

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'S BRIEF IN
SUPPORT OF PETITIONER--AMENDED**

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INTRODUCTION

This case concerns the vital interests of the Squaxin Island Tribe to catch and eat fish and shellfish for subsistence, cultural, religious and business reasons, interests that fall squarely within the protections and structures offered by the Clean Water Act and state laws and regulations advancing and implementing those required clean water protections. In short, it is about the Squaxin Island Tribe's way of life. The industrialization of the Salish Sea, including Puget Sound, is one of the most fundamentally damaging and life-altering things to happen to Puget Sound tribes that have lived and fished here since time immemorial and that have retained the treaty right to continue to do so for millennia more.

The Clean Water Act and state laws and regulations implementing it, is the critical step to correcting that damage and setting a path toward clean water and healthful fish and shellfish. Two clean water fundamental principles underlie this case and Squaxin Island Tribe's participation in it. First, there is no right to discharge pollutants into water. All such discharges were to be "eliminated" under the goals set by Congress no later than 1985, while the discharge of toxic pollutants like polychlorinated biphenyls ("PCBs") in toxic amounts, was to be wholly prohibited. 33 U.S.C. § 1251(a)(1) and (3). To ensure these goals, the Clean Water Act strictly prohibits the discharge of all pollutants to water.

33 U.S.C. § 1311. Only in situations where a National Pollutant Discharge Elimination System Permit (“NPDES”) can adequately control discharges and meet water quality standards should those discharges be allowed. *Id.* and § 1342. *See also*, 40 C.F.R. § 122.44(d). Second, states, as partners in implementing and enforcing the Clean Water Act, have always been allowed, indeed encouraged, to be more stringent and more protective than the federal minimums. *Shell Oil Co. v. Train*, 585 F.2d 408, 410 (9th Cir. 1978) (“The role envisioned for the states. . . encompass[es] both the opportunity to assume the primary responsibility for the implementation and enforcement of federal effluent discharge limitations (33 U.S.C. § 1342(b)) and the right to enact requirements which are more stringent than the federal standards. (33 U.S.C. § 1370)”); and *Chevron USA, Inc. v. Hammond*, 726 F.2d 483, 489-90 (9th Cir. 1984) (acknowledging states will and may enforce the Clean Water Act through permits and state limitations more stringent than federal minimums as necessary to meet water quality standards).

These clean water fundamentals and the Squaxin Island Tribe’s right to catch and eat fish without harm to members’ health, are at risk with the State of Washington’s (“Ecology”) approach and arguments in this case. The Squaxin Island Tribe therefore respectfully requests this Court reverse the decision of the Court of Appeals and find that RCW

90.48.520 requires, and WAC 173-201A-260(3) does not prohibit, the required use of a laboratory method such as 1668c for PCB limits in NDPES permits that is adequately sensitive to ensure compliance with permit discharge limits and water quality standards.

ASSIGNMENT OF ERROR

The Squaxin Island Tribe adopts the assignments of error in Petitioner Puget Soundkeeper Alliance's ("Soundkeeper") brief.

STATEMENT OF CASE

The Squaxin Island Tribe adopts Soundkeeper's Statement of the Case.

ARGUMENT¹

The Clean Water Act and a state's furtherance and implementation of the Act's goals and requirements is of a piece; a structure that only fully works as a whole. This is as true in Washington as the rest of the Nation. The law requires states, overseen by the U.S. Environmental Protection Agency ("EPA"), to develop water quality standards that protect the designated uses of our waters, including, here, catching and eating fish at levels that tribes have done for millennia without their health and the

¹ The Squaxin Island Tribe incorporates its brief in support of review in this Court, filed June 6, 2017 and provides argument here in supplement to its initial brief and in response to Respondents' arguments.

health of their children being threatened. 33 U.S.C. § 1313(c); 40 C.F.R. §§ 130.3 and 131.3(i). *See also*, WAC 173-201A-010 and 240.

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 and are required to protect people such as members of the Squaxin Island Tribe and other Native Pacific Northwest people, who consume high amounts of fish and shellfish. *See*, 81 Fed. Reg. 85,217, 85,219-20 (Nov. 28, 2016).

Those water quality standards though, do not stand alone and have full protective effect. Rather the law also prohibits the discharge of all pollutants absent NPDES permits that strictly limit and control those pollutants to ensure standards are met. 33 U.S.C. § 1342; 40 C.F.R. §§ 122.44(d) and 130.3.² *See also*, RCW 90.48.520. Finally, those permit terms are and must be enforceable, by the regulating agencies and also by the public whose waters are affected and whose health is required to be protected. *See, e.g.*, 33 U.S.C. §§ 1318, 1365 and WAC 173-201A-530. Each piece of this structure is integral to the whole and a failure within any component can cause a failure of the system, allowing waters to be

² The Squaxin Island Tribe also refers the Court to the discussion of requirements for ensuring water quality standards are met as part of Total Maximum Daily Load requirements in the tribe's initial brief in support of review, at 12-14.

polluted, health to be threatened, and polluters effectively unrestrained.

The Court of Appeals has allowed a break in the structure outlined above, jeopardizing the whole, and that break must be repaired.

I. LABORATORY METHODS MUST BE SUFFICIENTLY SENSITIVE TO ENSURE ALL REQUIREMENTS OF CLEAN WATER LAWS ARE MET.

A. Basic Canons Of Construction Dictate Reversal In This Case.

This case does not require application of new or novel theories.

Rather, basic canons of construction that have been consistently applied by this Court lead to reversal of the Court of Appeals' decision. The Squaxin Island Tribe adopts Soundkeeper's arguments and will add and emphasize some points here.

The issue here centers on the meaning of the second option under Ecology's regulation concerning testing for compliance with Clean Water Act requirements:

The analytical testing methods for these numeric criteria must be in accordance with [1] the "*Guidelines Establishing Test Procedures for the Analysis of Pollutants*" (40 CFR Part 136) or [2] **superseding methods published**. [3] [Ecology] may also approve other methods following consultation with adjacent states and with the approval of the USEPA.

WAC 173-201A-260(3)(h) (emphasis added). These testing methods are applied to pollutant discharge permits to ensure their requirements are met. That necessarily includes the requirements here under RCW

90.48.520 dictating stringent limits on the discharge of PCBs, a toxic pollutant that accumulates in fish tissue, in order to ensure that water quality standards for PCBs are met. These requirements under state law are the same as and integral to implementing and enforcing the requirements of the federal Clean Water Act and state requirements outlined above.

While it is correct that an agency is given great latitude in interpreting its own regulations, that latitude extends only so far. In particular, an agency interpretation that runs counter to the statute, runs counter to the requirements of the agency's regulation, or is an interpretation that is so unreasonable as to be arbitrary and contrary to law, cannot stand. RCW 34.05.570. Each of these is true here and that is evident through the application of basic canons of statutory construction.³

Statutes and regulations must be interpreted and applied consistent with their purposes and stated goals. *Tunstall ex rel. Tunstall v. Bergeson*, 141 Wn.2d 201, 211, 5 P.3d 691 (2000). Regulations that are inconsistent with statute (or that are interpreted and applied in a manner inconsistent with statutes) are invalid. *Dep't. of Labor and Industry v. Granger*, 159

³ Washington courts apply the rules of statutory construction to the construction of regulations as well as statutes. *Tesoro Refining and Marketing Co. v. State Dep't of Revenue*, 164 Wn.2d 310, 322, 190 P.3d 171 (2008).

Wn.2d 752, 764, 153 P.3d 839 (2007); *Corkle v. Dep't. of Labor and Industry*, 142 Wn.2d 801, 812, 16 P.3d 584 (2001).

Statutes and regulations must be read as a whole and must be read to give effect to the whole, both within the specific regulation, and across statutes and regulations within a regulatory structure. *Tunstall*, 141 Wn.2d at 211. *See also, Davis v. State*, 137 Wn.2d 957, 963, 977 P.2d 554 (1999). A court will not construe a provision such that it is rendered superfluous or meaningless. *Id. See also, State v. Roggenkamp*, 153 Wn.2d 614, 624-25, 106 P.3d 196 (2005). Here, Ecology would have the Court effectively replace the word “published” in the second option in WAC 173-201A-260(3)(h) with “approved by EPA,” essentially rendering the second option superfluous and duplicative of options 1 and 3, squarely contrary to rules of construction.

Ecology’s argument also implicates another rule of construction: when different words are used in a statute or regulation, they are presumed to have different meanings. *State v. Flores*, 164 Wn.2d 1, 14, 186 P.3d 1038 (2008) and *Roggenkamp*, 153 Wn.2d at 624. It is incorrect and contrary to basic construction for Ecology to now interpret the word “published” in the second option under WAC 173-201A-260(3)(h) as having the same meaning as the different words and phrases using in the first and third options.

Perhaps even more importantly, reading option 2 out of existence in this case means that RCW 90.48.520 is also rendered meaningless and a hole is torn in the structure of the Clean Water Act requirements for protecting the Squaxin Island Tribe's members' health and way of life. The Clean Water Act requires water quality standards that protect uses, including catching and eating fish. The Clean Water Act prohibits discharge of pollutants like PCBs absent a permit and that permit must include limits that ensure water quality standards for PCBs are met. In Washington, statutes and regulations protecting Washington waters also require, as they must, that permits include limits sufficiently stringent to meet water quality standards. Ecology's strained reading of WAC 173-201A-260(3)(h) will render the requirements in the Seattle Iron & Metals NDPES permit to control and limit PCB toxins meaningless. The limit in the permit is required in order to meet water quality standards that are themselves required to protect Squaxin Island members' right to catch and eat fish and not ingest unhealthy toxins. But, under Ecology's reading, allowed by the Court of Appeals, Seattle Iron & Metals need only test for levels of this dangerous toxin with a laboratory method that will allow toxins well in excess of those health-based limits in the permit to be discharged into public waters. This destroys the very structure of the clean water protections required under federal and state laws. Such an

interpretation is contrary to clean water laws and structure as a whole and cannot stand.

B. Ecology's Arguments Regarding Permitting And Enforcement Are Incorrect And Unsupported.

Ecology defends its position in this case with two arguments that are either false or wholly unsupported. First, Ecology sets up a false choice with its claim near the end of its brief that if it cannot allow the use of the outdated and insufficiently-sensitive Method 608, it will have no option but to deny the permit which will then allow unfettered and unmonitored pollution from Seattle Iron & Metals. Ecology Brf. at 17-18. It is both shocking and wholly incorrect that Ecology asserts this is the choice and result. As is completely clear under the Clean Water Act and state requirements that must implement the same, if Ecology is unable to ensure that a permit allowing the discharge of any pollutant, much less a dangerous toxin like PCBs, can be conditioned to ensure that water quality standards protecting health are met, then that discharge is absolutely prohibited. 33 U.S.C. § 1311(a).⁴ And, if Seattle Iron & Metals were to persist with discharging PCBs without a permit, it would be in violation of

⁴ Further, stormwater runoff, despite Ecology's implication to the contrary, is a point source discharge of pollutants under the Clean Water Act, subject to the pollutant discharge prohibition and permitting requirements. *See, NRDC v. Costle*, 568 F.2d 1369 (D.C.Cir. 1977) and 33 U.S.C. § 1342.

the Clean Water Act. Period. No one has a right to discharge toxic pollutants into our waters and potentially endanger public health and an entire people's way of life. Finally, if Ecology is implying it would not enforce the law against discharge of pollutants without a permit, the Clean Water Act provides the public the ability to do so where an agency refuses to enforce the law. 33 U.S.C. § 1365.

Second, Ecology insists that somehow the PCB limits in Seattle Iron & Metals' permit will be enforced even without requiring a lab method sufficiently stringent to ensure permit limits are met. Ecology insists this is true with no support or explanation about how that is supposed to occur. Ecology offers no alternate lab method that is sufficiently stringent, does not volunteer that Ecology will perform regular testing using an adequate lab method, and does not explain what might occur that will allow permit limits to be enforced as they are written. The Clean Water Act and state law requires monitoring and recordkeeping for the precise purpose of ensuring compliance. Ecology's claims in this regard must be dismissed as nothing more than wishful thinking.

II. THE ISSUE BEFORE THIS COURT DOES NOT CONCERN FACTUAL MATTERS SUCH AS TEST ACCURACY, MAKING THESE ARGUMENTS BY ECOLOGY AND SPOKANE COUNTY IRRELEVANT TO THIS COURT'S CONSIDERATIONS.

The issue before this Court is one of regulatory construction, a

purely legal issue. The Court of Appeals ruled that it owed Ecology's interpretation and application of WAC 173-201A-260(3)(h) deference and that the regulation's second option must be read, contrary to its language and rules of construction, as allowing only EPA-approved laboratory methods for ensuring NPDES permit compliance. Decision, at 14 (Appendix 1, Soundkeeper Supplemental Brf.). At no point in the litigation did the Court of Appeals (or the Pollution Control Hearings Board for that matter) address details of Method 1668c including how it might be applied (e.g. frequency or levels that would trigger enforcement) or its accuracy or utility in any way. Rather, the legal issue is and always has been, whether Ecology, under its regulation and state statutes, has the authority to require a laboratory method that is not pre-approved by EPA.

Ecology and proposed *amici* Spokane County argue for the first time here, that Ecology is correct in its interpretation of the law because Method 1668c's accuracy has been called into question, primarily by the polluter industries in comments against the method. Ecology Brf. at 13-14; Spokane Amicus Brf. at 6-9. These arguments do not address the legal issue that is actually on appeal in this case, are outside the record, and are post hoc rationalizations. Ecology's resistance to requiring Method 1668c has always been based on a legal interpretation argument concerning the meaning of the second option under WAC 173-201A-260(3)(h). And, it is

on the basis of Ecology's legal interpretation that the lower court ruled, deferring to Ecology's preferred reading of the regulation. That is the issue before this Court.

Moreover, details of test accuracy are irrelevant to the legal question before the Court. It must first be determined whether Ecology's legal interpretation, effectively reading the second option of WAC 173-201A-260(3)(h) out of existence and creating a conflict with the Clean Water Act, federal regulations, and RCW 90.48.520, is legally correct. If the Court determines Ecology's interpretation is correct (and it is not) then there is no need to assess accuracy of Method 1668c unless and until EPA approves the method. If the Court determines Ecology's interpretation is incorrect and that Ecology may require test methods in addition to and more protective than those that have been approved by EPA, then this matter will go back to Ecology and the Pollution Control Hearings Board for evidence and arguments about what tests are available, what tests should be required, and how they should be used. It is only at that stage that a method's accuracy is relevant and at that stage that a proper record can be made.

Finally, there is currently no record before the Court on the accuracy of Method 1668c and it would be entirely inappropriate for the Court to consider and rule on such a fact-intensive new issue as a

foundation of a decision here. Rather, the accuracy claims are only a post-hoc rationalization on appeal for a wholly incorrect legal interpretation. *See*, RCW 34.05.554; *King County v. Washington State Boundary Review Bd. for King County*, 122 Wn2d 648, 669-70, 860 P.2d 1024 (1993) (citing *State v. McFarland*, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995)). *See also*, *Rios v. Washington Dep't. of Labor and Industry*, 145 Wn.2d 483, 502, 39 P.3d 961 (2002) (appellate court must scrutinize the record for the rationale and basis for the agency decision at the time it was made and judge the decision on those grounds.)

The Court should reject the late attempt at irrelevant argument on factual matters not properly developed and not properly before the Court.

CONCLUSION

This is a case of substantial public importance. Fish consumption is a cultural, nutritional, and economic necessity, as well as a treaty right for the tribes of the Pacific Northwest, affecting their cultures, food, and economies. Those rights depend 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 that are necessary to protect public health. Failure to require a test method in NPDES permits like that of Seattle Iron & Metals 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 Tribe members and other consumers of fish and shellfish, meaningless and Squaxin Island people inadequately protected.

The Squaxin Island Tribe therefore respectfully requests the Court reverse the decision of the Court of Appeals and find that Ecology's interpretation of WAC 173-201A-260(3)(h) is incorrect and contrary to law, and requiring Ecology to include Method 1668c as an NPDES permit requirement.

Respectfully submitted this 7th day of September, 2017.



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I declare that on September 7, 2017, I served a true and correct copy of the foregoing Amicus Curiae Squaxin Island Tribe's Brief In Support Of Petitioner on the following parties ECF:

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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 7th day of September, 2017, at Seattle, Washington.


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