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SUPREME COURT OF THE STATE OF WASHINGTON

CITY OF TACOMA, BIRCH BAY WATER AND SEWER
DISTRICT, KITSAP COUNTY, SOUTHWEST SUBURBAN
SEWER DISTRICT, and ALDERWOOD WATER &
WASTEWATER DISTRICT,

Respondents,

v.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,

Petitioner.

**AMICUS CURIAE BRIEF BY BUILDING INDUSTRY
ASSOCIATION OF WASHINGTON**

BUILDING INDUSTRY ASSOCIATION OF WASHINGTON
Ashli Raye Tagoai, WSBA No. 58883
General Counsel
Sydney Paige Phillips, WSBA No. 54295
Associate General Counsel
300 Deschutes Way SW, Suite 300
Tumwater, WA 98501
(360) 352-7800

Counsel for Amicus Curiae

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I. INTRODUCTION

Affordable housing is a luxury in Washington, one which becomes more elusive to average citizens every day. Allowing the Washington State Department of Ecology (“Ecology”) to require tertiary treatment at wastewater treatment plants (“WWTP”) (or subject WWTP to total inorganic nitrogen (“TIN”) load caps in the interim) without following the necessary procedures under the Administrative Procedure Act (“APA”) will make owning and building homes in western Washington practically impossible.

The Building Industry Association of Washington (“BIAW” or the “Association”) is the trade association for home builders and associated trades in Washington and has firsthand knowledge of the impact that additional wastewater and sewer bills will have upon Washingtonians. Without the Department following the requirements of the APA, and permitting the necessary stakeholders to meaningfully participate in discussions surrounding a requirement to add tertiary treatment, the

following will happen: 1) Washington citizens, especially racial and social minorities, will be further unable to afford to purchase or rent homes in the communities where they currently live and work; 2) Washington citizens will not be permitted, nor will they be able to afford to build homes in western Washington counties; and 3) other private businesses and citizens will be detrimentally impacted when working with state agencies regarding rulemaking. For these reasons, this Court should affirm the decision of the lower court, and hold that the Department violated the APA when it issued its directive regarding the total inorganic nitrogen cap load.

II. FACTUAL AND PROCEDURAL BACKGROUND

In the interest of judicial economy, this brief defers to the thorough recitation of the facts and procedural background of this case as provided by the Court below, and the Respondent before this Court.

III. IDENTITY AND INTEREST OF AMICUS CURIAE

BIAW represents nearly 8,000 members of the Washington home-building industry. The Association is made up of fourteen

affiliated local associations: the Central Washington Home Builders Association, the Building Industry Association of Clark County, the Jefferson County Home Builders Association, the Master Builders Association of King and Snohomish Counties, the Kitsap Building Association, the Lower Columbia Contractors Association, the North Peninsula Builders Association, the Olympia Master Builders, the Master Builders Association of Pierce County, the San Juan Building Association, the Skagit-Island Counties Builders Association, the Spokane Home Builders Association, the Home Builders Association of Tri-Cities, and the Building Industry Association of Whatcom County. BIAW is one of the largest home-building associations in America, championing the rights of its members and fighting for affordable home ownership at all levels of government. BIAW pursues these goals through several means including legal challenges, legislative and policy work, and through our research center, the Washington Center for Housing Studies (“WCHS”). Additionally, BIAW supports its members by providing award-

winning education, employee healthcare plans, and the state's largest, longest-operating Retro (Retrospective Rating) safety incentive program, ROI¹.

BIAW offers this brief to assist the Court in considering the harmful impacts of requiring tertiary treatment, and/or TIN load caps, at WWTP on homeowners in Washington, as well as the uncertainty created if government agencies are permitted to create rules outside of the APA process.

IV. ISSUES ADDRESSED

1. Whether requiring tertiary treatment, and/or TIN load caps, at WWTP will increase costs to homeowners and result in the denial of permits for affordable housing in Washington.

¹ Retro is a safety incentive program offered by the Washington State Department of Labor and Industries ("L&I"). In Retro a participating company can earn a partial refund of their workers' compensation premiums if the company can reduce workplace injuries and lower associated claim losses. *See* About Retrospective Rating (Retro), last viewed March 18, 2024, <https://www.lni.wa.gov/insurance/rates-risk-classes/reducing-rates/about-retro>.

2. Whether permitting Washington State agencies to create administrative rules and regulations outside of the APA process will create uncertainty in other regulatory agencies like the State Building Code Council (“SBCC”) and L&I.

V. ARGUMENT

A. Requiring Tertiary Treatment Will Further Prevent Affordable Housing in Washington

If the Department of Ecology requires tertiary treatment at WWTP in Washington, then monthly housing-related bills will increase for homeowners and renters. Additionally, housing supply will inevitably decrease when this requirement, or a TIN load cap, leads to canceled development permits.²

² Canceled and delayed building permits are not speculative hypotheticals, rather they present a very real risk to affordable housing. A delay in permitting can cost home builders and owners thousands of dollars. Statewide, the average permit delay is six and a half months, costing on average \$31,375 in total holding cost. “For every \$1,000 added to the cost of constructing a new home, 2,200 families lose their ability to purchase a new home.” Andrea Smith, *Cost of Permitting Delays*, Washington Center for Housing Studies – BIAW, <https://www.biaw.com/research-center/cost-of-permitting-delays/> (internal quotations omitted). Immediately following Ecology’s denial letter stating it would “set nutrient loading limits at current levels...”, the City of Tacoma placed “caveats in

Washingtonians, cannot afford additional bills – especially not an additional \$500 added on to their monthly sewer bill. Nor can Washingtonians continue to be priced out of opportunities for home ownership, and rentals.

Data shows that Washington State is one of the most expensive states to live in and that the demand for affordable homes to rent and own is significantly greater than the supply.³

building permits allowing the City to ‘rescind the permit’ in the event Ecology limited the City’s treatment capacity by capping nitrogen discharges. This put several major projects in limbo, including multifamily housing developments, a behavioral health hospital, and an expansion at Bates Technical College Medical School.” *City of Tacoma v. Dep’t of Ecology*, 28 Wn. App. 2d 221, 233-34 (2023) (internal citation omitted).

³ The expense of home ownership is apparent when viewing the increase in typical home value. Between 2000 and 2023 the increase in Washington was 216 percent. The only seven states higher were Hawaii (309 percent), California (259 percent), Idaho (258 percent), D.C. (254 percent), Florida (248 percent), Maine (240 percent), and Vermont (219 percent). Matt Brannon, *Home Prices vs. Inflation: Why Americans Can’t Afford a House in 2024*, Clever (March 11, 2024), <https://listwiththeclever.com/research/housing-inflation-2024/>.

Further, Washington is now home to 18 cities where the typical home is worth \$1 million or more, ranking seventh in the nation for having the most million-dollar cities. King 5 Staff, *Report: Washington now home to 18 cities where the typical home is*

BIAW’s research center, WCHS, has been working tirelessly to help inform decision-makers and politicians about the ever-rising costs and barriers to homebuilding, homeownership, and the rental market in Washington. BIAW and the National Association of Home Builders (“NAHB”) estimate that a change of less than \$1,000 to monthly bills would result in home ownership and renting being entirely unaffordable to most Americans, resulting in increased debt and homelessness. *See* Na Zhao, *NAHB Priced-Out Estimates for 2023*, National Association of Home Builders (March 2023), <https://www.nahb.org/-/media/NAHB/news-and-economics/docs/housing-economics-plus/special-studies/2023/special-study-nahb-priced-out-estimates-for-2023-march-2023.pdf>.

worth \$1 million or more, King 5 News (April 4, 2024 at 1:21 pm), <https://www.king5.com/article/money/washington-home-to-18-cities-typical-home-worth-1-million-or-more/281-3225a860-e9a5-461a-9ab4-982211caabfc>.

1. Cost is the greatest barrier for homes to own or rent in Washington.

The population growth in Washington State outpaces and outmatches the available, affordable homes. The Washington State Department of Commerce (“Commerce”), as well as WCHS, have determined, after reviewing the available data, that home ownership is nearly unattainable for most people in Washington. *See, Washington state will need more than 1 million homes in next 20 years*, Washington State Department of Commerce (March 2, 2023), <https://www.commerce.wa.gov/news/washington-state-will-need-more-than-1-million-homes-in-next-20-years/>, *see also*, Andrea Smith, *Housing Affordability In Washington*, Washington Center for Housing Studies - BIAW (March 1, 2024), <https://www.biaw.com/research-center/washington-states-housing-affordability-index/>. Inflation, an aging workforce, supply chain issues, rising construction costs, regulatory costs, and an ever-increasing cost of living all contribute to the barriers to home ownership and the ability to rent in Washington. The

impact, however, of unaffordable housing ultimately lands upon low- and middle-income households, disproportionately affecting minorities - especially Black, Indigenous, and people of color (“BIPOC”), immigrants, LGBTQ2+ individuals, individuals with disabilities, first-time home buyers, and those living outside the nuclear family.⁴

⁴ See, e.g., “Home ownership in Washington has followed a disturbing pattern [...] 69% of White families are homeowners compared to only 34% of Black families. Fifty years ago, in 1970, 50% of Black families owned homes.” The Racial Restrictive Covenants Project, *Homeownership by race 1970-2022 – Washington State*, Civil Rights and Labor History Consortium University of Washington (last viewed March 18, 2024), https://depts.washington.edu/covenants/homeownership_washington.shtml; “[...] Black, Indigenous, and people of color (BIPOC) would need to buy more than 140,000 houses in the state to achieve parity with white homeownership on a percentage basis. The housing gap is even more significant today than in the 1960s, when housing discrimination and redlining were legal.” *Report: Black, Indigenous, and people of color (BIPOC) would need to buy more than 140,000 houses in the state to achieve parity with white homeownership in Washington State*, Washington Department of Commerce (last viewed on March 18, 2024), <https://www.commerce.wa.gov/news/report-black-indigenous-and-people-of-color-bipoc-would-need-to-buy-more-than-140000-houses-to-achieve-parity-with-white-homeownership-in-washington-state/> (emphasis added); “According to a 2021 Public Health – Seattle & King County

survey [...] 35% of LGBTQ respondents reported earning less than \$30,000 per year, which isn't enough to live anywhere, let alone [Capitol Hill].” Rich Smith, *Seattle’s LGBTQ Communities Demand Rent Stabilization*, *The Stranger* (February 22, 2024, 9:00 am), <https://www.thestranger.com/olympia/2024/02/21/79395600/Seattle-LGBTQ-communities-demand-rent-stabilization>; “Only 16% of [transgender] people owned their homes, in contrast to 63% in the U.S. population.” James, S.E., *et al.*, *The Report of the U.S. Transgender Survey*, Washington, DC: National Center for Transgender Equality (last viewed March 19, 2024), <https://calculators.io/national-transgender-discrimination-survey/>; “One of the greatest priorities of the Legislature is the work to mitigate the impacts of the housing affordability crisis. [...] the crisis remains acute and the barriers to housing are unacceptably high. This is just as true for those with intellectual and developmental disabilities in Washington as it is for everyone else. A recent grant program in the Housing Trust Fund received twice as many applications for more housing in Supported Living as expected, confirming an unmet need for housing continues.” Jamila Taylor, *People with disabilities are part of the WA housing crisis, too*, *Seattle Times* (February 13, 2024, 4:23 pm), <https://www.seattletimes.com/opinion/people-with-disabilities-are-part-of-the-wa-housing-crisis-too/>; “Small, independently rented residential units with shared kitchen and common spaces may soon be allowed in cities and counties across Washington [...] Co-living housing units are similar to dorm rooms, with each sleeping quarters independently rented and other parts of the building shared. [...] Housing advocates say co-living is one of the best ways to increase the amount of affordable housing in Washington.” Laurel Demkovich, *WA House approves bill to expand dormitory-like housing*, *Washington State Standard* (February 7, 2024, 12:10 pm),

BIAW’s Housing Affordability Index, a Washington-based resource for understanding the extent to which county-level housing markets are providing a range of choices that are affordable and attainable to Washingtonians found that “[h]ome ownership is unaffordable for 84 percent of Washington families, based on the median-priced home of \$586,100.” *See Housing Affordability In Washington, supra*. In less than a year, home prices in Washington have increased by 36 percent, rising from an average of \$430,000 in June 2023 to an average of \$586,100 in March 2024. *Housing Affordability Index: Homes less affordable today*, BIAW (March 11, 2024), <https://www.biaw.com/housing-less-affordable/>. To afford the current median home prices, BIAW’s WCHS has determined that Washington homeowners need to earn approximately \$165,100 per year, however, the statewide median income is \$90,325 –

<https://washingtonstatestandard.com/2024/02/07/wa-house-approves-bill-to-expand-dormitory-like-housing/>.

almost \$75,000 less per year than the necessary income to afford a median-priced home.

WCHS's research shows that should a Washingtonian, making the median income, have the necessary downpayment, and qualify for the purchase of the current median-priced home this purchase will result in an average monthly payment of \$3,862 (or 51 percent of their monthly gross income) – eking out 49 percent of their income to spend on every other bill a household may maintain including necessities such as food, electricity, water, as well as student loans, and medical debt. Personal finance experts only recommend a household spend 30 percent of their income on housing.⁵ Only 16.2 percent of households in Washington can afford median-priced homes with

⁵ The NAHB adopts for purposes of its yearly “Priced-Out” report that the sum of the mortgage payment for a household (which includes principal, loan interest, property tax, as well as homeowners’ property and private mortgage insurance premiums) is no more than 28 percent of the monthly gross household income. *See Zhao, supra.*

a conventional mortgage, and 83.8 percent of Washingtonians are not able to afford homes with a conventional mortgage.

Inflation also greatly impacts the affordability of homes. In a new study from Clever Real Estate, based on Redfin data, the cost of a typical home in the U.S. is \$412,778 - 24 times more expensive than the cost of a home in the 1960s, while inflation is only 10 times more expensive since the 1960s. Ana Teresa Solá, *Home prices rose 2.4 times faster than inflation since 1960s, study finds. What that means for homebuyers*, CNBC (March 19, 2024, 2:12 pm), <https://www.cnbc.com/2024/03/19/why-home-prices-have-risen-faster-than-inflation-since-the-1960s.html>.

This same study found that home prices have risen 2.4 times faster than inflation, pointing out that if home prices had kept pace with inflation since the 1960s, homes would on average only cost \$177,500, not nearly half a million dollars. Matt Brannon, *Home Prices vs. Inflation: Why Americans Can't Afford a House in 2024*, Clever (March 11, 2024), <https://listwithclever.com/research/housing-inflation-2024/>.

Further, the study found that in the 1980s, it took about three and a half years' worth of household income to purchase the typical home. Now, in 2024, it takes six years and four months' worth of household income to purchase the same home. *Id.*

Across Washington, the shortage of affordable homes to own and rent impacts extremely low-income households ("ELI"), whose incomes are at or below the poverty guideline, or 30 percent of their area's median income. Many of these households are spending more than half of their income on housing, and these individuals are more likely than others to sacrifice necessities such as food and healthcare to continue to pay their mortgage or rent, and face the risk of eviction or foreclosure at a greater rate.

2. The Cost of Adding Tertiary Treatment at WWTP Will Prevent More Washingtonians from Affording A Home.

Division III understood the main barrier to the implementation of tertiary treatment – cost. As discussed *supra*, several factors play into housing affordability, however, the cost of monthly, recurring bills such as a sewer or wastewater bill can

place housing in jeopardy if increased. The Court below acknowledged the unintended consequences of an interim TIN load cap while a WWTP raises the funds necessary to implement tertiary treatment – halting development, creating a de facto moratorium. *See City of Tacoma*, 28 Wn. App. 2d at 234. A City, such as Tacoma, would have to place conditions on the sewer availability notices leading to impaired lending, and effectively halting most developments including affordable housing, shelters, and accessory dwelling units. *Id.* The answer to many issues in western Washington is more affordable housing, not less. Preventing affordable homes from being built due to sewer limits from the addition of tertiary treatment (or TIN load caps) will force ELI families from urban communities, and further place the fragile Washington housing supply into a “tailspin.”

BIAW’s WCHS is currently working on a report to be published later this year regarding the cost of Washington water and sewer connections, and the data demonstrates that the average cost of hookups to homes in communities without

tertiary treatment is already \$5,601.86. This data is tied to new builds, but costs for sewage and other wastewater exist on a monthly and recurring basis, not including emergencies which are often the responsibility of the homeowner or renter. These costs can severely impact a household's ability to pay all its bills. Nearly all WWTP in Washington State do not currently have tertiary treatment available at their plant, and do not have the current infrastructure to add tertiary treatment without passing on significant costs to the customers they serve or the tax base as a whole.

One of the only WWTP in Washington to implement tertiary treatment, out of several hundred public WWTPs, is the Riverside Park Water Reclamation Facility ("Riverside") in Spokane. Riverside added tertiary treatment based on the Department of Ecology's requirement due to excess levels of phosphorus being released into the Spokane River. *The Riverside Park Water Reclamation Facility*, Spokane City (last viewed April 1, 2024),

<https://my.spokanecity.org/publicworks/wastewater/treatment-plant/>. The addition of tertiary treatment to Riverside was estimated to cost \$126 million for the construction alone. *Id.* This figure does not include additional maintenance, testing, and other costs associated with tertiary treatment. These costs must be borne by someone, and inevitably these costs will be borne by those with the least access to the funds necessary to cover these costs, resulting in increased homelessness, and individuals moving further from their work and communities to be able to afford to live.

The City of Tacoma estimates that the addition of tertiary treatment at its WWTPs connected to the Salish Sea will cost anywhere from \$250 million to \$750 million in construction costs alone. *See, City of Tacoma*, 28 Wn. App. 2d at 233, AR 620. The cost of constructing tertiary treatment for WWTPs in western Washington, without formal rule-making processes allowing stakeholders and the public to voice their concerns would render housing even more unaffordable to

Washingtonians. As mentioned *supra*, there are substantial costs to add tertiary treatment or to enforce TIN load caps, and the average Washingtonian cannot afford to cover that cost.

The APA provides the necessary procedures to prevent injustices in the administrative rule-making process – injustices such as allowing underprivileged individuals to bear the burden of cost for the decrease of nitrogen into the Salish Sea. There are alternative opportunities available to ensure the health of the environment while still providing affordable housing in Washington. However, without the salient opportunities for all necessary parties to raise their concerns, opinions, and solutions, there cannot be a world in which we can prioritize both of these goals.

B. Permitting Governmental Agencies to Create State Rules and Directives Without Engaging in Formal Rule Making Under the APA Harms the Citizens of Washington

The APA provides certainty and security to the citizens of Washington. The APA was enacted to “clarify the existing law of administrative procedure, to achieve greater consistency with

other states and the federal government in administrative procedure, and to provide greater public and legislative access to administrative decision making. See RCW 34.05.001 (emphasis added).

The APA provides certainty to parties, and those participating in an agency’s decision-making process, especially regarding the role the judiciary plays in reviewing decisions. For many, knowing that the Washington State Supreme Court sits in the same position as the superior court, applying the APA directly to the same record before the agency, provides great comfort by leveling the proverbial “playing field” for all parties and providing clear, administrable rules. *Dep’t of Labor & Industries v. Rowley*, 185 Wn.2d 186, 200 (2016) (citing *Brown v. Dep’t of Commerce*, 184 Wn.2d 509 (2015)). This Court has consistently stated that “[r]ules are invalid unless adopted in compliance with the APA.” *Northwest Pulp & Paper Ass’n v. Dep’t of Ecology*, 200 Wn.2d 666, 672 (2022) (citing *Hillis v. Dep’t of Ecology*, 131 Wn.2d 373, 398 (1997)). This Court has acknowledged that

“[r]ule making procedures under the APA involves providing the public with notice of the proposed rule and an opportunity to comment on the proposal. These procedures allow members of the public to meaningfully participate in the development of agency policies that affect them. *Id.* (internal citations omitted).

BIAW, and ROII, both participate closely with several State agencies including L&I and the SBCC. Should either of these agencies act similarly to Ecology and enact rules and directives without following the necessary steps under the APA, this decision would be detrimental to both BIAW and ROII’s work. Trade associations play a major role in advising members on how laws, regulations, and administrative rules impact their day-to-day operations.

For example, in the building industry, BIAW takes on the task of updating its members on all the changes to the building code when a new code cycle goes into effect. This communication is necessary for several reasons: 1) our members are dedicated to providing the highest quality of products to their

clients and need to be aware of the newest regulations; 2) our members are leaders in the building industry and want to be ahead of the curve when it comes to health and safety; and 3) our members are dedicated to building affordable homes for Washingtonians. BIAW staff participate in every SBCC meeting, attend work groups, advise on proposed directives and regulations, and, if necessary, file litigation to protect the rights of our members. BIAW can participate in the rulemaking process because the APA provides the necessary procedures to do so. Similarly, ROII participates in all aspects of L&I regarding home building – everything from safety at work to ensuring that injured employees are appropriately assisted to ensure the greatest recovery possible. ROII staff can participate in these processes with L&I staff because of the APA process. It allows the ROII staff to have certainty in the relationship with L&I, and the manner in which L&I will handle all of their rules.

Should Ecology be permitted to issue directives regarding WWTP without following the APA rulemaking process, this

decision will remove the voice of numerous private businesses in Washington that work closely with State agencies.

VI. CONCLUSION

Washingtonians cannot afford houses in Washington as it currently stands, let alone if required to pay for the addition of tertiary treatment, or a TIN load cap in the interim, to WWTP. This Court should affirm Division III's decision, and confirm that the Department of Ecology cannot issue a directive requiring the addition of tertiary treatment without following APA rules.

This document contains 3,611 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 12th day of April, 2024.

BUILDING INDUSTRY ASSOCIATION
OF WASHINGTON

By: *s/Ashli R. Tagoai*

Ashli R. Tagoai, WSBA #58883

General Counsel

Sydney P. Phillips, WSBA #54295

Associate General Counsel

*Attorneys for Amicus Curiae the Building
Industry Association of Washington*

DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on this date I caused the foregoing document to be served on the following parties via the Appellate Court filing portal as indicated below:

Ronald L. Lavigne
Sonia A. Wolfman
Office of the Attorney
General
P.O. Box 40117
Olympia, WA 98504-0117
ecyolyef@atg.wa.gov
Ronald.lavigne@atg.wa.gov
Sonia.wolfman@atg.wa.gov
*Attorneys for State of
Washington, Department of
Ecology*

James A. Tupper, Jr.
Marten Law LLP
1191 Second Ave, Suite 2200
Seattle, WA 98101
jtupper@martenlaw.com
*Attorney for City of Tacoma
and Kitsap County*

Eric C. Frimodt
Inslee Best Doezie & Ryder
10900 NE 4th St., Ste. 1500
Bellevue, WA 98004
efromodt@insleebest.com
*Attorney for Southwest
Suburban Sewer District*

Robert A. Carmichael
Catherine A. Moore
Carmichael Clark PS
P.O. Box 5226
Bellingham, WA 98227
bob@carmichaelclark.com
cmoore@carmichaelclark.com
*Attorneys for Birch Bay Water &
Sewer District*

Christopher D. Bacha
City Attorney
City of Tacoma
747 Market St., Room 1120
Tacoma, WA 98402
cbacha@cityoftacoma.org
Attorney for City of Tacoma

Joseph P. Bennett
Hendricks-Bennett PLLC
402 Fifth Ave South
Edmonds, WA 98020
joe@hendricksb.com
*Attorney for Alderwood Water &
Wastewater District*

Dated at Olympia, Washington, this 12th day of April, 2024.

s/ Sydney Phillips
Sydney Phillips, WSBA #54295

BUILDING INDUSTRY ASSOCIATION OF WASHINGTON

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Appellate Court Case Number: 102,479-7
Appellate Court Case Title: Birch Bay Water and Sewer District, et al. v. State of WA, Dept. of Ecology
Superior Court Case Number: 20-2-02539-6

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Address:

300 DESCHUTES WAY SW STE 300

TUMWATER, WA, 98501-7719

Phone: 434-426-4442

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