FILED
SUPREME COURT
STATE OF WASHINGTON
4/16/2024 8:00 AM
BY ERIN L. LENNON
CLERK

No. 102479-7

SUPREME COURT OF THE STATE OF WASHINGTON

CITY OF TACOMA, BIRCH BAY WATER AND SEWER DISTRICT, KITSAP COUNTY, SOUTHWEST SUBURBAN SEWER DISTRICT, and ALDERWOOD WATER & WASTEWATER DISTRICT,

Respondents,

v.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,

Petitioner.

AMICUS BRIEF OF THE WASHINGTON CONSERVATION ACTION EDUCATION FUND, SUQUAMISH INDIAN TRIBE, AND SQUAXIN ISLAND TRIBE

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I. INTRODUCTION

Amici Washington Conservation Action Education Fund, formerly the Washington Environmental Council, ("WCAEF"), the Suquamish Indian Tribe, and the Squaxin Island Tribe, support the Department of Ecology in this matter, and respectfully request that this Court reverse the order below and dismiss the Respondents' appeal.

Respondents discharge polluted wastewater into Puget Sound, where Amici Tribes harvest fish and shellfish pursuant to reserved Treaty rights, and WCAEF's thousands of members and supporters observe wildlife, swim, study, and recreate. Wastewater contains high concentrations of nutrients, including various forms of nitrogen, that contribute to the reasonable potential of water quality standards violations in Washington. These impacts to water quality harm fisheries and a sustainable future for Puget Sound.

In a novel ruling, the Court of Appeals incorrectly held that a statement in a letter denying a petition for rulemaking

itself constituted a rule, even though the statement was authorized and called for by the plain language of the Administrative Procedure Act, RCW 34.05.330(1), and was the administrative equivalent of dicta. The statement in question was a public declaration of intent to implement and enforce existing laws for protection of water quality.

Amici advise the Court that protection and restoration of water quality requires robust implementation and enforcement of environmental laws. Far too often, agencies are underfunded, understaffed, or fearful of legal or political reprisal from dischargers, and do not adequately enforce environmental laws. If a mere statement that the agency intends to implement and enforce existing law is construed as a new rule, it would likely undermine transparent implementation of Administrative Procedure Act ("APA") rulemaking procedures, and further hinder environmental protection, with associated harm to aquatic ecosystems and exercise of Treaty rights.

II. IDENTITY AND INTEREST OF AMICI

A. Washington Conservation Action Education Fund

Washington Conservation Action Education Fund, formerly Washington Environmental Council, is a non-profit conservation organization based in Seattle, Washington. WCAEF's mission is to develop, advocate, and defend policies that ensure environmental progress and justice by centering and amplifying the voices of the most impacted communities. For over 50 years, WCAEF has brought people together to solve Washington's most critical environmental issues.

WCAEF's People for Puget Sound Program is dedicated to recovering Puget Sound and the larger Salish Sea. WCAEF provides unique and significant expertise to Ecology's efforts to improve water quality and improve wildlife habitat in Puget Sound, through WCAEF's paid staff with computer modeling and scientific expertise and through WCAEF's extensive volunteer membership.

Specifically, WCAEF has long engaged with the Department of Ecology on nutrient pollution and on wastewater discharges. WCAEF began attending the Puget Sound Nutrient Forum in 2017 and engaged on the need to reduce nutrient pollution. WCAEF has also been appointed by Governor Inslee to serve on the Marine Resources Advisory Council to oversee progress on combatting ocean acidification, including reducing sources of nutrients. Low dissolved oxygen and acidification impair food webs and natural resources such as fish and shellfish that are integral to the health of Puget Sound and the people that rely on these marine waters. WCAEF is also a party to a pending proceeding before the Pollution Control Hearings Board (PCHB) regarding the Puget Sound Nutrient General Permit, which also involves Ecology and Respondents. *See Puget Soundkeeper Alliance v. State of Washington Department of Ecology*, P21-082c (Washington Pollution Control Hearings Board). That proceeding will provide a full evidentiary hearing

and is the correct forum for Respondents' stated concerns. However, it has been stayed pending resolution of this case.

Finally, WCAEF has advocated for funding for sewage treatment plant upgrades at the state and federal level. As noted by Ecology, the Washington State Legislature has provided funds to Ecology specifically to develop the Puget Sound Nutrient General Permit, and also has provided $9,000,000 in funding as grants to dischargers. WCAEF joined onto letters to Washington's federal delegation requesting increased federal funding for the Clean Water State Revolving Fund, an important source for wastewater upgrades and improvements.

B. Suquamish Indian Tribe

The Suquamish Indian Tribe is a federally recognized Indian Tribe with a governing body recognized by the United States Secretary of the Interior. The Suquamish Indian Tribe is located on the Port Madison Reservation in Suquamish, Washington in Kitsap County. The Suquamish Indian Tribe is a signatory of the 1855 Treaty of Point Elliott, in which the

Tribe forever reserved its right to take fish among other reserved rights. Since time immemorial and up to the present day, the Suquamish Indian Tribe and its members engage in subsistence, cultural, and commercial harvesting of finfish and shellfish throughout the adjudicated usual and accustomed fishing area of the Suquamish Indian Tribe ("U&A"). *See United States v. Washington*, 459 F. Supp. 1020, 1049 (W.D. Wash. 1978). Suquamish U&A encompasses a large portion of Puget Sound, from the northern tip of Vashon Island to the Fraser River in Canada, into which several wastewater treatment plants discharge. The Suquamish Indian Tribe is also involved in the co-management of fisheries resources with the State of Washington. The Suquamish Indian Tribe engages in other water-dependent cultural activities, conservation efforts, and other fisheries resource recovery activities throughout its U&A, and has been engaged in the Puget Sound Nutrient General Permit process, those processes leading to it, and the appeal pending before the PCHB.

C. Squaxin Island Tribe

The Squaxin Island Tribe is a federally recognized Indian tribe located in Southern Puget Sound in Mason County, Washington with treaty rights to harvest fish and shellfish, "at their usual and accustomed fishing places in the shallow bays, estuaries, inlets and open Sound of Southern Puget Sound and in the freshwater streams and creeks draining into those inlets." *See generally United States v. Washington*, 384 F.Supp. 312, 378 (W.D. Wash. 1974); *United States v. Washington*, 459 F.Supp. 1020 (W.D. Wash. 1978). The Tribe's culture and economic well-being depend upon clean water to support abundant and sustainable fisheries. Thus, the Tribe has vital interests in ensuring that laws and regulations intended to protect water quality, and related aquatic habitat, are implemented and enforced so that it can continue to exercise its Treaty rights and successfully execute its role as a steward and co-manager of Puget Sound.

The Squaxin Island Tribe is uniquely positioned to offer a perspective on Puget Sound water quality. The Tribe's location at the south end of the sound, where nutrients discharged from all parts north accumulate, make regulating municipal wastewater in all areas of Puget Sound especially critical to the Squaxin Island Tribe. Because of low water circulation in the Southern Puget Sound, discharged nutrients tend to accumulate there and exacerbate algae blooms, which contribute to low dissolved oxygen conditions and a disproportionate impact on the Squaxin Island Tribe's fisheries and the water quality in its U&A. Harmful effects of low marine dissolved oxygen include acidification, which can prevent shellfish and other marine organisms from forming shells; shifts in the number and types of bottom-dwelling invertebrates; increases in abundance of macroalgae, which can impair the health of eelgrass beds; seasonal reduction in fish habitat and intensification of fish kill events; and potential disruption of the entire food web.

D. Involvement of Amici in the Development of Puget Sound Nutrient General Permit

Amici have long advocated for protection and restoration of water quality in Puget Sound, and all submitted comments and participated during the development of the Puget Sound Nutrient General Permit. That history is detailed in the Amici's brief before the Court of Appeals and part of the record on review.

E. Scientific Context and Basis for Ecology's Wastewater Regulation

Amici provide a brief overview of the history of regulation of wastewater discharge into Puget Sound to provide further context for the justification of Ecology's statements in the letter denying a rulemaking petition by Northwest Environmental Advocates (the "NWEA denial letter") and our position that further bureaucratic delay is both unwarranted and harmful. We do not always agree with Ecology and strongly believe that more stringent wastewater regulation is necessary

and overdue, as well as increased efforts to communicate and consult with Tribal governments. With that said, Ecology's statements and modest actions relating to this suit were built on decades of scientific studies and public process that relied upon existing laws and authorities.

Peer-reviewed scientific investigations have clearly identified sewage treatment plants discharges as causing and contributing to low oxygen levels in parts of Puget Sound, a finding that has been consistent from the initial South Puget Sound Dissolved Oxygen Study[1] through the recent

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[1] (Albertson et al., *South Puget Sound Water Quality Study, Phase 1,* WASHINGTON STATE DEPARTMENT OF ECOLOGY PUBLICATION NO. 02-03-021 (2002a) https://fortress.wa.gov/ecy/publications/SummaryPages/0203021.html; Roberts et al., *South Puget Sound Dissolved Oxygen Study: Interim Data Report*, WASHINGTON STATE DEPARTMENT OF ECOLOGY PUBLICATION NO. 08-03-037 (2008) https://fortress.wa.gov/ecy/publications/SummaryPages/0803037.html)

development and application of the Salish Sea Model.[2] Wastewater discharges are contributing to dissolved oxygen impairments and worsening acidification of the Salish Sea.[3]

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[2] (Mohamedali et al., *Puget Sound Dissolved Oxygen Model Nutrient Load Summary for 1999-2008* (2011a) www.ecy.wa.gov/biblio/1103057.html; Mohamedali et al., *South Puget Sound Dissolved Oxygen Study: Interim Nutrient Load Summary for 2006-2007*, WASHINGTON STATE DEPARTMENT OF ECOLOGY PUBLICATION NO. 11-03-001 (2011b) https://fortress.wa.gov/ecy/publications/SummaryPages/1103001.html

[3] (Roberts et al., *Quality Assurance Project Plan: Salish Sea Acidification Model Development,* WASHINGTON STATE DEPARTMENT OF ECOLOGY PUBLICATION NO. 15-03-109 (2015b) https://fortress.wa.gov/ecy/publications/SummaryPages/1503109.html) (Bianucci et al., *Sensitivity of the regional ocean acidification and carbonate system in Puget Sound to ocean and freshwater inputs,* ELEM. SCI ANTH. 6(1):22 (2018) http://doi.org/10.1525/elementa.151; Pelletier et al., *Seasonal variation in aragonite saturation in surface waters of Puget Sound – a pilot study,* ELEM. SCI ANTH. 6(1):5 (2018) http://doi.org/10.1525/elementa.270; Pelletier et al., *Salish Sea Model: Ocean Acidification Module and the Response to Regional Anthropogenic Nutrient Sources*, WASHINGTON STATE DEPARTMENT OF ECOLOGY PUBLICATION NO. 17-03-009 (2017b) https://fortress.wa.gov/ecy/publications/SummaryPages/1703009.html)

The dischargers have been involved in these processes since the early 2000s. Each modeling and monitoring stage included Quality Assurance Project Plans[4], interim and final

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[4] (McCarthy et al., *Quality Assurance Project Plan: Salish Sea Model Applications*, WASHINGTON STATE DEPARTMENT OF ECOLOGY PUBLICATION NO. 18-03-111 (2018) https://fortress.wa.gov/ecy/publications/SummaryPages/1803111.html; Roberts et al., *Quality Assurance Project Plan: Salish Sea Dissolved Oxygen Modeling Approach: Sediment-Water Interactions,* WASHINGTON STATE DEPARTMENT OF ECOLOGY PUBLICATION NO. 15-03-103 (2015a) https://fortress.wa.gov/ecy/publications/SummaryPages/1503103.html; Roberts et al. (2015b); Albertson, S., *Addendum to Quality Assurance Project Plan South Puget Sound Water Quality Study Phase 2: Dissolved Oxygen for Evaluation of Shellfish Harvesting near Joint Base Lewis-McChord and Chambers Creek*, WASHINGTON STATE DEPARTMENT OF ECOLOGY PUBLICATION NO. 13-03-102 (2013) https://fortress.wa.gov/ecy/publications/SummaryPages/1303102.html; Sackmann, B., *Quality Assurance Project Plan: Puget Sound Dissolved Oxygen Modeling Study: Intermediate-scale Model Development*, WASHINGTON STATE DEPARTMENT OF ECOLOGY PUBLICATION NO. 09-03-110 (2009) https://fortress.wa.gov/ecy/publications/SummaryPages/0903110.html; Albertson et al., *Quality Assurance Project Plan: South Puget Sound Water Quality Study Phase 2: Dissolved Oxygen*, WASHINGTON STATE DEPARTMENT OF ECOLOGY PUBLICATION NO. 07-03-101 (2007) https://fortress.wa.gov/ecy/publications/SummaryPages/070310

1.html; Roberts, M., *Addendum to Quality Assurance Project Plan: South Puget Sound Water Quality Study, Phase 2: Dissolved Oxygen,* WASHINGTON STATE DEPARTMENT OF ECOLOGY PUBLICATION NO. 07-03-101ADD1 (2007a) https://fortress.wa.gov/ecy/publications/SummaryPages/0703101ADD1.html; Roberts, M., *Addendum #2 to Quality Assurance Project Plan: South Puget Sound Water Quality Study Phase 2: Dissolved Oxygen*, WASHINGTON STATE DEPARTMENT OF ECOLOGY PUBLICATION NO. 07-03-101ADD2 (2007b) https://fortress.wa.gov/ecy/publications/SummaryPages/0703101ADD2.html; Roberts and Pelletier, *Addendum #3 to Quality Assurance Project Plan: South Puget Sound Water Quality Study Phase 2: Dissolved Oxygen*, WASHINGTON STATE DEPARTMENT OF ECOLOGY PUBLICATION NO. 07-03-101ADD3 (2007) https://fortress.wa.gov/ecy/publications/SummaryPages/0703101ADD3.html).

data reports [5], model calibration and scenarios reports[6], and peer-reviewed scientific journal articles.[7]

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[5] (Mohamedali et al. (2011a); Mohamedali et al. (2011b); Roberts et al., *South Puget Sound Dissolved Oxygen Study: Interim Data Report,* WASHINGTON STATE DEPARTMENT OF ECOLOGY PUBLICATION NO. 08-03-037 (2008) https://fortress.wa.gov/ecy/publications/SummaryPages/0803037.html)

[6] (Ahmed et al., *Puget Sound Nutrient Source Reduction Project. Volume 1: Model Updates and Bounding Scenarios*, WASHINGTON STATE DEPARTMENT OF ECOLOGY PUBLICATION NO. 19-03-001 (2019) https://fortress.wa.gov/ecy/publications/SummaryPages/1903001.html; Pelletier et al., *Salish Sea Model: Sediment Diagenesis Module,* WASHINGTON STATE DEPARTMENT OF ECOLOGY PUBLICATION NO. 17-03-010 (2017a) https://fortress.wa.gov/ecy/publications/SummaryPages/1703010.html; Pelletier et al. (2017b); Ahmed et al., *South Puget Sound Dissolved Oxygen Study: Water Quality Model Calibration and Scenarios,* WASHINGTON STATE DEPARTMENT OF ECOLOGY PUBLICATION NO. 14-03-004 (2014) https://fortress.wa.gov/ecy/publications/SummaryPages/1403004.html; Roberts et al., *Puget Sound and the Straits Dissolved Oxygen Assessment: Impacts of Current and Future Human Nitrogen Sources and Climate Change through 2070*, WASHINGTON STATE DEPARTMENT OF ECOLOGY PUBLICATION NO. 14-03-007 (2014a) https://fortress.wa.gov/ecy/publications/SummaryPages/1403007.html; Roberts et al., *South Puget Sound Dissolved Oxygen Study: South and Central Puget Sound Water Circulation*

Because of the way water circulates, nutrients and other pollutants in sewage discharges accumulate in southern Puget

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Model Development and Calibration, WASHINGTON STATE DEPARTMENT OF ECOLOGY PUBLICATION NO. 14-03-015(2014b) https://fortress.wa.gov/ecy/publications/SummaryPages/1403015.html)

[7] (Pelletier et al., *Seasonal variation in aragonite saturation in surface waters of Puget Sound – a pilot study,* ELEM. SCI ANTH. 6(1):5 (2018) http://doi.org/10.1525/elementa.270; Bianucci et al. (2018); Khangaonkar et al., *Assessment of circulation and inter-basin transport in the Salish Sea including Johnstone Strait and Discovery Islands pathways,* OCEAN MODELLING, 109:11-32 (2017) https://www.sciencedirect.com/science/article/abs/pii/S1463500316301408; Khangaonkar et al., *Simulation of annual biogeochemical cycles of nutrient balance, phytoplankton bloom(s), and DO in Puget Sound using an unstructured grid model*, OCEAN DYNAMICS (2012a) https://link.springer.com/article/10.1007/s10236-012-0562-4; Roberts and Bilby, *Urbanization alters litterfall rates and nutrient inputs to small Puget Lowland streams*, JOURNAL OF THE NORTH AMERICAN BENTHOLOGICAL SOCIETY, 28(4):941-954 (2009) https://www.journals.uchicago.edu/doi/10.1899/07-160.1)

Sound. Nitrogen and carbon released in one location negatively impact dissolved oxygen and acidification miles away.[8]

There is no question that human activities increase nitrogen and carbon contributions through both wastewater treatment plant discharges and watershed activities.

These problems are worsening. The population of the Puget Sound region is expected to double by 2070. Increasing the population will likely approximately double nitrogen from wastewater if current wastewater treatment plant technology remains unchanged, which would further reduce oxygen levels in Puget Sound. Technology exists today to upgrade plants to nutrient removal, which several dischargers have elected to plan and design for now, in advance of expected regulations.

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[8] (Ahmed et al. (2019); Pelletier et al. (2017a); Pelletier et al. (2017b); Ahmed et al. (2014); Roberts et al. (2014a); Khangaonkar et al., *Puget Sound Dissolved Oxygen Modeling Study: Development of an Intermediate Scale Water Quality Model*, WASHINGTON STATE DEPARTMENT OF ECOLOGY PUBLICATION NO. 12-03-049 (2012b) https://fortress.wa.gov/ecy/publications/SummaryPages/1203049.html; Albertson et al. (2002a))

Nutrient removal requirements were not a surprise for dischargers. In fact, in the early 2000s, Pierce County opted to design the Chambers Creek plant upgrade specifically to incorporate nutrient-removal technology in response to the urgency of the problem and the certainty of future regulations.

At every stage of this work, Ecology engaged with the municipalities that discharge wastewater to Puget Sound and the Salish Sea. Dischargers provided review comments on monitoring plans, quality assurance project plans that outlined how the computer modeling would be conducted, data reports with the results, and technical reports with modeling outputs. Ecology convened advisory groups for the South Puget Sound Dissolved Oxygen Study and Salish Sea Model development. Ecology initiated the Puget Sound Nutrient Forum to share information and solicit feedback on the approaches to controlling nutrients discharged to Puget Sound.

Dischargers had privileged access to Ecology's processes, more so than did Tribal Amici. When Ecology

decided to pursue the general permit approach to controlling nutrients, they established the Puget Sound Nutrient General Permit Advisory Committee, composed of wastewater dischargers primarily, with some state agencies and a few conservation groups, including Washington Environmental Council (now WCAEF). The PSNGP Advisory Committee met regularly as Ecology introduced early ideas for various sections of the permit to solicit feedback from the dischargers and the rest of the committee. A representative of the dischargers chaired the committee and was instrumental in developing the agendas.

Ecology's statements in the NWEA denial letter were an explanation of commitments and policy discretion based in decades of study and public engagement. The state is long overdue in requiring modern practices for sewage pollution, which was the content of the NWEA petition. The Court should not rely on a response to that petition to further delay action on regulating sewage pollution. The Puget Sound regional

population grows every year, and dischargers must transition to modern sewage approaches to protect the unique and valuable resources. Puget Sound water quality warrants action now.

F. Ecology's Limited Enforcement

Despite Ecology's extensive modeling, study, and engagement with the public and with dischargers, in Amici's view, Ecology has undertaken limited regulation of nitrogen discharges from wastewater treatment facilities. Many dischargers make use of administratively extended discharge permits under the Clean Water Act, because Ecology lacks staff and resources to issue new permits that would more effectively protect water quality standards and require modern treatment technologies. These permits, colloquially known as "zombie permits," have perpetuated under-regulation of nitrogen discharges into Puget Sound and corresponding likely violation of dissolved oxygen water quality standards.

The Puget Sound General Nutrient Permit begins the process of requiring dischargers to collect data and prepare optimization plans but does not contain enforceable discharge limits. It is an important, but modest and collaborative, step toward more effective regulation.

III. STATEMENT OF THE CASE

The Puget Sound Nutrient General Permit is Ecology's chosen method of regulating the pollutant Total Inorganic Nitrogen at this time. The General Permit went through full notice and public comment procedures. It is properly on appeal before the Pollution Control Hearings Board, where Ecology, Respondents, King County, WCAEF, the Suquamish Indian Tribe, and others are parties.

In contrast, this case is what remains of dischargers' preemptive attempt to derail the General Permit before it was issued. Dischargers brought a wide variety of claims, all of which have been rejected except for the sole, narrow issue on appeal, which is whether a statement in the NWEA denial letter

constitutes a rule for purposes of the Washington Administrative Procedure Act.

Such a statement in a denial letter is not a rule. When Ecology denies a petition for rulemaking under the APA, the APA **requires** Ecology to explain its reasons for denial and "where appropriate… the alternative means by which it **will address** the concerns raised by the petitioner." RCW 34.05.330(1) (emphasis added). At issue here, Ecology denied a petition for rulemaking that would designate tertiary treatment of wastewater as required technology. The petition came from Northwest Environmental Advocates (NWEA), a conservation organization well known for litigious Clean Water Act advocacy. Ecology determined that an explanation was appropriate, and complied with the APA requirements and explained its rationale and alternative means as follows:

> Ecology remains committed to [working with stakeholders to solve the DO problem in Puget Sound]. While this work is progressing, Ecology will through the individual permitting process:

> 1. Set nutrient loading limits at current levels from all permitted dischargers in Puget Sound and its key tributaries to prevent increases in loading that would continue to contribute to Puget Sound's impaired status.
> 2. Require permittees to initiate planning efforts to evaluate different effluent nutrient reduction targets.
> 3. For treatment plants that already use a nutrient removal process, require reissued discharge permits to reflect the treatment efficiency of the existing plant by implementing numeric effluent limits used as design parameters in facility specific engineering reports.

City of Tacoma v. Dep't of Ecology, 28 Wash. App. 2d 221, 232, 535 P.3d 462, 470 (2023).

The Court of Appeals incorrectly determined that Ecology's explanation of the "the alternative means by which it will address the concerns raised by the petitioner" itself constitutes a rule under the APA, and that the failure to undergo rulemaking procedures thus was unlawful.

Based on this ruling, the Court issued a sweeping determination that "the new requirements in the individual permits and the general permit are unlawful," *id.* at 251, even

though all the referenced permits went through notice and comment procedures, none of the referenced permits were before the Court, and the scope of relief went well beyond what was addressed in briefing or argument. The implications and reach of the Court of Appeals' ruling are unclear given that it did not have or even purport to have jurisdiction over the referenced permits.

Amici otherwise adopt Ecology's statement of the case.

IV. ARGUMENT

Ecology's statement in the NWEA denial letter was authorized and required by the APA. RCW 34.05.330(1). The petition for rulemaking raised legitimate and well-established concerns regarding regulation of wastewater discharge into Puget Sound. Even as Ecology did not agree with the necessity for the proposed rulemaking at that time, setting aside the merits of the denial, it was appropriate and lawful for Ecology to explain how it would address the concerns raised.

As correctly explained in Ecology's briefing, the statements in the letter amount to unenforceable administrative dicta, in which the agency explained how it planned to (but was not bound to) exercise its discretion to implement and enforce existing laws. A statement about intended policy direction is not a rule.

Amici have a deep stake in water quality in Puget Sound. Protecting and restoring water quality is essential to the exercise of Treaty rights and the enjoyment of a vibrant Puget Sound ecosystem. In an effort not to repeat Ecology's briefing, Amici focus on the implications of the Court of Appeals' decision on protection of Treaty and environmental resources. Amici have been more than patient. Protecting the health of Puget Sound health is an urgent need that must be addressed as municipalities plan for future population increases.

A. The Court of Appeals Decision Discourages Full and Transparent Compliance with the APA.

There is an irony in the Court of Appeals' decision—the Court determined that Ecology's compliance with RCW 34.05.330(1)'s direction that "where appropriate," Ecology must provide an explanation of "the alternative means by which **it will address** the concerns raised by the petitioner," itself constituted an unlawful rule in large part because the letter did exactly what the statute requires and stated how Ecology intended to address the concerns raised by petitioner. *Id* (emphasis added).

Indeed, it is unclear how Ecology could comply with both RCW 34.05.033(1)'s direction to explain how the agency "will address" concerns, and the Court of Appeals wide definition of rulemaking, in which an explanation of what the agency's understanding of what it will do in the future constitutes a rule.

Notwithstanding the absurdity of initiating rulemaking to deny a petition for rulemaking, it would be practically impossible to comply with the timing requirements. RCW

34.04.033(1) requires a denial within 60 days after submission of a petition, while the rulemaking procedures set forth in RCW Chapter 34.05 Part III take over 60 days to carry out. Statutes should be read to harmonize different statutory provisions, not to produce absurd and contradictory results. *See Associated Gen. Contractors of Washington v. State*, 544 P.3d 486, 496 (Wash. 2024).

Given these contradictions, in all likelihood if the Court of Appeals decision is affirmed, when agencies such as Ecology deny petitions they would find that it is not "appropriate" to explain the ""the alternative means by which it will address the concerns raised by the petitioner." Under the Court of Appeals' reasoning, if Ecology had simply denied the NWEA petition without explaining alternative means by which it would address the concerns raised, it would have been deemed to comply with the APA. This opaque outcome may safeguard against potential litigation, but it would be inconsistent with the letter and spirit of the APA and good governance. It would also

undermine the protection of Treaty resources and the environment.

The power to petition for rulemaking is an important mechanism for affected groups to seek greater or improved regulation. Petitions for rulemaking are often denied, but the explanation of the denial and alternative means of addressing the concerns provide an opportunity for the agency to consider and publicly disclose the concerns raised. The explanation also provides a benefit of explaining to the regulated community and the broader public what the agency intends to do, encouraging transparent and consistent implementation of laws, regulations, and policies. If affirmed, the Court of Appeals' decision would undermine consistent and transparent agency action and thus undermine the public interest.

B. The Court of Appeals Decision Threatens to Undermine Implementation and Enforcement of Environmental Laws.

In the challenged denial letter, Ecology explains several planned means by which it intended to address a well-

documented and worsening water quality crisis in the Puget Sound. Amici support Ecology's long overdue commitment to more robust regulation of wastewater discharge into Puget Sound, and have serious concern that deeming such a statement rulemaking will only serve to discourage transparent exercise of agency discretion to implement and enforce environmental laws.

Lack of enforcement has consistently diminished protection of Treaty resources and the environment in Washington. As explained by Billy Frank, Jr. in a Northwest Indian Fisheries Commission article and accompanying watersheds report, "enforcing existing state and federal pollution laws is one of the most effective actions we can take to recover salmon in western Washington and protect tribal treaty rights."[9]

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[9] https://nwifc.org/enforcing-environmental-laws-is-key-to-salmon-recovery/

In Amici's experience, State resource agencies including Ecology are often understaffed, underfunded, and faces political backlash for enforcement of even the most basic environmental laws, particularly those protecting water quantity and quality. The effects of lack of enforcement are most acutely borne by environmental justice communities.

As set forth in the Healthy Environment for All (HEAL) Act, RCW 70A.02.005(2), "Washington state studies and national studies found that people of color and low-income people continue to be disproportionately exposed to environmental harms in their communities. As a result, there is a higher risk of adverse health outcomes for those communities. This risk is amplified when overlaid on communities with preexisting social and economic barriers and environmental risks, and creates cumulative environmental health impacts." The HEAL Act further recognizes that it is important to "to reduce exposure to environmental hazards within Indian country, as defined in 18 U.S.C. Sec. 1151, due to off-

reservation activities within the state, and to improve state practices to reduce contamination of traditional foods wherever they occur. Exposure to such hazards can result in generational health and ecological problems, particularly on small reservations where it is impossible to move away from a hazard." *Id.*

Ecology's statement in the NWEA denial letter, while unenforceable and not binding, was a welcome signal that Ecology would finally take greater measures to protect water quality in Puget Sound. These measures, among other benefits, would help to protect Treaty resources and address environmental justice impacts. Public commitments are an important way to communicate to dischargers and the affected public that the agency will protect the environment. Commitments can enhance consistent and robust enforcement, which is essential to resource protection and recovery.

The Court of Appeals ruling is not supported by law and represents a significant deviation from the APA and

Washington case law. The Amici have further practical concern that the Court of Appeals ruling, if affirmed, will serve as an unnecessary additional bureaucratic constraint to effective implementation and enforcement of sewage regulation. Further delaying requirements to modernize sewage treatment technologies locks in status quo approaches, which will allow continued degradation of Puget Sound. Protecting the health of Puget Sound is an urgent and important issue that is foundational to the health and well-being of all Washingtonians, and to the exercise of Tribal Amici's Treaty rights.

V. CONCLUSION

For all the reasons stated herein, Amici respectfully request that the court reverse the decision below, and dismiss Tacoma's appeal.

Pursuant to RAP 18.17, undersigned counsel certifies that this amicus brief contains 4,496 words.

Respectfully submitted this 15th day of April, 2024.

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CERTIFICATE OF SERVICE

I certify that on the 15th day of May 2024, I caused a true and correct copy of the foregoing Amicus Brief to be served on the parties herein via the Appellate Court filing portal.

Dated this 15th day of May, 2024.

s/Wyatt F. Golding
WYATT F. GOLDING, WSBA #44412

ZIONTZ CHESTNUT

April 15, 2024 - 5:00 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	102,479-7
Appellate Court Case Title:	Birch Bay Water and Sewer District, et al. v. State of WA, Dept. of Ecology
Superior Court Case Number:	20-2-02539-6

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