

No. 94293-5

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* MEMORANDUM OF SPOKANE
RIVERKEEPER IN SUPPORT OF PETITION FOR REVIEW**

Rick Eichstaedt, WSBA No. 36487
University Legal Assistance
721 North Cincinnati Street – P.O. Box 3528
Spokane, WA 99220-3528
(509) 835-5211

Attorney for *Amicus Curiae*-Applicant
Spokane Riverkeeper

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I. IDENTITY AND INTEREST OF AMICUS

Amicus curiae-applicant Spokane Riverkeeper adopts and incorporates its statement of interest contained in its motion for leave to file an amicus brief previously filed with this Court.

II. STATEMENT OF THE CASE

The Lower Duwamish Waterway (“LDW”) is a 5.5 mile stretch of the Duwamish River that flows into Elliot Bay. *Puget Soundkeeper All. v. Dept. of Ecology*, No. 48267-3-II, *2 (Wash. App. Feb. 22, 2017). The LDW is heavily contaminated because of the major industrial activity in the area, due to a large part from the pollution of polychlorinated biphenyls (“PCBs”). Petition for Review at 3. PCBs are a group of manmade chlorinated organic chemicals that are highly toxic to humans and animals; consuming fish and shellfish with high amounts of PCBs is a public health hazard according to the Washington Department of Health. (*Id.* at 3-4). To help control this problem, discharge in bodies of water is prohibited without a National Pollutant Discharge Elimination

System (“NPDES”) permit issued by the Washington Department of Ecology (“Department”), which sets the allowable limits of necessary discharge. (*Id.* at 4). Here, SIM received a NPDES permit that required SIM to limit PCB discharge to 0.00017 µg/L. *Id.* at 7.

Despite this set limit of discharge, the Pollution Control Hearings Board (“PCHB”) allowed the PCB effluent limitation to be determined using laboratory analysis Method 608. Petition for Review at 8. This method is only capable of quantifying PCBs to 0.5 µg/L. *Id.* at 8-9. Method 608 was chosen even though there is a more sensitive method (1668C) available that can quantify PCBs as low as 0.000022 µg/L. *Id.* at 9.

Puget Soundkeeper appealed the PCHB Order to the Court of Appeals. Petition for Review at 9. There, the court upheld the PCHB determination finding that Method 1668C is not a method published under WAC 173-201A-260(h), and thus is not available for inclusion in the NPDES permit. *Id.* at 9-10.

The court further allowed the 0.5 µg/L quantifying capability even though that could not establish if SIM was complying with its NPDES permit of discharging up to 0.00017 µg/L of PCBs.

Id.

III. ARGUMENT

In Washington, a petition for review will be accepted by the Supreme Court, among other reasons, “[i]f the petition involves an issue of substantial public interest that should be determined by the Supreme Court.” RAP 13(b)(4); *see, e.g., State v. Watson*, 155 Wash. 2d 574, 577, 122 P.3d 903, 904 (2005).

A. Puget Soundkeeper’s petition for review involves an issue of substantial public interest that should be determined by the Washington Supreme Court.

Under Washington law, the State strives to uphold a public policy to “maintain the highest possible standards to insure the purity of all waters of the state consistent with public health and public enjoyment thereof” RCW § 90.48.010.

In order to enforce this public policy, Washington prohibits

“the discharge of toxicants . . . that would violate any water quality standard, including toxicant standards, sediment criteria, and dilution zone criteria.” RCW § 90.48.520.

Several other laws and provisions in Washington adhere to these main assertions. *See, e.g.*, WAC § 173-201A-520 (prohibiting the issuance of discharge permits that would cause or contribute to a violation of water quality criteria); WAC § 173-201A-240(1)-(2) (prohibiting toxic substances that have the potential to adversely affect characteristics of water use or public health, and granting the Department authority to employ or require chemical testing to evaluate this compliance); WAC § 173-220-130(1)(b)(i) (stating that any discharge permit issued by the Department must insure compliance with water quality standards pursuant to any state law).

In fact, although not many Washington courts have addressed this issue head on, a prevailing theme from the small number of cases suggest that discharge permits and other discharge limitation mechanisms must comply with water

quality standards and the Department's rules. *See, e.g., Puget Soundkeeper All. v. Pollution Control Hearings Bd.*, 189 Wash. App. 127, 356 P.3d 753 (2015) (finding against the Department when it allowed a violation of its own rules to be a non-permit violation, reasoning that allowing violations of water quality standards for the convenience of permittees and regulators is a disregard of the laws and regulations); *Puget Soundkeeper All. v. Dept. of Ecology*, 102 Wash. App. 783, 9 P.3d 892 (2000) (reasoning that the discharge permit system was meant to improve increasingly stringent technology-based limits on discharges and that reduction of effluent limits are furthered by advances in technology).

Here, Spokane Riverkeeper, much like Puget Soundkeeper, is greatly concerned with the negative environmental impacts the decision by the court of appeals will have on bodies of water throughout the state, marking a substantial public interest. Washington prides itself on maintaining the highest possible standard of water quality, and

prohibits discharges that would violate these water quality standards. RCW § 90.48.520. However, the Department is in clear violation of these provision by granting SIM a PCB testing method that can only calculate a measure that is three thousand times greater than the issued limitation in the NPDES permit. Petition for Review at 12. This precedent is an extremely dangerous one. Permittees and discharge industries will be able to ignore the effluent limitations issued to them in the NPDES permit if the testing for that specific discharge cannot calculate the exact limit. The Court must hear this case to quash this “slippery slope.”

Further, a PCB testing mechanism exists which would allow the Department to hold SIM accountable for its required discharge limitation of PCBs. Petition for Review at 9. Ecology has the power to “employ” chemical testing to evaluate compliance of an NPDES permit and ensure the discharge will not adversely affect public health or water uses. WAC 173-201A-240(1)-(2). Further, advances in technology will and

should influence the reduction of effluent limitations. *See generally, Puget Soundkeeper All.*, 102 Wash. App. at 789-90, 9 P.3d at 895. Testing Method 1668C will further promote the environmental and social interests of protecting and preserving Washington bodies of water.

B. Excessive PCB amounts present risks and dangers to water quality standards and public health.

PCBs are an issue of statewide and national concern.

There are almost 5,600 water bodies in the United States that that are failing to meet water quality standards established for PCBs. Environmental Protection Agency, National Summary of State Information (visited May 22, 2017),

https://iaspub.epa.gov/waters10/attains_nation_cy.control.

There are more than 600 fish advisories for PCBs in 37 states.

Environmental Protection Agency, Polychlorinated Biphenyls (PCBs) Update: Impact on Fish Advisories (September 1999) at

3. PCB-contaminated fish are the primary source of PCBs for people in the United States. Agency for Toxic Substances and Disease Registry, ATSDR Case Studies in Environmental

Medicine Polychlorinated Biphenyls (PCBs) Toxicity (May 2016) at 26-27. PCBs continue to pose a potential threat to human health and the environment. Environmental Council of the States, PCBs In Products, Resolution No. 12-9 (August 28, 2012).

PCBs are not a historic problem. A recent study conducted by the Department of Ecology found that in 216 samples of currently available consumer products tested, 156 samples were found to have PCBs in levels measurable in parts per billion (well above water quality standards). Alex Stone, Polychlorinated Biphenyls in Consumer Products, Department of Ecology Publication No. 16-04-014 (November 2016) at 12. A sample of children's yellow sidewalk chalk 1,060 parts per billion, a cereal package was found to contain 2,320 parts per billion, and yellow office foam products were found to contain 2,310 parts per billion. *Id.* at 14, 16-17. These are all products that end up in a waste stream that may ultimately end up in our lakes and rivers.

With these disheartening facts in mind, Washington's Department of Ecology should do everything in its power to effectively limit PCB discharge in bodies of water. NPDES permit discharge limitations must be followed to ensure public safety. Locally, as of 2015, the Spokane River has the worst PCB contamination in Washington. *See Sierra Club v. McLerran*, No. 11-CV-1759-BJR, 2015 WL 1188522 (W.D. Wash. Mar. 16, 2015). Obviously, Spokane Riverkeeper wants to help solve this problem, but the decision by the court of appeals will make this much more difficult. Also, looking at the bigger picture, Washington State should be concerned that this relaxed standard of PCB testing will lead to more chemical compounds in waterways. The safety and health concerns regarding this are apparent and dangerous.

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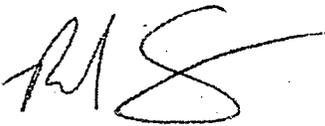
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IV. CONCLUSION

For the above reasons, *amicus curiae*-applicant Spokane Riverkeeper respectfully requests that this Court grant Puget Soundkeeper's petition for review.

Respectfully submitted this 23rd day of May, 2017.

UNIVERSITY LEGAL ASSISTANCE

By: 

Rick Eichstaedt, WSBA No. 36487
Attorney for Amicus Curiae-Applicant
Spokane Riverkeeper

CERTIFICATE OF SERVICE

I, Vicki L. Yount, certify that on the 23rd day of May, 2017, I caused the foregoing Amicus Curiae Memorandum to be served via USPS postage prepaid on the following:

Attorney for Petitioner Puget Soundkeeper Alliance

Richard A. Smith
Smith & Lowney, PLLC
2317 E. John St.
Seattle, WA 98112
rasmithwa@igc.org

Attorney for Petitioner Puget Soundkeeper Alliance

Claire E. Tonry
Smith & Lowney, PLLC
2317 E. John St.
Seattle, WA 98112
clairet@igc.org

Attorney for Respondent Department of Ecology

Phyllis J. Barney, Assistant Attorney General
P.O. Box 40117
Olympia, WA 98504-0117
PhyllisB@atg.wa.gov

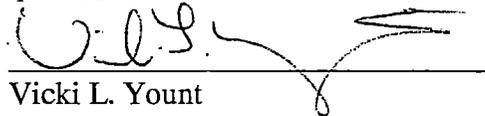
Attorney for Pollution Control Hearings Board

Dionne M. Padilla-Huddleston, Assistant Attorney General
P.O. Box 40110
Olympia, WA 98504-0110
DionneP@atg.wa.gov

Attorney for Seattle Iron & Metals, Corp.

Stephen R. Parkinson
Joyce Ziker Parkinson, PLLC
1601 5th Ave., Ste. 2040
Seattle, WA 98101-1627
sparkinson@jzplaw.com, jstevens@jzplaw.com

DATED this 23rd day of May, 2017.


Vicki L. Yount