAC 173-308-210, Class B biosolids may be applied to the land under a permit and according to a site-specific land application plan. No further treatment for pathogens is required beyond Class B pathogen reduction treatment and final pathogen elimination through exposure to environmental and biological conditions during required periods of restriction on public access, grazing, and crop-harvesting. Class B biosolids is a recognized valuable commodity, and its land application is an activity both authorized and promoted by statute.

Similarly, septage meeting the conditions in WAC 173-308-270 is considered a biosolids quality product. RCW 70.95J.010(1). Under WAC 173-308-270, septage may be applied to land under a permit and according to a site-specific land application plan. No further treatment for pathogens is required beyond the stabilization that occurs due to the long residence in the septic tank and final pathogen elimination through exposure to environmental and biological conditions during required periods of restriction on public access, grazing, and crop-harvesting. Thus, the land application of septage is an activity independently authorized and encouraged by law.

The County's ordinance prohibits all land application of septage and all land application of Class B biosolids, subjecting any person who

applies either product to land in Wahkiakum County to a fine of one thousand dollars for each load of septage or Class B biosolids they apply. These are total bans of activities authorized and promoted by the state.

Moreover, these prohibitions impermissibly interfere with the state's method for achieving its goals. *Biggers*, 162 Wn.2d at 699; *Diamond Parking*, 78 Wn.2d at 781; *Parkland Light & Water*, 151 Wn.2d at 434; *Gade*, 505 U.S. at 103. The biosolids program is the method by which the law is designed to attain its goal of maximizing the reuse of sewage sludge. The production of biosolids products through various forms of treatment, and the land application of these products in ways appropriate to them, are essential elements of the program. The state's method for ensuring that biosolids land application is maximized is to establish treatment standards that minimize health risks. When treated to these standards, sludge qualifies as biosolids and may be land applied with minimal risk. By its prohibitions, the County's ordinance does interfere with the method designed to reach the state's goal. Indeed, the ordinance interferes to such a degree that it thwarts the very purpose of the statutorily mandated program.

4. Wahkiakum County's ordinance is a de facto ban of all biosolids land application within the county

The County argued below, and the trial court accepted, that because its ordinance does not prohibit the land application of Class A biosolids, it is merely a further, more stringent regulation rather than a total ban, and is therefore permissible under the state constitution. This argument attempts to avoid the principle that ordinances amounting to a total ban of an activity promoted by statute will ordinarily be preempted, by contending that its prohibitions do not amount to a total ban of any statutorily encouraged activity. This argument fails for three reasons.

First, it fails because, as argued in the previous section, the County's prohibitions on septage land application and Class B biosolids land application are not merely further, more stringent regulations. They are total bans of activities promoted by statute and regulation. It also fails because the prohibitions interfere with the methods by which the statute is designed to reach its goal.

But the County's argument also fails on its own terms. Even if the County had some further authority to regulate in the biosolids field,⁵ its ordinance works as a de facto ban of virtually all biosolids land application in the County. As a matter of fact and as a matter of economic

⁵ RCW 70.95J.020(4) provides reason to conclude that the County lacks any such authority, stating that "materials that [qualify] as a biosolid shall be regulated pursuant to this chapter."

necessity, Class B biosolids and septage, the two types of biosolids prohibited from being land applied by the ordinance, are used so pervasively across the state that they essentially constitute the entire practice of biosolids application. CP 148. This cannot be changed without enormously costly conversions of wastewater treatment system infrastructure and operations. CP 150–160. The County’s prohibitions thus amount to a de facto total ban on biosolids land application.

a. Ordinances that amount to a de facto total ban of an activity that is otherwise encouraged by statute will ordinarily be preempted

When analyzing whether an ordinance conflicts unconstitutionally with a statute, it is the material effect of the ordinance that matters. *Gade*, 505 U.S. at 107. The impact of the ordinance on the objectives of a statute must be examined to determine whether it thwarts the statute’s policy in a material way. *Blue Circle Cement*, 27 F.3d at 1509. Thus, “ordinances that amount to an explicit or de facto total ban of an activity that is otherwise encouraged by [statute] will ordinarily be preempted.” *Id.* at 1508.

Local ordinances have been declared invalid where they amounted to de facto bans of activities encouraged by law. In *Blue Circle Cement*, the Tenth Circuit considered whether a local ordinance conflicted with the federal Resource Conservation and Recovery Act (RCRA). *Blue Circle*

Cement, 27 F.3d at 1504–08. The ordinance imposed a conditional use permit requirement and thus empowered local government to ban the recycling of hazardous waste through burning it as an alternative fuel, even where this activity occurred at a RCRA permitted facility under the terms of the permit. *Id.* at 1502. Blue Circle Cement challenged the ordinance as preempted under federal law. The county defended the ordinance partly on the ground that RCRA has a “savings clause” that expressly permits states and local governments to adopt more stringent provisions. *Id.* at 1506. But in the face of the county’s de facto ban, the court gave no weight to the statute’s savings clause. Noting that the purpose of the law was to facilitate resource recovery and conservation, that the materials were valuable as energy sources, and that Congress’s goal was to replace land disposal with advanced treatment, recycling, and incineration, the court held that whatever power the savings clause reserved to local authorities, “it does not vest in such authorities the power to ban outright the important activities that [the statute] is designed to promote.” *Id.* at 1505–06. The Blue Circle court’s reasoning is at least as compelling here, where the Legislature did not include an explicit savings clause.⁶

⁶ Unlike RCRA, Chapter 70.95J RCW contains no savings clause. Its regulation, Chapter 173-308 WAC, provides only that: “Facilities and sites where biosolids are applied to the land must comply with other applicable federal, state and

In *ENSCO, Inc. v. Dumas*, 807 F.2d 743 (8th Cir. 1986), a county defended its ban on storage, treatment, or disposal of a particular class of hazardous waste as merely a more stringent requirement. The Eighth Circuit held the ordinance invalid because the ordinance “through its ban on storage, treatment, and disposal in essence mandates that these wastes in [the] County will not be handled in the manner deemed safest by Congress and the EPA.” *ENSCO*, 807 F.2d at 745. Similarly, the Supreme Court of Arkansas, in *Jacksonville v. Arkansas Department of Pollution Control and Ecology*, 308 Ark. 543, 824 S.W.2d 840, 842 (1992), held that both state and federal law preempted a local ordinance from barring the future incineration of hazardous waste because the ordinance frustrated RCRA’s “preference for treatment rather than land disposal of hazardous waste.” Finally, in *Ogden Environmental Services v. City of San Diego*, 687 F. Supp. 1436 (S.D. Cal. 1988), another case involving a de facto ban, the federal district court found invalid a local ordinance that imposed a conditional use permit requirement on such activity without specifying any criteria for obtaining such a permit. The court held that the ordinance conflicted with federal law because it was a de facto ban on hazardous waste storage facilities and frustrated RCRA’s

local laws, regulations, and ordinances, including zoning and land use requirements.” WAC 173-308-030(6). This neither provides for nor recognizes local authority to impose “more stringent requirements.”

general objective to facilitate treatment in place of land disposal. *Ogden Envtl. Servs.*, 687 F. Supp. at 1446–47.

In sum, courts in multiple jurisdictions have recognized that an ordinance amounting to a de facto total ban of an activity that is otherwise encouraged by statute will ordinarily be preempted.

b. Wahkiakum County's ordinance effectively bans all biosolids land application within the county

Biosolids generated in Wahkiakum County consist entirely of Class B biosolids and septage. CP 27, 317–318. Beyond Wahkiakum County, around 88 percent of all biosolids managed in the state are either septage or Class B biosolids, the rest presumably being Class A. CP 148. Increasing the percentage of Class A biosolids is not feasible: publicly owned wastewater treatment facilities in the state have conformed their practices to the state's biosolids management regulations by treating their sludge to produce a Class B product; to change this, new treatment facilities would need to be built or existing treatment facilities would have to convert to Class A treatment operations. CP 150. Numerous facilities in Washington, ranging from the small facility serving the town of Cathlamet in Wahkiakum County to the enormous facilities serving metropolitan King County, have considered and evaluated converting to

Class A biosolids production. *Id.* Almost all have found the economic and practical obstacles prohibitive. *Id.*⁷

By banning the land application of all biosolids produced in Wahkiakum County and virtually all of the biosolids produced in the rest of the state, Wahkiakum County effectively eliminates the possibility of land applying biosolids in Wahkiakum County, leaving no room at all for the state to permit and regulate it. The County's ordinance thus operates as a de facto ban of biosolids land application, undermining the program in the county. If all other counties in the state were to adopt regulations similar to Wahkiakum's, there would be no effective biosolids land application anywhere in the state—a result clearly contrary to the Legislature's intent in adopting the biosolids statute. Wahkiakum County is attempting to exercise a power that could not be simultaneously conferred on all counties in the state without destroying the biosolids program.

Considering a similar issue, the California Court of Appeal, in *City of Los Angeles v. County of Kern*, 214 Cal. App. 4th 394, 154 Cal. Rptr.

⁷ King County found that converting two of its facilities would have cost almost \$60,000,000 more than continuing their Class B programs. CP 243, 244, 262, 271, 297, 306. Central Kitsap County found that converting its facility would have cost in the range of \$3,000,000 to \$7,000,000 more than continuing its Class B program. CP 153, 163–165, 168, 179. The City of Kennewick found that conversion would have cost \$5,500,000 more than continuing its Class B program. CP 197. The City of Everett found that the cost of converting ranged from \$9,000,000 to almost \$35,000,000 more than the cost of continuing its Class B program. CP 155, 237.

3d 122 (2013), held: “An ordinance of one local government that prohibits, within its jurisdiction, the employment by another local government of a major, widely accepted, comprehensively regulated form of recycling is not consistent with [the state law’s] mandate.” *City of L.A.*, 214 Cal. App. 4th at 416. The court reasoned: “If we held that Kern County is empowered to ban land application of biosolids, we would necessarily be implying that all counties and cities are empowered to do the same. . . . [L]os Angeles has to do something with its biosolids. The same goes for every city and county in the state. Kern County asks us to adopt a position that would authorize all local governments to say ‘not here.’ That principle would not be consistent with a statute that requires all local governments to adhere to waste management plans in which recycling is maximized.” *Id.* at 417–418. The *City of L.A.* court’s reasoning is persuasive and speaks directly to the point here.

VI. CONCLUSION

Because the County’s ordinance is an obstacle to the full implementation of state law, it is conflict preempted. The February 22,

2013, decision of the Cowlitz County Superior Court upholding the ordinance should be reversed.

RESPECTFULLY SUBMITTED this 22nd day of July 2013.

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STATE OF WASHINGTON

NO. 44700-2

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

DEPUTY

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Appellant,

v.

WAHKIAKUM COUNTY, a political
subdivision of Washington State,

Respondent.

CERTIFICATE OF
SERVICE

Pursuant to RCW 9A.72.085, I certify that on the 22nd day of July
2013, I caused to be served a true and correct copy of Appellant
Department of Ecology's Opening Brief in the above-captioned matter
upon the parties herein as indicated below:

DANIEL H. BIGELOW
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☒ U.S. Mail
☐ By Fax
☐ By Email

the foregoing being the last known address.

I certify under penalty of perjury under the laws of the state of
Washington that the foregoing is true and correct.

DATED this 22nd day of July 2013, at Olympia, Washington.


TERESA L. TRIPPEL, Legal Assistant