

No. 74039-9

THE SUPREME COURT OF WASHINGTON

AIRPORT COMMUNITIES COALITION,

Petitioner,

v.

THOMAS FITZSIMMONS, a state officer in his capacity as Director of
the State of Washington Department of Ecology,
Respondent, and

THE PORT OF SEATTLE, a municipal corporation,

Additional Respondent.

**MOTION OF SIERRA CLUB, WASHINGTON TOXICS
COALITION, PUBLIC EMPLOYEES FOR ENVIRONMENTAL
RESPONSIBILITY, WASTE ACTION PROJECT, PUGET
SOUNDKEEPER ALLIANCE, RE SOURCES FOR SUSTAINABLE
COMMUNITIES, CITIZENS FOR A HEALTHY BAY, CITIZENS
AGAINST SEATAC EXPANSION, KETTLE RANGE
CONSERVATION GROUP, COLUMBIA RIVERKEEPER,
OKANOGAN HIGHLANDS ALLIANCE, FRIENDS OF GRAYS
HARBOR, OKANOGAN WILDERNESS LEAGUE, AND THE
LANDS COUNCIL FOR LEAVE TO APPEAR
AS AMICUS CURIAE**

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Sierra Club, Washington Toxics Coalition, Public Employees for Environmental Responsibility, Waste Action Project, Puget Soundkeeper Alliance, RE Sources for Sustainable Communities, Citizens for a Healthy Bay, Citizens Against Seatac Expansion, Kettle Range Conservation Group, Columbia Riverkeeper, Okanogan Highlands Alliance, Friends of Grays Harbor, Okanogan Wilderness League, and the Lands Council (collectively, "amici") hereby urge the Court's retention and consideration of the Airport Communities Coalition's First Amended Petition in the above-captioned action. Amici further respectfully request leave of the Court to appear as *amici curiae* and file an amicus curiae brief pursuant to RAP 10.6.

This case raises fundamental and urgent issues of broad public import, because it involves the rights and interests of the general public. Specifically, the public's ability to protect the environment through legal appeal to Washington's Environmental Hearings Boards and Washington courts is at stake here.¹ The public interest is also implicated here by the unconstitutional nature of the Legislature's action.

¹ Washington's Environmental Hearings Boards consist of the Pollution Control Hearings Board, the Forest Practices Appeals Board, the Shoreline Hearings Board, and the Hydraulic Appeals Board. *See*, RCW 43.21B.005.

1. Statement of Applicants' Interests and Familiarity with the Issues

Amici urge the Court to retain ACC's Petition and exercise its discretionary original jurisdiction over this case in light of the substantial public interest in the underlying issues, as evidenced by the assembled coalition of environmental organizations. Amici are environmental organizations from across Washington State, who have considerable experience as litigants in judicial and quasi-judicial proceedings. As noted further below, several of the coalition members are parties in a pending administrative appeal before Pollution Control Hearings Board; one is a party in this Court's review of the PCHB decision that prompted SSB 5787; and others have appeared before each of Washington's Environmental Hearings Boards.

Collectively, amici are experienced litigants who use laws such as the federal Clean Water Act, 33 U.S.C. §§ 1251 *et. seq.*, and Washington's Water Pollution Control Act, RCW 90.48, to fight for water quality and protection of the environment. Amici are all too familiar with the considerable investments of time and money needed to find and hire experts, to retain legal counsel, to build a case -- in short, to mount an effective legal challenge to agency action.

Given their active involvement in the public processes established to foster environmental protection, amici are alarmed at the precedent set

by SSB 5787. As a precedent, SSB 5787 indicates that powerful interests such as the Port of Seattle may not be subject to adverse environmental rulings. It suggests that environmental appellants can faithfully prosecute an appeal at considerable cost, and can prevail in an adjudicative process that meticulously determines facts and carefully applies the law to those facts, only to see that investment dashed through legislative intervention. It suggests that powerful interests can obtain special interest legislation -- even during the pendency of court appeals -- to override hard-won environmental rulings, and to preempt the court's role in determining the legality of agency action.

In this case, the Legislature has attempted to revoke the Pollution Control Hearings Board's authority to reject, based on its evaluation of the evidence presented in an exhaustive appeal, the use of the synthetic precipitate leaching process (SPLP) test when it is not appropriate.

Amici have long-standing and significant interests in protecting the ground, surface, and marine water quality throughout Washington State. Amici's interests in water quality and environmental protection throughout Washington, and in the efficacy of Washington's environmental laws, are threatened by the Legislature's inappropriate intervention here.

In particular, members of the amicus coalition offer the following unique perspectives:

- a. Sierra Club.** With more than 700,000 members, the Sierra Club is the largest and most effective conservation organization in the United States. The 27,000 plus members of the Cascade and Northern Rockies Chapters organize and support conservation efforts within Washington State that focus on national forests, energy, water, transportation, and sprawl issues, as well as political and legislative ones.
- b. Washington Toxics Coalition** is a non-profit, member-based organization dedicated to protecting public health and the environment by identifying and promoting alternatives to toxic chemicals and pollution. WTC uses research, grassroots organizing, litigation, and citizen education to promote pollution prevention in homes, schools, workplaces, agriculture, industry, and by government agencies.
- c. Public Employees for Environmental Responsibility** is a private, non-profit organization that protects government-employed resource professionals throughout the country and in Washington State. PEER promotes environmental ethics and government accountability, and works with resource professionals to help change the way government agencies conduct business. PEER is a member of the appellant coalition

presently appealing the Industrial Stormwater General Permit before the PCHB in *Puget Soundkeeper Alliance et al. v. Department of Ecology*, PCHB 02-162, 02-163, 02-164.²

- d. Waste Action Project** is a Seattle-based non-profit environmental group, acting as a private attorney general to enforce the Clean Water Act. WAP uses legal tools to protect the environment and human health, and empowers its members and the public through effective advocacy and education.
- e. Puget Soundkeeper Alliance** protects and preserves Puget Sound by tracking down and stopping the discharge of toxic pollutants into its waters. The Alliance actively monitors and patrols the waters of Puget Sound to detect and document sources of illegal pollution. The Alliance was formed in 1984.
- f. RE Sources for Sustainable Communities** is a non-profit environmental education organization focusing on fresh and marine water quality, air quality, and waste reduction and recycling. Along with the North Sound Baykeeper, RE

² Several parties to the instant amicus motion are also parties to the ongoing PCHB appeal of the ISGP, including: Puget Soundkeeper Alliance, Waste Action Project, RE Sources for Sustainable Communities, and Citizens for a Healthy Bay.

Sources acts as an advocate and educator for marine water quality for northern Puget Sound.

- g. Citizens for a Healthy Bay** promotes full public involvement in the process of hazardous waste cleanup, restoration and stewardship of Commencement Bay in Tacoma, Washington. CHB promotes habitat restoration, and provides an on-the-water presence in Commencement Bay to detect and prevent pollution.
- h. Citizens Against Seatac Expansion** is a broad-based, non-profit citizen's group which acts to protect the local environment and communities from the impacts of Sea-Tac International Airport. CASE fights for clean water, including fighting for better enforcement of the Port of Seattle's NPDES permit for discharges from Sea-Tac Airport into local streams. CASE is a party to *Port of Seattle v. Pollution Control Hearings Board*, No. 73419-4, presently pending before the Court.
- i. Kettle Range Conservation Group** is a regional conservation group, with offices in Republic and Spokane, Washington. On behalf of more than 800 members, KRCCG advocates protection and restoration of natural ecosystems in the Pacific Northwest.

- j. Columbia Riverkeeper** works to end pollution of the Columbia River, to save remaining fish and wildlife populations in the Columbia River and tributaries, and to educate people about the river and the serious threats to her.
- k. Okanogan Highlands Alliance** educates its members and the public about the threat that chemical-leach mining poses to the quality of air, soil, and water, human health, wildlife, and natural ecosystems in the Okanogan Highlands. OHA was the lead appellant in *Okanogan Highlands Alliance et al. v Department of Ecology and Battle Mountain Gold Company*, PCHB Nos. 97-146, 97-182, 97-183, 97-186, and 99-019 (2000).
- l. Friends of Grays Harbor** is a 100% volunteer citizen's group made up of crabbers, fishers, oyster growers and caring citizens. FOGH protects the natural environment and human health in the Grays Harbor estuary and vicinity through science, advocacy, law, activism, and empowerment.
- m. Okanogan Wilderness League (OWL)** fights to protect the natural resources of the Methow Valley, with a special emphasis on water resources. OWL is an experienced litigant; *see, e.g., Okanogan Wilderness League, Inc. v. Town of Twisp*,

133 Wn.2d 769, 947 P.2d 732 (1997); and has participated in numerous administrative appeals before the Pollution Control Hearings Board and the Shoreline Hearings Board.

- n. **The Lands Council** has advocated for protection of forests and rivers in eastern Washington since 1983. The Lands Council is dedicated to the transition of the greater Columbia River ecosystem from resource exploitation to long term community and biological sustainability.

2. Specific Issues to Which Brief Will Be Directed

The environmental coalition's amicus brief will be directed to the first two issues identified in the brief of petitioner ACC: SSB 5787's violation of the Separation of Powers doctrine; and SSB 5787's preemption by conflict with the Clean Water Act.

a. Separation of Powers

"The separation of powers doctrine ensures that the fundamental functions of each branch of government remain inviolate." Hillis v. Department of Ecology, 131 Wn.2d 373, 390, 932 P.2d 139, 148 (1997), *citing Carrick v. Locke*, 125 Wn.2d 129, 135, 882 P.2d 173 (1994). Under our tripartite system of government, the legislative branch passes laws, and the judicial branch adjudicates, by determining facts and applying the law to those facts.

In this case, amici object to the Legislature's interference in the judicial process. A hard-fought appeal before the Pollution Control Hearings Board resulted in a nuanced ruling based on detailed findings of fact and conclusions of law. *See*, "Findings of Fact, Conclusions of Law, and Order" dated August 12, 2002, PCHB No. 01-160. The parties appealed, and indeed their appeal is presently pending before the Washington Supreme Court in *The Port of Seattle v. Pollution Control Hearings Bd.*, No. 73419-4.

Nevertheless, not content to play by the rules applicable to all citizens, the disgruntled Port of Seattle opted to plead its case to the Legislature instead of the Court. And the Legislature has now intervened in the appellate process by passing SSB 5787, in effect attempting to dictate the outcome of an ongoing appeal.

The environmental groups will address the unconstitutionality of the Legislature's action in their amicus brief.

b. Conflict with Clean Water Act

The coalition's amicus brief will also address SSB 5787's irrevocable conflict with the requirements of the federal Clean Water Act. Contrary to the CWA, SSB 5787 directly limits the PCHB's ability to determine what measures are necessary to comply with state water quality standards. Here, the PCHB acted pursuant to its legal authority in

determining the facts and applying the law to the facts. In doing so, it determined that compliance with state water quality standards would not be reasonably assured if the SPLP test were used. Nevertheless, the state legislature has now blessed the use of the SPLP test in all circumstances. It has, in effect, decreed that the test may be used without regard to the facts and circumstances of specific projects.

The Legislature cannot dictate what measures are adequate to comply with water quality standards because the Legislature has no authority to vary the terms of the Clean Water Act.³ This action necessarily conflicts with the Clean Water Act, which requires compliance with water quality standards.

Amici seek to assure compliance with the requirements of federal law, as well as their ability to secure such compliance through recourse to Washington's Environmental Hearings Boards and courts. In this instance, the PCHB's construction of the federal Clean Water Act is at stake. But the precedent established with SSB 5787 applies equally to other federal laws, and to other state boards.

3. Reasons Why Additional Argument is Necessary

³ Further, the task of deciding what complies with the CWA is a judicial task, not a legislative one, and, as noted above, the Legislature violates the Separation of Powers doctrine by acting outside its authority.

Amici would present unique and valuable perspectives to the Court that are not adequately represented by any of the existing parties, who either support the petition on the merits or whose primary interests lie in eliminating, by any available means, protective conditions imposed by the PCHB in its Order dated August 12, 2002. Amici represent a widespread community of concerned organizations and their members, whose interests and perspectives would be of assistance in resolving this dispute because they represent a breadth and depth of perspective which the litigants on the third runway do not bring to the issue.

In short, amici can help the Court understand the widespread implications of SSB 5787 and the Legislature's actions here, as impacting other matters and cases.

For the reasons set forth above, the Court should grant this motion for leave to appear as *amici curiae* and to file an amicus brief for consideration in this case.

Respectfully submitted this 30th day of June, 2003.

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