

Supreme Court No. _____
Court of Appeals, Div. II, 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 MEMORANDUM OF DUWAMISH RIVER CLEANUP
COALITION/TECHNICAL ADVISORY GROUP IN SUPPORT OF
PETITION FOR REVIEW**

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IDENTITY AND INTEREST OF AMICUS CURIAE

The Duwamish River Cleanup Coalition/Technical Advisory Group (DRCC/TAG) is a non-profit organization that represents the community surrounding the Lower Duwamish Waterway Superfund site. The DRCC/TAG is the EPA-designated community advisory group for the Lower Duwamish Waterway cleanup effort. For a full description of DRCC/TAG and its interest, please see the statement of interest contained in DRCC/TAG's Memorandum in Support of Petition for Review.

STATEMENT OF THE CASE

DRCC/TAG relies on Petitioner's statement of the case.

ARGUMENT

Puget Soundkeeper Alliance has briefed the Court on the conflicts between the Court of Appeals' decision in this case and an existing Court of Appeals decision, *Puget Soundkeeper Alliance v. PCHB*, 189 Wn. App. 127, 356 P.3d 753 (2015). DRCC/TAG writes separately to emphasize the significance of the public interests at stake in this case.

The Court of Appeals' decision below allows Ecology to violate Washington's water quality standards under the guise of compliance with federal law. This interpretation jeopardizes the public's substantial

investment in Duwamish cleanup projects, and the health and safety of those the cleanup is designed to protect.

I. Communities near the Lower Duwamish Waterway have a substantial interest in a safe, clean environment.

The community surrounding the DRCC/TAG, often referred to as the Duwamish Valley, includes portions of Seattle’s Georgetown, South Park, Beacon Hill, Delridge, and White Center neighborhoods (comprising zip codes 98106 and 98108). These neighborhoods are among Seattle’s lowest income and most ethnically diverse.¹

These neighborhoods also bear disproportionate environmental impacts. In 2013, DRCC/TAG’s Technical Advisory Group completed an EPA-funded² Cumulative Health Impacts Analysis indexing environmental health burdens in Seattle.³ The analysis ranked Seattle’s zip codes by environmental burden using the California EPA’s cumulative impacts analysis methodology.⁴ The report concluded that Seattle’s

¹ Linn Gould & BJ Cummings, *Duwamish Valley Cumulative Health Impacts Analysis 3* (2013) (“CHIA”), available at http://duwamishcleanup.org/wp-content/uploads/2013/03/CHIA_low_res.pdf.

² DRCC/TAG received an environmental justice grant from the EPA to conduct the study. CHIA at 2. The EPA defines environmental justice as “the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.” CHIA at 5.

³ See CHIA, *supra* n.5.

⁴ See CHIA at 8–9.

Beacon Hill/Georgetown/South Park neighborhood (zip code 98108), which borders the Duwamish, bears the heaviest environmental burden in Seattle.⁵ Considered separately from the rest of the 98108 zip code, the Georgetown and South Park census tracts, both of which immediately touch the Duwamish, are especially impacted.⁶

Residents in these impacted communities come into contact with Duwamish contamination through several sources, including direct contact with contaminated sediments from fishing, picnicking, swimming and boat launching.⁷

The most concerning point of contact is fish consumption. PCBs are not water-soluble; they build up in contaminated sediments, then bioaccumulate in the fatty tissue of resident fish and shellfish.⁸ Because of this contamination, the Washington Department of Health has declared

⁵ CHIA at 34.

⁶ CHIA at 37–38.

⁷ See U.S. EPA, *Record of Decision: Lower Duwamish Waterway Superfund Site 35* (2014) (“ROD”) available at https://www3.epa.gov/region10/pdf/sites/ldw/ROD_final_11-21-2014.pdf. In addition to ordinary pleasure boat launching, the Duwamish Tribe uses parks along the Lower Duwamish Waterway for canoe launchings. *Id.*

⁸ *Puget Soundkeeper Alliance v. Dept. of Ecology and Seattle Iron & Metals Corp.*, PCHB No. 13-137c, Findings of Fact, Conclusions of Law and Order at 4 (July 23, 2015) (“PCHB Decision”), attached to Pet’r’s Pet. for Discretionary Review at app. pp. A-22 through A-70.

eating even minimal amounts of fish and shellfish from the Lower Duwamish a “public health hazard.”⁹

Many people in the communities around the Duwamish—particularly immigrants from Asia and the Pacific Islands—fish in the Duwamish.¹⁰ Fishing provides these people with food, a form of outdoor leisure, and a sense of community and culture.¹¹ In a study on fishing in the Lower Duwamish prepared for the EPA, researchers reported that nearly two-thirds of the Duwamish fishers eat the fish they catch, and do not appear to understand the health advisory.¹²

The Department of Ecology has set a state-wide limit for PCB discharges at .00017µg/L.¹³ Ecology has deemed this limit necessary to protect human health against cancer risks from consuming contaminated fish and shellfish in a water body.¹⁴

⁹ PCHB Decision at 4.

¹⁰ U.S. EPA and Wash. Dept. of Ecology, *Lower Duwamish Waterway Fishers Study Data Report* ES-2 to 3 (2016), available at <https://semspub.epa.gov/work/10/100036528.pdf>.

¹¹ *Id.* at 56–57.

¹² *Id.* at 73. Though many Duwamish fishers had heard about the fish advisory, they believed that if fish smells and looks fresh and is cooked thoroughly, it does not present any health risks; fishers did not appear to understand the risks of chemical contamination. *Id.* at ES-4.

¹³ WAC 173-201A-220.

¹⁴ *See* WAC 173-201A-240(5)(b).

The Pollution Control Hearings Board agreed that this limit applied to Seattle Iron and Metals' permit.¹⁵ The Court of Appeals' decision, however, would allow Seattle Iron and Metals to discharge up to *three thousand* times this allowed concentration without consequence, because the specified testing method is not sensitive enough to meaningfully measure violations.

Accepting Ecology's determination that the .00017 µg/L limit for PCB emission is necessary to protect human health, the Court of Appeals' decision below jeopardizes the health of those who live near the Lower Duwamish Waterway—people who already bear a disproportionate environmental burden. Leaving the decision below intact fails to protect those who need the most protection from environmental contamination.

II. The public has substantial interest in the success of the Duwamish cleanup efforts.

The U.S. EPA designated the Lower Duwamish Waterway a Superfund site in 2001.¹⁶ Since this designation, the EPA, Ecology, the City of Seattle, King County, and other stakeholders—including the DRCC/TAG—have been involved in a multi-million dollar effort to

¹⁵ PCHB Decision at 47 (rejecting the “mixing zone” condition in Seattle Iron & Metals' permit).

¹⁶ See ROD, *supra* n. 7.

develop a cleanup plan for the Lower Duwamish. The EPA formally designated the DRCC/TAG and its Technical Advisory Group the official community advisory group for the cleanup process.¹⁷

The EPA published a final cleanup plan in 2014.¹⁸ The federal component alone is expected to cost \$342 million dollars.¹⁹ Other stakeholders' also spent millions of dollars developing the cleanup plan.²⁰

The cleanup plan articulated in the Record of Decision has three basic prongs: cleanup of “early action areas” (mostly completed before publication of the ROD), controlling ongoing sources of contamination, and ongoing in-waterway cleanup.²¹

Ecology is the lead agency for ongoing source control,²² though DRCC/TAG also monitors ongoing source contamination. Generally, source control happens first, and when Ecology has gotten water quality to

¹⁷ See U.S. EPA & Washington State Dept. of Ecology, *Lower Duwamish Waterway Site Community Involvement Plan 6* (2002), available at https://www3.epa.gov/region10/pdf/sites/ldw/CIP_oct2002.pdf.

¹⁸ ROD at 6. The EPA's Record of Decision is the authoritative memorandum on the final cleanup plan.

¹⁹ ROD at ii.

²⁰ See, e.g., *City of Seattle v. Monsanto*, Pl.'s Compl., No. 2:16-cv-00107-RSL, at ¶ 12, 2017 U.S. Dist. LEXIS 24957 (W.D. Wash. Feb. 22, 2017), attached to Pet'r's Pet. at app. A-71 through A-97.

²¹ ROD at 11–12.

²² ROD at 11.

a certain acceptable level, in-waterway cleanup can begin.²³ Ecology will continue to control sources to prevent recontamination.²⁴ Without ongoing source control, ongoing water pollution could re-contaminate sediments, leading to a never-ending cycle of costly cleanup activities in the LDW.²⁵

The Court of Appeals' decision jeopardizes these cleanup efforts. The decision allows Seattle Iron and Metals to discharge PCBs at concentrations up to .5 µg/L—nearly *three thousand times* the legal limit of .00017 µg/L—without consequence. These emissions could prevent water quality in the Duwamish from ever reaching the acceptably low level that triggers in-waterway cleanup.²⁶ Even if cleanup begins, continued discharges of unsafe levels of PCBs could re-contaminate sediments in the Lower Duwamish, rendering cleanup efforts futile.

III. The Court of Appeals' decision jeopardizes these interests.

The risk of recontamination that the Court of Appeals' decision poses is not merely theoretical. Seattle Iron and Metals routinely discharges PCBs at levels that far exceed the legal limit. Without a meaningful testing requirement, these discharges could jeopardize the

²³ ROD at 12.

²⁴ ROD at 12.

²⁵ See ROD at 12.

²⁶ Cf. ROD at 12.

public's investment in Duwamish cleanup and DRCC/TAG's members' health and safety.

CONCLUSION

The Court of Appeals' decision in this case would allow a major polluter on the Lower Duwamish waterway to discharge nearly three thousand times the legal limit of a toxic chemical into Washington's waters. The people who live near the Lower Duwamish Waterway already bear a disproportionate environmental burden. Allowing Seattle Iron and Metals to continue to contaminate the Lower Duwamish out of unwarranted deference to federal regulations endangers the health of people who live, work, and play near the Duwamish. This outcome would also jeopardize the substantial public investment in the Superfund cleanup process for the Lower Duwamish—an investment amounting to hundreds of millions of dollars. These substantial public interests are worthy of this Court's review. This Court should therefore grant Puget Soundkeeper Alliance's Petition.

Respectfully submitted June 19, 2017.


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DECLARATION OF SERVICE

I declare that on June 19, 2017, I served a true and correct copy of
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I declare under penalty of perjury under the laws of the State of
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Executed June 19, 2017 at Seattle, Washington.


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