

NO. 94293-5

Court of Appeals, Div. II Case No. 48267-3-II

SUPREME COURT OF THE STATE OF WASHINGTON

PUGET SOUNDKEEPER ALLIANCE

Petitioner,

v.

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

Respondents.

**AMICUS CURIAE SQUAXIN ISLAND TRIBE BRIEF IN
SUPPORT OF PUGET SOUNDKEEPER ALLIANCE'S PETITION
FOR DISCRETIONARY REVIEW**

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I. IDENTITY OF AMICUS CURIAE PETITIONER

Amicus Curiae Petitioner is the Squaxin Island Tribe, a federally-recognized Indian Tribe with a reservation near Shelton, Washington in Puget Sound. (“Squaxin Island”).

II. COURT OF APPEALS DECISION SUBJECT OF PETITION

Squaxin Island supports the Petition to this Court of Puget Soundkeeper Alliance dated March 24, 2017, (the “Petition”), seeking review of the above-captioned decision of the Court of Appeals, Division II, Unpublished Opinion, dated February 22, 2017. A copy of the decision is attached to Puget Soundkeeper Alliance’s Petition.

III. ISSUES PRESENTED FOR REVIEW

Squaxin Island adopts the statement of issues presented in Puget Soundkeeper Alliance’s Petition dated March 24, 2017.

IV. STATEMENT OF INTEREST OF AMICUS CURIAE SQUAXIN ISLAND

Squaxin Island are “People of the Water.” Squaxin Island and its members have a treaty right to harvest fin fish and shellfish in a manner sufficient to support their way of life in and around the waters of Puget Sound. A treaty is not a grant of rights to Indians but a grant of rights from them, and those rights not specifically granted are reserved to the

Indians.¹ The interests at stake here are related to the most vital interests of the Squaxin Island Tribe to catch and eat fish and shellfish for subsistence, cultural, religious and business reasons.

Squaxin Island relies on land and resources in the waters of Puget Sound and along its shorelines and river estuaries for traditional, commercial, economic, cultural, and spiritual purposes. They have lived, fished, hunted, and gathered in this area since time immemorial. Fin fish, especially salmon, and shellfish play a central role in the Squaxin Island's day-to-day existence. These resources and continuing traditional activities require clean water and the ability to accurately assess and enforce that cleanliness. The tribe participates in natural resources enhancement and protection programs with the Northwest Indian Fisheries Commission, the Puget Sound Water Quality Authority, the Washington State Department of Fish & Wildlife, and other groups and agencies to ensure that today's decisions provide for a healthy future.²

Squaxin Island is situated in the South Puget Sound and near the mouth of rivers and streams that flow into the Sound. As a result, the discharge and presence of pollutants in those rivers and streams and throughout the Sound can have significant effects on Squaxin Island and

¹ *United States v. Winans*, 198 U.S. 371, 380-81 (1905).

² <http://squaxinland.org/government/departments/natural-resources/>.

its way of life and economy. Because of this, Squaxin Island has been very active for decades in ensuring that the State of Washington water quality standards, and Clean Water Act programs required to protect and enforce those standards, are as stringent as necessary to protect healthy fish and shellfish and the interests of Squaxin Island.

On multiple occasions in the recent past, Squaxin Island has submitted letters and comments as part of water quality standards rulemaking efforts by the State of Washington, Department of Ecology (“Ecology”) and EPA, both directly and in coordination with the Northwest Indian Fisheries Commission. (“NWIFC”).³ The rulemaking in question concerned necessary updates to the human health criteria for water quality standards in Washington related to the consumption of fish and shellfish.

Washington’s water quality standards for toxic pollutants that bioaccumulate in fish and shellfish are necessarily based upon the amount of fish or shellfish people are expected to consume. *See*, 81 Fed. Reg. 85,217, 85,219-20 (Nov. 28, 2016). Washington’s water quality standards

³ *See as example of Squaxin Island participation in water quality rulemaking*, <http://www.ecy.wa.gov/programs/tcp/regs/2011-SMS/120127-fish-consumption/Squaxin.pdf>; <http://www.ecy.wa.gov/programs/wq/ruledev/wac173201A/comments/0056b.pdf> and <http://www.ecy.wa.gov/programs/wq/ruledev/wac173201A/comments/0056c.pdf>.

previously protected consumption of only 6.5 grams of fish or shellfish per day (“g/day”), about the amount of fish that can fit on a cracker and totaling only about one 7-ounce meal per month. *See*, former National Toxics Rule at 40 C.F.R. § 131.36(d)(14)(2015). Surveys repeatedly demonstrated that members of tribes like Squaxin Island consume far more than that, especially if adjusted for the fact that tribes’ consumption is suppressed due to toxins and reduced fish stocks.⁴ Information from Squaxin Island demonstrated that tribal members consumed 318 g/day.⁵

⁴ *See* Columbia River Inter-Tribal Fish Commission, 1994, Fish consumption survey Umatilla, Nez Perce, Yakama and Warm Springs Tribes of the Columbia River Basin, Columbia River Inter-Tribal Fish Commission Report #94-03, Portland, Oregon; National Center for Environmental Assessment, Washington, DC, EPA/600/R-06/080F, Fish Consumption Survey of the Suquamish Indian Tribe of the Port Madison Indian Reservation, Puget Sound Region, August 2000; (for Colville Confederated Tribes) Westat, 2012, Upper Columbia River Site Remedial Investigation and Feasibility Study: Tribal Consumption and Resource Use Survey, Final Report, http://www.epa.gov/region10/pdf/sites/ucr/tribal_consumption_resource_use_survey_final_report_june2012.pdf; Lummi Natural Resources Department, Water Resources Division, Lummi Nation Seafood Consumption Study. (J. Freimund, M. Lange and C. Dolphin; August 31, 2012) (mean rate for adult male respondents of 383 grams per day, and values of 800 and 918 g/day for the 90th and 95th percentiles, respectively.)

⁵ Toy, K.A., Polissar, N.L., Liao, S., and Mittelstaedt, G.D. 1996, Fish Consumption Survey of the Tulalip and Squaxin Island Tribes of the Puget Sound Region, Tulalip Tribes, Department of Environment; U.S. Environmental Protection Agency, Reanalysis of fish and shellfish consumption data for the Tulalip and Squaxin Island Tribes of the Puget Sound Region: Consumption Rates for Consumers Only (2013) (the fish

In at least one tribal dietary study in Puget Sound, tribal children have been shown to consume fish at over three times the rate of adults, relative to their body weight, which in turn increases their health risks.⁶ Squaxin Island advocated for water quality standards based on what tribal members actually consumed in order to ensure their health, subsistence, cultural, religious and business interests were protected.

EPA ultimately finalized updated water quality standards for Washington in November of 2016, 81 Fed. Reg. 85,417 (Nov. 28, 2016), citing the need to protect tribal members' health and ability to catch and eat fish as an important consideration underlying the new, more stringent standards. *Id.* at 85,422-25. Under Clean Water Act requirements, the updated water quality standards will drive more stringent limits on toxic pollutants that bioaccumulate in fish and shellfish, particularly pollutants such as mercury and polychlorinated biphenyls ("PCBs"), the pollutant at issue in the Petition for Review. More stringent limits on PCBs will require laboratory methods for testing water quality that are sufficiently sensitive to know and understand:

(1) whether the waters in Washington State meet the applicable

consumption rate for the Squaxin Island Tribe at the 95th percentile for consumers was estimated at 318 g/day (the earlier estimate including non-consumers was 247 g/day)).

⁶ EPA, Reanalysis for Tulalip and Squaxin Island Tribes, *Id.*

standards, designed to protect the health of tribal members that consume high amounts of fish and shellfish;

(2) the standards or levels of PCB reductions that must be achieved by any cleanup plan for waters that are polluted with PCBs; and

(3) whether pollutant dischargers are meeting the requirements in their Clean Water Act discharge permits, limiting the discharge of extremely harmful pollutants like PCBs.

This is a case of substantial public importance and Supreme Court review is needed to correct inconsistencies between the Court of Appeals decision and applicable law. It is important for the Court to accept this case for review to ensure that Washington's water quality standards are effective, implemented, and fully compliant with the Clean Water Act in order to protect the Squaxin Island way of life.

ARGUMENT

Squaxin Island adopts and supports the arguments presented in Puget Soundkeeper Alliance's Petition for Review of this matter, and additionally sets forth the following arguments that are of particular concern to Squaxin Island.

I. ENSURING LABORATORY METHODS SUFFICIENTLY SENSITIVE TO DISCERN COMPLIANCE WITH WATER QUALITY STANDARDS IS CRITICAL TO PROTECTING THE HEALTH AND RIGHTS OF SQUAXIN ISLAND, A QUESTION OF SUBSTANTIAL PUBLIC INTEREST

A. Tribes' Rights To Catch And Eat Fish Are Of Profound Cultural Significance And Integral To The Existence Of Squaxin Island.

Squaxin Island has a significant fishing fleet with fishing and gathering of shellfish, a critical aspect of tribal life. Fish consumption is a cultural, nutritional, and economic necessity, as well as a treaty right for the tribes of the Pacific Northwest. The Squaxin Island reservation, as is the case with most Puget Sound tribes, is at the mouth or downstream end of watersheds as they flow into Puget Sound. Therefore, any pollutants present in the water will directly affect Squaxin Island, its culture, its foods, and its businesses. Historically, consumption of fish and shellfish was the primary food source for members of Squaxin Island.

When fisheries are closed due to toxic contamination or tribes are subjected to health warnings that limit the amount of fish that can be eaten, as happens throughout the state and especially Puget Sound, tribes lose access to a resource that is their lifeway and livelihood. Alternatively, tribal members are forced to choose to consume contaminated fish and shellfish rather than lose the opportunity to consume their traditional

food.⁷ *See also*, 81 Fed. Reg. at 85,423-26.

The loss or limitation of fisheries' resources also affects tribes economically. If tribal members are unable to harvest fish and shellfish for personal use, they will incur additional food costs to substitute for what they could have harvested. Tribal members may be unable to sell fish or shellfish they have harvested because of closed areas—even just the perceptions around potential water contamination—usually beyond the tribes' control, can negatively affect a tribes' fishing business. And, of course, tribes are subject to the potential costs of health impacts from prolonged exposure to toxic chemicals that may bioaccumulate in fish.⁸

The interests of Squaxin Island and Pacific Northwest Tribes in clean water and safe, healthy, available fish and shellfish cannot be

⁷ Harris, S.G. and B.L. Harper, A Native American Exposure Scenario. *Risk Analysis* 17:6, 789-795. December, 1997; Donatuto, J. and B.L. Harper, Issues in Evaluating Fish Consumption Rates in Native American Tribes. *Risk Analysis* 28:6, 1497-1506, December, 2008; O'Neill, C.A., Variable Justice: Environmental Standards, Contaminated Fish, and "Acceptable" Risk to Native Peoples, *Stan. Env'tl, L.J.* 3,37,46-51(2000); O'Neill, C.A., Protecting the Tribal Harvest: the Right to Catch and Consume Fish. *J Environmental Law Litigation* 22:131-151(2007).

⁸ Washington Dep't of Fish and Wildlife, "Fish, Wildlife, and Washington's Economy," Olympia, WA, 2010, http://wdfw.wa.gov/publications/01145/wdfw_01145.pdf; National Marine Fisheries Service, NOAA Office of Science and Technology, "Fisheries Economics of the United States 2011," Pacific Region Summary, 2011, <http://www.st.nmfs.noaa.gov/Assets/economics/documents/feus/2011/FEUS2011%20-%20Pacific.pdf>.

overstated. Squaxin Island's very existence depends on clean water and a healthy fishery and that necessarily includes a laboratory method sufficient to the task of assessing and enforcing water quality standards.

B. The Clean Water Act Requires The Development And Implementation Of Water Quality Standards To Protect Catching And Eating Fish, Including By People Who Consume Large Quantities.

1. *Water quality standards must protect designated uses for all people.*

The Clean Water Act requires states to develop and implement water quality standards. 33 U.S.C. § 1313(c). A water quality standard must consist of a science-based water quality criteria that will protect designated uses of the water, and Congress directed that the designated uses to be protected and encompass human health, including ensuring that the fish are safe to catch and eat. 33 U.S.C. § 1313(c)(2). *See also*, 81 Fed. Reg. at 85,418-19. If a state fails to develop water quality standards meeting those requirements (or fails to update water quality standards to ensure they continue to meet those requirements), the EPA must step in and do so. 33 U.S.C. § 1313(c)(4).

EPA has developed extensive regulations and guidance to direct and assist states in developing protective water quality standards. *See*, 40 C.F.R. §§ 130.3, 130.10(a)(3), 131.4, 131.5, 131.10 and 131.11. *See also*, EPA, *Methodology for Deriving Ambient Water Quality Criteria for the*

Protection of Human Health (2000) at 5-1, also available at <http://perma.cc/OUg1xn41Q88>, (“Human Health Guidance”). For the toxic pollutant at issue in this case, PCBs, fish and shellfish consumption is a critical factor. PCBs are bioaccumulative, meaning that they accumulate in fish and shellfish tissue and the quantity of the toxin increases as it moves up the food chain. 81 Fed. Reg. at 85,429 and Human Health Guidance at 1-1 and 5-15.

EPA guidance is further clear that the water quality standard must be developed to protect the amount of fish that a person would *normally* consume, and in assessing that consumption rate, states must take into account cultural and geographic differences. National Environmental Justice Advisory Committee, *Fish Consumption and Environmental Justice* (2002), at 11 and 13, also available at <http://perma.cc/OD64qSMD6s8> (“Environmental Justice Report”). In order to set a proper standard, an agency must determine the amount of fish people, including tribal members, consume daily—the fish consumption rate.⁹ If the rate is set too low, the resulting water quality standard will not be protective enough allowing too much of a toxin like PCBs to accumulate in fish. In turn, people will be exposed to unhealthy,

⁹ Setting a proper human health water quality criteria to protect consumption of fish and shellfish involves an equation, one component of which is the fish consumption rate. Human Health Guidance at 1-9, 1-10.

perhaps even dangerous, levels of toxins when consuming their normal or culturally-customary amount of fish or shellfish. Environmental Justice Report at 14-15; 24.

The Environmental Justice Report emphasized that, for many native communities and/or communities of color, fishing and eating fish is more than simply an inexpensive way to feed one's family or an option for recreation. *Id.* at 2-13. The report therefore also emphasized the need to use actual data for fish and shellfish consumers in the state and to set standards that are protective of a state's varied communities. *Id.* at 30-32. Surveys of and data from Washington communities—Indian Tribes and the Asian/Pacific-Islander Communities in King County—figure prominently in the Environmental Justice Report. *See id.* at pp. 8-9, 12, 14-15, 27 (Table 1), 29.

After two failed attempts by the State of Washington, one voluntarily withdrawn and one partially disapproved by EPA, EPA developed a human health water quality standard for the State of Washington for PCBs and other toxic pollutants in November of 2016. 81 Fed. Reg. 85,417 (Nov. 28, 2016). The new water quality standards are based on a fish consumption rate of only 175 g/day, far below what most tribal members consume, but substantially improved from the 6.5 g/day that had been the basis for human health water quality standards in

Washington. *Id.* at 85,426. As such, the new standard is far more protective of human health, and much more strict than the standard for PCBs that applied when the permits at issue in this case were finalized.

2. *Water quality standards meet the requirement to protect people only when effectively implemented through water assessment, cleanup plans and enforcement of permit requirements.*

Water quality standards will conform to the Clean Water Act requirement to protect designated uses and protect Squaxin Island members only to the extent that the standards are actually applied and enforced. While the new water quality standards are now more protective of Squaxin Island and all of the tribes in Washington, the new standards will be ineffective absent the state requiring a laboratory method for testing for PCBs that is sufficiently sensitive to detect PCBs at much smaller quantities than Method 608. Method 608 is the only method in use now and the decision below held that Ecology need not require a more sensitive or precise method for testing water quality in Washington.

Water quality standards are integral to other requirements in the Clean Water Act. States must use the standards as the measure of cleanliness of state waters. The Act requires states to assess and report on whether, and to what extent waters are meeting basic standards. 33 U.S.C. § 1313(d); 40 C.F.R. § 130.4. For those waters that are not, states are

required to develop cleanup plans called Total Maximum Daily Loads (“TMDLs”). 33 U.S.C. § 1313(d)(1)(C). A TMDL identifies the extent and magnitude of a waterbody’s failure to meet basic standards, identifies the sources of the pollutant in question and sets forth a plan for bringing the water back to meeting standards. 40 C.F.R. § 130.7. If a state does not mandate the use of laboratory methods sufficiently sensitive to assess the waters, this entire cleanup structure is jeopardized. Obviously, if laboratory methods aren’t sensitive enough to identify whether water is polluted, that waterbody will not be identified on a state’s list of impaired waters, it then will not get a TMDL cleanup plan, and the state and citizens won’t be able to determine the sources of pollutants and at what level those sources are responsible for the pollution problem.

Puget Sound (as well as other waters in the state) is contaminated with PCBs. *See* Ecology’s list of impaired waters accessible through <https://fortress.wa.gov/ecy/approvedwqa/ApprovedSearch.aspx> showing areas of Puget Sound that are listed as not meeting water quality requirements for PCBs. Those PCBs are coming from a variety of sources, with a prime example being the PCBs from Seattle Iron & Metals, the permittee in this case. Those waters are also the source of Puget Sound’s fish and shellfish, critical to the Squaxin Island way of life. Failure to require adequate testing and assessment of Puget Sound and

especially of its tributary rivers and streams, and/or development of TMDLs with a precision sufficient to understand and target the problem, will mean that these toxic pollutants will persist in the environment at levels potentially harmful to Squaxin Island.

As can be seen from the facts of this case, the water quality standards are also implemented and enforced through permits issued to industries and individuals that may discharge pollutants. 33 U.S.C. § 1342; 40 C.F.R. § 122.44(d). *See also*, 40 C.F.R. § 130.3 (water quality standards “serve the dual purposes of establishing the water quality goals for a specific waterbody and serving as the regulatory basis for establishment of water quality-based treatment controls and strategies beyond the technology-based levels for treatment required by. . . the Act”). EPA regulations plainly require that any permit issued to a pollutant discharger must include limits on pollutants adequate to ensure that the discharge does not cause or contribute to a violation of water quality standards and adequate to ensure compliance with any applicable TMDL cleanup plan. 40 C.F.R. § 122.44(d).

Here, PCBs discharged subject to Seattle Iron & Metals’ National Pollutant Discharge Elimination System permit must be limited to 0.00017 micrograms per liter (ug/L) to ensure compliance with PCB water quality standards and/or the Duwamish River TMDL. Court of Appeals decision,

attached as appendix to Puget Soundkeeper Alliance's Petition for Review, at 3 and 5. But the court declined to require that those permit limits actually be enforceable (or really even meaningful) when the court failed to require a laboratory test method for determining compliance with the permit effluent limits other than Method 608. Method 608 will only detect a violation of the PCB permit limit when PCBs are at orders of magnitude more than what is required or allowed by the water quality standards; water quality standards that are required by law to protect catching and eating fish from Washington's waters. Ct. of Appeals at 13. It should further be noted that the PCB Permit limits in this case are only what is necessary to meet the old, less protective PCB water quality standard applicable at the time the case commenced (the standards based upon only 6.5 g/day of fish consumption). The new standard finalized by EPA in November of 2016, is designed to better protect members of Squaxin Island for the amounts of fish they actually consume. That means that moving forward, Method 608 is even less adequate to protect Squaxin Island and other tribes in Washington.

Failure to require a test method that can ensure compliance with PCB water quality standards and pollutant discharge permit limits required to meet those standards, leaves the water quality standards that are supposed to protect Squaxin Island and other consumers of fish and

shellfish, meaningless and Squaxin Island inadequately protected. It is in the public interest to ensure that Clean Water Act requirements, including permit requirements, are met and enforced. *Fund for Animals, Inc. v. Espy*, 814 F. Supp. 142, 152 (D.D.C. 1993) (citing *Federal Crop. Ins. Corp. v. Merrill*, 332 U.S. 380, 387-88, 68 S. Ct. 1, 45 (1947)). As the Ninth Circuit has emphasized, “the public interest requires strict enforcement of the [Clean Water Act] to effectuate its purpose of protecting sensitive aquatic environments.” *U.S. v. Akers*, 785 F.2d 814, 823 (9th Cir. 1986).

The Court of Appeals decision not to require test methods for PCB pollutants sufficiently sensitive to determine compliance with basic Clean Water Act requirements, particularly water quality standards necessary to protect Squaxin Island’s way of life, also violates the very principles of environmental justice required to be observed and protected by EPA’s Environmental Justice Guidance. Squaxin Island urges the Court to accept review of this case because full implementation and enforcement of Washington’s human health water quality standards through sufficient laboratory test methods is an issue of substantial public importance.

II. THE COURT OF APPEALS DECISION FAILS TO CONFORM TO BASIC CLEAN WATER ACT REQUIREMENTS AND CREATES A CONFLICT WITH THE LAW AND WITHIN THE DECISION ITSELF.

The Court of Appeals' failure to require a laboratory method sensitive enough to enforce the permit requirements for PCB pollutants makes for an internally inconsistent decision that is difficult to square with basic Clean Water Act requirements. The Court of Appeals seems to recognize the obligation to ensure that NPDES permits are enforceable when, on page 8 of the decision, the court specifically finds that states may not issue Clean Water Act discharge permits if the conditions in the permit do not provide for compliance with the applicable requirements of the Clean Water Act or regulations promulgated under the Act. As set forth above, those requirements are to ensure that water quality standards will actually be applied and implemented in a manner that will protect the designated uses of water, including catching and eating fish. Ct. of Appeals at 8, citing 40 C.F.R. § 122.4(a), (d).

Nonetheless, the Court of Appeals decides on the thinnest reed that it will allow the State and polluters to sidestep basic clean water legal requirements by not requiring that compliance with the permit requirements need be effectively monitoring and enforced. Ct. of Appeals at 14. That is the net result of the court's decision. This makes the court's

decision squarely, internally inconsistent and fails to conform to basic requirements of the Clean Water Act and applicable regulation, requirements the Court of Appeals itself recognizes should apply.

The decision is also contrary to basic rules of statutory and regulatory construction. The Court of Appeals fails to read WAC 173-201A-260(3)(h) together with the clean water requirements outlined above and those contained in state statutes and regulation. In effect, the Court of Appeals reads the second part of the state regulation out of existence, agreeing with Ecology that only the first part of the regulation—methods published by EPA—should apply, regardless of the plain language of the regulation allowing for the use of other laboratory methods as long as Ecology consults with EPA (not even requiring approval of EPA). Basic canons of statutory construction require all statutory provisions and requirements to be read together in order to give effect to all provisions. *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wash.2d 543, 560, 14 P.3d 133 (2000); *State v. Neher*, 112 Wash.2d 347, 351, 771 P.2d 330 (1989); *Sim v. Washington State Parks and Recreation Commission*, 90 Wash.2d 378, 383, 583 P.2d 1193 (1978). Courts apply the same canons of construction to regulations as to statutes. *Multicare Med. Ctr. v. Dep't of Soc. & Health Servs.*, 114 Wash.2d 572, 591, 790 P.2d 124 (1990). Here, that requires giving effect to the second part of

Ecology's regulation that allows the use of laboratory methods other than those published by EPA and giving effect to that provision in light of the obligation to ensure compliance with all applicable water quality standards and permit limits.

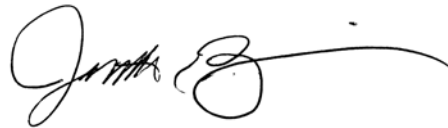
For the reasons articulated in Puget Soundkeeper Alliance's Petition to this Court and the reasons stated above, the Court of Appeals decision in this case is in conflict with applicable law and Squaxin Island Tribe urges this Court to accept review to correct that conflict.

CONCLUSION

This case is of substantial public importance due to its impact on the Squaxin Island Tribe and tribes throughout Washington and Puget Sound. This case bears directly on protecting their lifeways, livelihoods, culture and health, and the ability to catch and eat fish and shellfish in quantities in keeping with their cultural and geographic histories. This case further bears directly on core principles of the Clean Water Act and

state law following and implementing the Act. The Squaxin Island Tribe respectfully requests that the Court accept review of the Court of Appeals decision herein.

Respectfully submitted this 6th day of June, 2017.



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DECLARATION OF SERVICE

I declare that on June 6, 2017, I served a true and copy of the foregoing *Amicus Curiae Squaxin Island Tribe Brief In Support of Puget Soundkeeper Alliance's Petition For Discretionary Review*

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed this 6 day of

June, 2017, at Seattle, Washington.



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