NO. 100573-3

SUPREME COURT OF THE STATE OF WASHINGTON

NORTHWEST PULP & PAPER ASSOCIATION, THE ASSOCIATION OF WASHINGTON BUSINESS, and WASHINGTON FARM BUREAU,

Petitioners,

v.

STATE OF WASINGTON, DEPARTMENT OF ECOLOGY,

Respondent,

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY'S ANSWER IN OPPOSITION TO APPELLANTS' PETITION FOR DISCRETIONARY REVIEW

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I. INTRODUCTION

Appellants Northwest Pulp and Paper Association et al. (NWPP) seek review of a decision of the Court of Appeals that correctly held that an update to the Department of Ecology's Permit Writers Manual was not an administrative rule under the Administrative Procedure Act (APA). NWPP's arguments for review are predicated on mischaracterizations of the permitting Guidance Manual, applicable federal law, and the Court of Appeals' opinion. Contrary to NWPP's arguments, the Court of Appeals followed, rather than contravened, this Court's precedents, concluding that the options for permit writers found in the Guidance Manual update are not uniformly applied to the entire class of permittees and thus do not constitute an administrative rule under the APA. Its application of settled law to the undisputed facts of this case does not warrant review.

Unlike a rule of general applicability, the Guidance Manual update is simply a compilation of options for agency permit writers to consider when developing discharge permits for

facilities that have a reasonable potential to discharge polychlorinated biphenyls (PCBs) to state waters. NWPP's repeated characterization of the Guidance Manual as mandating the use of two PCB testing methods in every permit is simply false. The plain language of the Guidance Manual instructs that these methods should be applied in a permit writer's discretion, on a case-by-case basis, according to the individual needs of the facility. Further, the Guidance Manual does not alter any state or federal requirement or standard applicable to permittees; it simply helps guide permit writers' exercise of discretion in implementing requirements and standards found in the federal Clean Water Act and state law.

The Guidance Manual is thus guidance for Ecology staff, not an administrative rule. The Court of Appeals got it right, and this Court should deny NWPP's Petition for Discretionary Review.

II. RESTATEMENT OF THE ISSUES

1. Did the Court of Appeals correctly hold that the Guidance Manual was not a "directive of general applicability" and thus not an administrative rule, because the guidance is not applied uniformly to the entire class of permit holders, and Ecology staff apply appropriate Guidance Manual options on a case-by-case, site-specific basis when federal and state law require a facility to have a permit to discharge pollutants?

2. Should this Court conclude that the Guidance Manual is not an administrative rule, because the qualifications and standards for permits are set in federal and state law and regulation, and the Guidance Manual neither adds to nor alters those qualifications and standards?

III. RESTATEMENT OF THE CASE

A. Polychlorinated Biphenyls (PCBs)

PCBs are a group of 209 chemical compounds, each of which have the same chemical base, but slightly different

structures. AR 0922.0004.[1] PCBs are of major environmental concern because of their toxicity, ubiquity, and persistence in the environment. *Id.* The Environmental Protection Agency (EPA) prohibited PCB manufacture and commercial use in 1976. *Id.* Despite this prohibition, PCBs persist in the environment, and may also be newly created in small quantities as a result of chemical processes. AR 0749.0001.

B. The Clean Water Act and NPDES Permit Program

The federal Clean Water Act, 33 U.S.C. §§ 1251–1388, and state Water Pollution Control Act, RCW 90.48, prohibit the discharge of any pollutant to surface waters unless the discharge is made pursuant to the terms of a National Pollutant Discharge Elimination System (NPDES) discharge permit. 33 U.S.C. § 1342(a); RCW 90.48.160. Ecology, pursuant to its authority as the state water pollution control agency, sets water quality standards for state waters. RCW 90.48.260; 40 C.F.R. § 131.10;

[1] Cites to AR are to the Administrative Record filed with the Court. Cited pages are attached as Appendix B.

WAC 173-201A. Water quality standards can be expressed as numeric limits for individual pollutants, or as a narrative limit that is descriptive rather than numeric. *See e.g.,* WAC 173-201A-240 (stating that "[t]oxic substances shall not be introduced above natural background levels"). Washington water quality standards include a numeric limit for PCBs. WAC 173-201A-240, table 240.

If a facility has a "reasonable potential" to discharge a pollutant in an amount that would violate water quality standards, the facility's NPDES permit must contain effluent limitations on the discharge in order to prevent that violation. 40 C.F.R. § 122.44(d)(1); WAC 173-220-130(b)(i). An effluent limitation is any restriction on timing, quantity, rate, or concentration of pollutants discharged into the waters of the state. 33 U.S.C. § 1362(11); 40 C.F.R. § 122.44(k). Effluent limitations may be expressed as numeric limits that identify the amount of a specified pollutant that may be contained in a facility's discharge, or, if setting numeric limits is infeasible, other types

of limitations may be incorporated instead, in the form of best management practices designed to reduce pollutant discharges. 40 C.F.R. § 122.44(d); 40 C.F.R. § 122.44(k)(3)–(4).

NPDES permits contain testing requirements of various kinds. 40 C.F.R. § 122.44(i). One type of testing is monitoring of a specific pollutant, like PCBs, for compliance with a numeric effluent limitation. 40 C.F.R. § 122.44(i)(1). For such compliance monitoring, a facility must use a test method listed in 40 C.F.R. part 136 that is sufficiently sensitive to identify and measure a pollutant. 40 C.F.R. § 122.44(i)(1)(iv); WAC 173-201A-260(3)(h); *Puget Soundkeeper All. v. Dep't of Ecology*, 191 Wn.2d 631, 424 P.3d 1173 (2018) (hereinafter *Seattle Iron and Metals*). A method listed in 40 C.F.R. part 136 is also required for testing that must be completed for an application for a permit. 40 C.F.R. § 136.1(a). Method 608.3 is

the test method approved in 40 C.F.R. part 136 by the EPA for testing for PCBs.[2]

In addition to compliance monitoring and the testing required for a permit application, federal regulation provides that Ecology may reasonably require the collection of other information "to assess the discharges of the facility." 40 C.F.R. § 122.21(g)(13). This additional information may include additional quantitative data, including the results from additional testing, that Ecology may then use to assess the discharge. 40 C.F.R. § 122.21(g)(13).

Method 608.3, found in 40 C.F.R. part 136, can measure the total amount of PCBs in a sample, and can also measure the amount of certain specific "Aroclors" in a sample, "Aroclor"

[2] Incremental improvements to the methods discussed in this case occurred during the time of the Guidance Manual update. Method 608.3 is the current version of Method 608 approved by the EPA for permit compliance monitoring (82 Fed. Reg. 40836 (Aug. 28, 2017)). Method 8082A's prior version is Method 8082. Method 1668C's prior versions may appear in the record as 1668 or 1668a.

being the trade name for manufactured combinations of PCBs that were once intentionally produced for industrial purposes. AR 0922.0004. Method 608.3 cannot, however, measure each of the 209 individual PCB compounds that make up the family of PCBs. Each of these 209 individual PCBs are referred to as PCB "congeners." *Id.*

40 C.F.R. part 136 does not specify test methods for identifying and measuring each of the 209 individual congeners of PCBs. In such circumstances, when a specific pollutant does not have a test method listed in 40 C.F.R. part 136, federal regulations allow a permitting authority to specify a test method for measuring that pollutant in the permit itself. 40 C.F.R. § 122.44(i)(1)(iv)(B). Thus federal regulations allow a permitting authority to specify testing methods other than Method 608.3 when it is necessary to test for individual PCB congeners, and when the testing is not for compliance with a numeric effluent limit.

Consistent with these regulations, the Guidance Manual specifies two other test methods that may be used for PCB testing when it is beneficial to identify individual congeners, for such purposes as measuring the effectiveness of a treatment to eliminate PCBs from an effluent, or for identifying the source of PCB contamination in order to install best management practices to limit the contamination. Method 8082A is approved by the EPA for measuring PCBs in sediments, and can also be used for wastewater testing. AR 0797.0002. Method 1668C, published by the EPA, can identify individual congeners, and is also used to measure PCBs in wastewater. AR 0922.0005.

The three test methods vary in their sensitivity and analytical ability to detect PCBs. AR 0164.0261. Method 608.3—the method specified in 40 C.F.R. part 136 for compliance monitoring—is the least sensitive. Method 1668C is the most sensitive, can be used to identify each of the 209 individual congeners, and is able detect smaller amounts of PCBs than the other two methods. *Id.*

C. Ecology's Permit Writers Manual (Guidance Manual)

The Guidance Manual sets out procedures for permit writers to use when developing discharge permits. AR 0164.0004. The Guidance Manual requires the use of test methods approved in 40 C.F.R. part 136 for measuring compliance with numeric effluent limits. The Guidance Manual does not dictate the use of other test methods for any other purpose, but provides guidance in using those methods for other purposes.

Ecology maintains the Guidance Manual to improve the quality and consistency of discharge permits, and to improve the efficiency of the permitting process. AR 0164.0031. The Guidance Manual states clearly that it "is not regulation and should not be cited as regulatory authority for any permit condition." AR 0164.0033. The Guidance Manual integrates and implements existing state and federal law and regulations. *Id.* Ecology convened a work group to update the Guidance Manual in 2015 to respond to new developments in the law and technical

guidance regarding PCB detection and measurement. The updated Guidance Manual, which included Chapter 6, Section 4.5 addressing PCBs, was issued in July 2018. AR 0164.0004.

IV. AUTHORITY AND ARGUMENT

This Court's review is not warranted here because the Court of Appeals' decision faithfully follows, rather than conflicts, with this Court's prior decisions defining an administrative rule under the APA. RAP 13.4(b)(1). NWPP fails to demonstrate that the Guidance Manual meets the definition of a rule because the Guidance Manual is not uniformly applied to an entire class of permitted facilities. Additionally, while PCB pollution is of public concern, Ecology's guidance to its permit writers in exercising discretion on a case-by-case basis does not present an issue of substantial public interest that requires a determination by this Court. RAP 13.4(b)(4). NWPP's Petition for Discretionary Review should be denied.

A. The Court of Appeals Decision Comports with Prior Rulings of This Court

NWPP is correct that all facilities that discharge PCBs are required to have permits that contain limits, whether numeric or narrative. But that requirement is dictated by statutes and regulations under the Clean Water Act and RCW 90.48, not the Guidance Manual.[3] The Clean Water Act is the authority for the requirement that facilities that discharge PCBs must have permits that limit those discharges. 33 U.S.C. §§ 1311; 1342(a). Ecology implements the requirements of the Clean Water Act when it issues NPDES permits to dischargers.

1. The Guidance Manual is not uniformly applied to all permittees

NWPP claims that the Court of Appeals failed to apply this Court's prior precedent and created a "new standard" for determining when an agency order, directive or regulation is of

[3] 33 U.S.C. §§ 1311, 1342; 40 C.F.R. § 122.44(d)(a); RCW 90.48.520; WAC 173-201A-510(1) (discharge permits "must be conditioned so the discharges authorized will meet the water quality standards.").

general applicability. This is incorrect. The court relied on well-settled law to find that the Guidance Manual was not a rule of general applicability.

In holding that the Guidance Manual was not a rule, the court stated that "[h]ow the agency applies the challenged standard, not the outcome of the application, is determinative." *Northwest Pulp & Paper Ass'n v. Dep't of Ecology*, No. 55164-I-II, slip op. at 12 (Wash. Dec. 14, 2021) (Appendix A). This is consistent with this Court's prior decisions. In *Simpson Tacoma Kraft Company v. Department of Ecology*, this Court found that Ecology imposed a standard of general applicability when Ecology applied a numeric standard for dioxin uniformly to the entire class of entities that discharged dioxin, regardless of which facility or waterbody was at issue. *Simpson Tacoma Kraft Co. v. Dep't of Ecology*, 119 Wn.2d 640, 648, 835 P.2d 1030 (1992). Similarly, in *Failor's Pharmacy v. Department of Social and Health Services*, this Court found that reimbursement schedules were an administrative rule because they were imposed on all

members of the regulated community, even though outcomes (the amount each provider was reimbursed) may have differed. *Failor's Pharmacy v. Dep't of Social and Health Services*, 125 Wn.2d 488, 495–96, 886 P.2d 147 (1994). The Court of Appeals followed and applied this law.

NWPP's argument otherwise is predicated on a mischaracterization of the Guidance Manual. NWPP claims that the Guidance Manual is uniformly applied to all permittees, and asserts that the use of Methods 8082A and 1668C are "dictates" that are "required" to be used in all permits. Petition for Discretionary Review (Pet.) at 2, 18, 19 n.2, 27, 28. NWPP, however, conspicuously cannot point to any language in the Guidance Manual mandating that Methods 8082A and 1668C be uniformly used in all permits, because there is no such language. This is why Ecology prevailed below, and why the Court should deny review here.

The ***only*** required use of a test method for PCBs found in the Guidance Manual is the required use of Method 608.3 for

measuring compliance with numeric PCB limits, and for the monitoring necessary to complete a permit application. Appendix A at 13, AR 0164.0249,[4] AR 0164.0261,[5] AR 0164.0262.[6] This comports with federal and state regulation, and the Guidance Manual does nothing more than accurately reflect this. 40 C.F.R. § 122.44(i)(1)(iv); 40 C.F.R. § 136.1(a); WAC 173-201A-260(3)(h).

The Court of Appeals correctly noted that "[t]he Manual does not state that permit writers must mandate data collection using Methods 1668C and 8082A." Appendix A at 16. In contrast to the mandatory language requiring the use of Method 608.3 for compliance testing, the language regarding Methods 8082A and

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[4] "Federal NPDES permitting regulations require use of analytical test methods approved under 40 CFR Part 136 for assessing compliance with permit limits. The method currently approved for use in PCB analysis under 40 CFR Part 136 is Method 608."

[5] "[N]umerical effluent limit compliance must be evaluated using Method 608.3."

[6] "40 CFR 122.21(e)(3) says the application shall not be considered complete unless 40 CFR part 136 approved methods are used."

1668C is permissive and does not apply to measuring for compliance with numeric limits. Instead, as the Court of Appeals correctly concluded, the Guidance Manual's recommendations for the use of test methods other than Method 608.3 for purposes other than compliance testing provides for flexibility and discretion in determining what testing, if any, is required individual permits. Appendix A at 13–14. The court quoted directly from the permissive language of the Guidance Manual, and identified, as does the guidance, that Methods 8082A and 1668C "***may***" be used to evaluate ***sources*** of PCBs, and that the use of those methods "***may***" be required to identify individual congeners or for the analysis of ***the effectiveness of best management practices***. Appendix A at 13–14 (citing AR 0164.0250 and AR 0164.0264) (emphasis added). The Guidance Manual further states that monitoring requirements should only be included in permits when necessary for a facility's specific discharge situation. AR 0164.0260. The Guidance Manual does not call for mandatory application of any test

method other than Method 608.3 when it is appropriate, stating instead that "[w]hile PCB monitoring may be appropriate for some dischargers based on individual facility characteristics, permit writers should consider the value and purpose of requiring PCB monitoring when developing discharge permits." AR 0164.0261. The court thus correctly recognized the permissive nature of the Guidance Manual, determining that it allows staff to exercise discretion, and provides for "case-by-case analysis of variables rather than uniform application of a standard." Appendix A at 13.

If a facility has a reasonable potential to discharge PCBs, the permit for that facility must include effluent limitations that prevent PCBs in the discharge from violating water quality standards in the receiving waters. This requirement is imposed by the Clean Water Act and RCW 90.48, not by a policy of Ecology that is set out in the Guidance Manual. Thus the guidance is distinguishable from the dioxin standard uniformly applied to all dischargers in *Simpson Tacoma Kraft* and the

reimbursement schedule applied uniformly to prescription providers in *Failor's Pharmacy*.

As the court correctly observed, the Guidance Manual only states that ***if*** such tests are used, then those results must be used "to make the most informed decisions possible." Appendix A at 16. This is directly consistent with federal regulation that allows for the collection of additional information for the issuance of NPDES permits. 40 C.F.R. § 122.21(g)(13).

The Guidance Manual is also consistent with the EPA's approach found in its *Technical Support Document for Water-Quality-Based Toxics Control*, as noted by Division III of the Court of Appeals in its decision in *Spokane County v. Sierra Club*. *Spokane Cnty. v. Sierra Club*, No. 47158-2-II, 2016 WL 4366951 (Wash. Ct. App. Aug. 16, 2016) (unpublished).[7] In *Spokane County*, the court concluded Ecology has discretion in how it performs the analysis to determine if a facility has the

[7] Office of Water, U.S. Envtl. Prot. Agency, *Technical Support Document for Water Quality-Based Toxics Control* (Mar. 1991) (EPA/505/2-90-001), *available at:* https://www3.epa.gov/npdes/pubs/owm0264.pdf (last visited January 24, 2022).

reasonable potential to discharge PCBs, and that discretion includes its ability to issue a permit that required testing and data collection. *Id.* at *9. In reaching this conclusion, the court cited the Technical Support Document, which states "EPA recommends that the more information the authority can acquire to support the limit, the better a position the authority will be in to defend the limit if necessary. In such a case, the regulatory authority may well benefit from the collection of effluent monitoring data prior to establishing the limit." *Id.* at *8 (emphasis omitted).

The Guidance Manual imposes neither a standard nor a schedule uniformly applied in all the permits issued to all facilities that discharge PCBs. Instead, the Guidance Manual offers options for permit writers, and instructs Ecology staff to exercise their discretion and include only permit conditions that are necessary at a specific facility, after conducting a site-specific analysis. Thus, the Guidance Manual does not contain an agency policy that is uniformly applied as an "action [] of general

applicability within the definition of a rule." *Failor's Pharmacy*, 125 Wn.2d at 495.

2. The Guidance Manual options are not binding on permit writers

NWPP also errs to assert that permit writers have no flexibility to use a process outside of the Guidance Manual. Pet. at 13. NWPP cites its own comment letter and a line on a PowerPoint slide to argue that the Guidance Manual options are binding on permit writers. Pet. at 13. But in making this assertion, NWPP ignores the plain language of Water Quality Program Manager's cover memorandum for the Guidance Manual, correctly noted by the Court of Appeals, directing that when "a permit writer believes a permitting situation requires a different process than in the manual, the permit writer should discuss the alternative process with their supervisor." AR 0164.0004. This flexibility is echoed elsewhere in the Guidance Manual, which states that "[i]f the process does not fit a permitting circumstance, the permit writer can explore alternative processes as long as the law and regulation are met."

AR 0164.0033. Thus, the Guidance Manual does not impose strict adherence to any set of uniform requirements on permit writers other than those already found in state and federal regulation.

3. The Court of Appeals properly applied this Court's case law and created no new standard

The Court of Appeals set no new standard or test for "generally applicability" as NWPP claims. Pet. at 18. What NWPP claims is a new test for general applicability is instead a proper exposition of why the Guidance Manual does not meet the test set out in *Simpson Tacoma Kraft* and *Failor's Pharmacy*—that an agency action is of general applicability if it is applied uniformly to all members of a class. App. A at 13. As explained, by the Court of Appeals, the Guidance Manual does not meet this standard of general applicability because it (1) has no mandatory requirements beyond those found in federal and state regulation, and allows Ecology staff to exercise discretion and professional judgment when determining which tests to include in a permit; (2) provides for case-by-case analysis of what is needed at a

specific facility based on site-specific conditions not a uniform standard; and (3) does not contain binding requirements on the regulated community other than those found in statute and regulation. *Id.* Because of these characteristics, the Guidance Manual is not an agency action that is applied uniformly to the regulated community. RCW 34.05.010(16); *Simpson Tacoma Kraft*, 119 Wn.2d at 648. It therefore is not generally applicable, and therefore is not an administrative rule.

NWPP's criticism of the court's reliance on *Sudar v. Department of Fish & Wildlife Commission* is not persuasive. Pet. at 19–20. *Sudar* involved a challenge to a policy adopted by the state Fish and Wildlife Commission, which the court in *Sudar* determined was guidance for agency staff, rather than a rule of general applicability. *Sudar v. Dep't of Fish & Wildlife Comm'n*, 187 Wn. App. 22, 31, 347 P.3d 1090 (2015). *Sudar* did not create a new standard that conflicts with this Court's prior decisions, as NWPP contends. Pet. at 19. The *Sudar* court instead relied on this Court's opinion in *Budget Rent A Car Corporation v.*

Department of Licensing to determine that the Commission's policy was not a rule because it did not add qualifications beyond those found in the statute for obtaining a benefit. *Sudar*, 187 Wn. App. at 33 (citing *Budget Rent A Car Corp v. Dep't of Licensing*, 144 Wn.2d 889, 898, 31 P.3d 1174 (2001)).

Budget Rent A Car, decided after both *Simpson Tacoma Kraft* and *Failor's Pharmacy*, held that the method the Department of Licensing used to calculate fleet size was not a rule because its requirements directly arose from the statute codifying an interstate agreement, not from any action of the department. *Budget Rent A Car*, 144 Wn.2d at 897–98. Because the requirements arose from the statute, and were not added to by the Department, this Court held the calculation method did not meet the definition of a rule. *Id.* at 898. That is exactly the case here, where the Guidance Manual implements requirements found in federal and state law. The court's decision in this case is thus directly consistent with *Sudar* and this Court's opinion in *Budget Rent A Car*.

Contrary to NWPP's argument, the Court of Appeals created no new test or standard for analyzing whether an agency action is one of general applicability. The court instead correctly applied this Court's prior decisions in holding that the Guidance Manual is not an agency action uniformly applied to all members of the class of NDPES permittees.

B. The Guidance Manual Does Not Establish, Alter or Revoke Any Qualification for the Issuance of a Permit

Not only is the Guidance Manual not a rule of general applicability, but it also does not fall into one of five enumerated categories found in the definition of rule, as required to be deemed an administrative rule. RCW 34.05.010(16)(a)–(e). NWPP's argument again rests on mischaracterizations of the Guidance Manual.

NWPP rests its tenuous argument that the Guidance Manual alters a qualification or standard for permit issuance on its claim that the guidance requires the use of Methods 8082A and 1668C in all permits, and thus it falls under RCW 34.05.010(16)(d). Pet. at 25–26. But as discussed above,

the Guidance Manual does not mandate the use of 8082A or 1668C in all permits, and therefore cannot be said to alter a qualification or standard for permitting. A facility must have a permit if it will discharge pollutants. As NWPP correctly states, the Clean Water Act and federal regulations set out the standard for permit issuance, including the requirement for a facility to use Method 608.3 for monitoring for compliance with numeric limits and for permit applications. 40 C.F.R. § 122.44(d)(1); 40 C.F.R. § 122.21(e)(3); Pet. at 26. This is exactly what the Guidance Manual requires. AR 0164.0262.

The use of test methods other than those approved in 40 C.F.R. part 136 for purposes other than measuring compliance with numeric limits was affirmed by this Court in *Seattle Iron and Metals*. In *Seattle Iron and Metals*, this Court recognized that the EPA developed Method 1668 "intending it to be used in [Clean Water Act] programs." *Seattle Iron and Metals*, 191 Wn.2d at 645. Method 1668 was developed to be used in addition to other tests. *Id.* Federal regulation states that Method 1668C

may be useful for measuring PCBs as individual congeners. 40 C.F.R. pt. 136, Appendix A, Method 608.3 at 1.5.

Should a permit writer determine, based on review of conditions at a facility, that those conditions warrant the use of Method 1668C for identifying specific congeners of PCBs, the federal regulations allow for its use. When there is no approved method for a pollutant parameter in 40 C.F.R. part 136, "monitoring shall be conducted according to a test procedure specified in the permit for such pollutants or pollutant parameters." 40 C.F.R. § 122.44(i)(1)(iv)(B). The ability to identify individual congeners can assist a facility in identifying sources of PCB contamination, and also assist in evaluating the effectiveness of best management practices and treatment for the control of PCBs. The uses of these test methods for such purposes are entirely consistent with the permits' purpose of including effluent limitations for the control of pollutant discharges. Federal regulation allows the permit to specify a test procedure to identify individual congeners at a facility.

It is federal regulation, not the Guidance Manual, that provides for the use of the additional data collected if a facility has a reasonable potential to discharge PCBs. 40 C.F.R. § 122.21(g)(13). Thus, even if the Guidance Manual imposed mandatory requirements uniformly on all permittees, which it does not, it does not alter a qualification or requirement for issuance of a permit because allowance for the collection of additional data is found in federal regulation. The guidance manual does not fall under the enumerated rule category of RCW 34.05.010.16(d).

NWPP's vaguely speculates that data collected under 40 C.F.R. § 122.21(g)(13) may potentially subject a facility to some future enforcement. Pet. 12; 28–29. However, the Clean Water Act provides a shield from enforcement for a facility that is operating in compliance with its permit. 33 U.S.C. § 1342(k); *Piney Run Preservation Ass'n v. Cnty. Comm'rs of Carroll Cnty., MD*, 268 F.3d 255, 259 (4th Cir. 2001). Speculation regarding

potential future enforcement does not establish that the Guidance Manual meets the definition of a rule.

The Guidance Manual is guidance to Ecology staff, which exercises its discretion in issuing NPDES permits. The permits, not the Guidance Manual, contain enforceable conditions based on requirements of state law and regulation. If a NPDES permit contains a test requirement for an improper purpose, or in contravention of federal regulations, the permit can be challenged, and is subject to administrative and judicial review. RCW 43.21B.110.

NWPP additionally claims, in a footnote, that the Guidance Manual also falls within RCW 34.05.010(16)(c), but provides no analysis or argument on this erroneous theory, and therefore this claim is waived. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

The Guidance Manual does not impose any requirement in discharge permits beyond those authorized in the Clean Water Act and RCW 90.48, and therefore it does not establish or alter a

qualification or standard for the issuance of a permit. The Guidance Manual does not fall under the rule category found in RCW 34.05.010(16)(d).

V. CONCLUSION

For the reasons set out above, the Court of Appeals' decision does not warrant this Court's review. The court's decision is consistent with this Court's prior decisions, and Ecology's guidance to its permit writers does not present an issue of substantial public interest that must be decided by this Court. RAP 13.4(b). Ecology respectfully requests that this Court deny NWPP's Petition for Discretionary Review.

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This document contains 4,699 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 10th day of February 2022.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the state of Washington that on February 10, 2022, I caused to be served the foregoing document in the above-captioned matter upon the parties herein via the Appellant Court Portal Filing system, which will send electronic notifications of such filing to the following:

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DATED this 10th day of February 2022 at Olympia, Washington.

Phyllis J. Barney
Assistant Attorney General

APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

December 14, 2021

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

NORTHWEST PULP & PAPER ASSOCIATION; THE ASSOCIATION OF WASHINGTON BUSINESS; AND WASHINGTON FARM BUREAU, Appellants, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Respondent.	No. 55164-1-II PUBLISHED OPINION

GLASGOW, A.C.J.—In July 2018, the Department of Ecology added a new section, chapter 6, section 4.5 (Section 4.5), to its Water Quality Program Permit Writer's Manual to specifically address the release of polychlorinated biphenyls (PCBs) into Washington's surface waters. To identify and measure the presence of PCBs in surface waters, Section 4.5 allows the use of testing Methods 1668C and 8082A, which are particularly sensitive, in addition to Method 608.3, the method expressly authorized in federal regulation.

Northwest Pulp & Paper Association, Association of Washington Business, and Washington Farm Bureau (hereinafter collectively referred to as Northwest Pulp & Paper) petitioned for judicial review and declaratory judgment under the Washington Administrative Procedure Act (APA), chapter 34.05 RCW, asking the superior court to invalidate Section 4.5. Northwest Pulp & Paper argued Section 4.5 is an invalid rule under the APA because Ecology

failed to comply with the procedural requirements for rule making, Ecology exceeded its authority, and the section is arbitrary and capricious. The superior court dismissed the petition and denied the request for declaratory judgment, concluding that Section 4.5 is not a rule under the APA.

We hold Section 4.5 is guidance for agency staff, not a rule subject to the APA's rule-making requirements. We affirm.

BACKGROUND

I. PCBs, POLLUTANT DISCHARGE PERMITS, AND STATE WATER QUALITY

"Banned since the 1970s, PCBs are manufactured toxic chemicals that persist in the environment and are capable of bioaccumulation and biomagnification: they increase in concentration in individual organisms and with each successive level of the food chain." *Puget Soundkeeper All. v. Dep't of Ecology*, 191 Wn.2d 631, 635, 424 P.3d 1173 (2018) (*Seattle Iron & Metals*). Some PCBs are likely carcinogens that are harmful to humans.

The federal Clean Water Act (also known as the Federal Water Pollution Control Act), 33 U.S.C. §§ 1251-1388, seeks "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" by regulating the discharge of pollutants, including PCBs. 33 U.S.C. § 1251(a); 40 C.F.R. § 129.4(f). Under the Clean Water Act, it is unlawful to discharge any pollutant into the water unless the discharger has applied for and received a National Pollutant Discharge Elimination System (NPDES) permit. 33 U.S.C. §§ 1311(a), 1342(a)(1). In Washington, responsibility for controlling state water pollution and administering the NPDES permit program is delegated to Ecology. 33 U.S.C. § 1342(b); RCW 90.48.260(1).

Ecology has established state water quality standards to protect surface waters in Washington. *See* chapter 173-201A WAC. Water quality standards set contaminant concentration

limits in surface water, ground water, and sediment, for example. These standards include both narrative and numeric criteria. WAC 173-201A-010(1)(a). Washington's narrative standard for toxic substances provides, "Toxic substances shall not be introduced above natural background levels in waters of the state which have the potential either singularly or cumulatively to adversely affect characteristic water uses, cause acute or chronic toxicity to the most sensitive biota dependent upon those waters, or adversely affect public health." WAC 173-201A-240(1).

Initially, Washington's numeric standards for toxic substances included acute and chronic criteria for freshwater and marine water to protect aquatic life. Ecology has since promulgated a rule that added numeric criteria to protect human health. One numeric criterion for protecting human health currently provides that the total PCBs in a body of surface water should be limited to 0.00017 μg/L (micrograms per liter). WAC 173-201A-240(5) tbl.240.

II. MANAGING PCB POLLUTION

A. Effluent Limits and Best Management Practices

If a discharger violates or has the "reasonable potential" to violate water quality standards by discharging a particular pollutant, then the discharger's NPDES permit must contain effluent limitations for that pollutant. 40 C.F.R. § 122.44(d)(1)(iii). An "effluent limitation" is "any restriction . . . on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into surface waters of the state." WAC 173-220-030(9). Effluent limitations may be technology based, meaning they are "based on the capability of a treatment method to reduce the pollutant to a certain concentration." Administrative Record (AR) at 0164.0029. They may also be water quality based, meaning they are based on

limiting the concentration of effluent "such that it will not cause a violation of water quality standards." AR at 0164.0030.

The legislature has required, "In no event shall the discharge of toxicants be allowed that would violate any water quality standard." RCW 90.48.520. NPDES permits "must be conditioned so the discharges authorized will meet the water quality standards. No waste discharge permit can be issued that causes or contributes to a violation of water quality criteria." WAC 173-201A-510(1). The policy goal of prohibiting any and all violations of state water quality standards remains difficult to attain in practice, however. "Ecology sets maximum effluent limits for certain pollutants at numbers presently undetectable and unquantifiable in order to encourage scientific progress toward the goal of cleaner and safer water." *Seattle Iron & Metals*, 191 Wn.2d at 643.

In addition to effluent limitations, a permit may require the discharger to use best management practices to prevent the discharge of pollutants. Best management practices may include specific treatment requirements, maintenance and operating procedures, or strategies to control runoff, leaks, and spillage. 40 C.F.R. § 122.2. Permits may require dischargers to comply with narrative conditions that "complement numeric limits," such as requirements to "study the efficiency of the treatment system" or to "develop a plan to identify and implement pollution prevention that is technically and economically achievable." *Puget Soundkeepers All. v. Dep't of Ecology*, 102 Wn. App. 783, 794-95, 9 P.3d 892 (2000).

Ecology's Water Quality Program recommended a new permitting approach for PCBs in 2016 that "requires dischargers to use improved detection methods to find PCBs in waste streams" and to use updated best management practices, based on guidance from the Environmental Protection Agency (EPA) and "on-the-ground experience," to prevent PCB pollution. AR at

0843.0001. The recommended changes were to the methods for detecting PCBs, not PCB effluent limits. However, the program recognized that these changes will "have eventual ramifications to all water quality permittees with PCB limits" because more sensitive methods of monitoring will "turn up previously unseen PCBs in discharges," which "could drive new permit limits and violations." AR at 0843.0001, .0003.

B. Test Methods for Detecting PCBs

Congress tasked the EPA with "promulgat[ing] guidelines establishing test procedures for the analysis of pollutants." 33 U.S.C. § 1314(h); 40 C.F.R. § 122.2. Those test methods are established in 40 C.F.R. part 136. Currently, the only test method for measuring PCBs that is approved under part 136 is Method 608.3. 40 C.F.R. § 136.3, tbl.IC.[1] The description of Method 608.3 in appendix A of part 136 explains that the "EPA has promulgated this method . . . for use in wastewater compliance monitoring under the [NPDES]" permitting system. 40 C.F.R. Pt. 136, App. A, Method 608.3, at 1.6.1.

Yet, as Ecology explains in its Permit Writer's Manual, surface water quality standards to protect aquatic life and human health are set at levels lower than Method 608.3 is able to detect and quantify. Method 608.3 is able to reliably detect a concentration of 0.065 micrograms of PCBs per liter of water. This means water could contain approximately 382 times more PCBs than the state numeric criterion necessary to protect human health of 0.00017 μg/L, yet the PCBs would

[1] Table IC references both Method 608.3 and Method 625.1. Method 608.3 is specifically "for determination of organochlorine pesticides and [PCBs] in industrial discharges and other environmental samples," whereas Method 625.1 is more generally "for determination of semivolatile organic pollutants in industrial discharges and other environmental samples." 40 C.F.R. Pt. 136, App. A, Method 608.3, at 1.1, Method 625.1, at 1.1. The description of Method 625.1 clarifies that "Method 608.3 should be used for determination of pesticides and PCBs." 40 C.F.R. Pt. 136, App. A, Method 625.1, at 1.4.

not be detectable using Method 608.3. *Cf. Seattle Iron & Metals*, 191 Wn.2d at 638 (addressing an argument that monitoring using Method 608 (a precursor to Method 608.3) was insufficient because "the test cannot ensure a permit holder complies with statutory water quality standards").

Two testing methods exist for measuring PCBs that are more sensitive. Methods 8082A and 1668C "provide lower analytical limits" than Method 608.3. AR at 0164.0250. Although Method 608.3 is the only method that can be used under 40 C.F.R. part 136 to determine compliance with numeric effluent limits, Methods 8082A and 1668C may be used for purposes other than determining compliance.

For example, Method 1668C can be used for "monitoring of final effluents for PCB congeners." AR at 0277.0028; *see also* 40 C.F.R. Pt. 136, App. A, Method 608.3, at 1.5 ("Method 1668C . . . may be useful for determination of PCBs as individual chlorinated biphenyl congeners," although Method 1668C has "not been approved for use at 40 [C.F.R.] part 136."). PCBs consist of "209 individual compounds known as congeners." AR at 0922.0004. Mixtures of these compounds were commercially produced, and the mixtures are known by their trade names, most commonly Aroclor. Water quality based effluent limits consider the concentration of total PCBs in the water, and Method 608.3, the part 136-approved method for analyzing PCBs, measures the total concentration of Aroclors in the water. In contrast, Method 1668C is a "very sensitive analytical method that has the capability of detecting 209 different PCB congeners." AR at 0164.0254. The EPA has explained that because there is no part 136-approved method for measuring individual congeners, Ecology has "flexibility to require the use of EPA Method 1668C for monitoring of PCB congeners." AR at 0277.0028.

III. SECTION 4.5 OF THE PERMIT WRITER'S MANUAL

In 2018, Ecology issued a revised version of its Permit Writer's Manual. A cover letter from the Water Quality Program Manager states that this Manual "describes Ecology's procedures when issuing permits for wastewater discharges. Permit writers are required to use the procedures in this manual for developing permits." AR at 0164.0004. However, "[i]f a permit writer believes a permitting situation requires a different process than in the manual, the permit writer should discuss the alternative process with their supervisor." AR at 0164.0004.

The Manual's "Note to Readers" describes it as "a working document for people at [Ecology] who write wastewater discharge permits," and the Manual's introduction similarly classifies it as "a technical guidance and policy manual for permit writers" that aims "to enhance the quality and consistency of the wastewater discharge permits issued by Ecology and to improve the efficiency of the permitting process." AR at 0164.0017, .0031 (boldface omitted). The introduction clarifies that the Manual "is not regulation and should not be cited as regulatory authority for any permit condition." AR at 0164.0033. Rather, the Manual "describes law and regulation pertaining to permitting," which "must be followed to issue a legal permit." *Id.* "Where those laws and regulations are not explicit on implementation the manual describes a process for implementation" that has been developed by Ecology, but "[i]f the process does not fit a permitting circumstance, the permit writer can explore alternative processes as long as the law and regulation are met." *Id.* Permit writers are expected to "exercise a considerable amount of discretional authority" and "good judgment." AR at 0164.0036-.0037.

The Manual describes the test methods for identifying and measuring PCBs as "evolving rapidly." AR at 0164.0242. Ecology added Section 4.5 to the Manual in 2018 to specifically

address methods for identifying and measuring PCBs. The Manual emphasizes that only test methods approved under 40 C.F.R. part 136 can be used for permit applications and permit compliance monitoring, consistent with federal regulation. Because Method 608 (now 608.3) is the only method for analyzing PCBs that is approved under part 136, Section 4.5 repeatedly states that it must be used for permit applications and for monitoring compliance with numeric effluent limits for PCBs. *See, e.g.*, AR at 0164.0249, .0256, .0261-.0263.[2]

The Manual clearly states that Methods 8082A and 1668C cannot be used to evaluate compliance with numeric effluent limits for PCBs. However, the Manual presents Methods 8082A and 1668C, along with Method 608.3, as "the three methods that are used for permitting purposes." AR at 0164.0249. Because water quality standards for PCBs are lower than Method 608.3 can evaluate, and Methods 8082A and 1668C "provide lower analytical limits," Ecology advises that Methods 8082A and 1668C may be used for purposes other than evaluating compliance. AR at 0164.0250.

For example, Section 4.5 specifically advises permit writers to "[u]se all valid and applicable data, including data collected using methods not approved under 40 [C.F.R.] Part 136 (e.g. Methods 1668C and 8082A)," to evaluate whether a discharger's effluent has the reasonable potential to violate a water quality standard and to calculate appropriate numeric effluent limits for permits. AR at 0164.0261-.0262. Section 4.5 also allows permit writers to evaluate the effectiveness of best management practices using "methods appropriate" for this purpose. AR at 0164.0263. This method selection "will depend on expected concentrations in the sampled media,

[2] At the time of the Manual's publication, Method 608, an earlier iteration of Method 608.3, was still permitted as laboratories were in the process of receiving accreditation for Method 608.3.

the [practices] required or selected, and the potential sources of PCBs on and to the site or facility." AR at 0164.0264. And it may be appropriate to use Method 1668C where "identification of sources based on congener profile is necessary." AR at 0164.0263.

With Method 1668C specifically, Ecology explains that it is "***not*** proposing to seek EPA approval of this method under 40 [C.F.R.] part 136.5," which provides for approval of alternate methods for limited regional use, "as there are known problems in regards to the repeatability and accuracy of the method in addition to the expense of the analysis." AR at 0164.0256. But Ecology recognizes that "targeted monitoring under Method 1668C" may be "useful for identifying PCB sources" or "evaluating the effectiveness of a best management practice," two activities that are separate from compliance monitoring. AR at 0164.0257.

A quality assurance project plan is required when using Method 1668C for any purpose, and it is recommended when using Method 8082A. These plans "ensure that the collected environmental data can be used for making decisions." *Id.* They detail the processes necessary for "data collection, management[,] and subsequent analysis," and they develop standard operating procedures "to evaluate and control data accuracy." AR at 0164.0258. Procedures such as measuring the PCBs present in distilled water (blanks) for comparison "increase result precision" and "ensure no contamination occurs at any point during the analytical procedure." AR at 0164.0255.

Subsection 4.5.4 provides additional guidance that permit writers "should consider . . . when requiring monitoring using either [M]ethod 8082A or 1668C." AR at 0164.0257. For example, before requiring additional data collection, the permit writer should consider "the question the additional monitoring is going to attempt to answer and what kind of data is needed

to meet that end." *Id.* Some monitoring may be done to assist with making a decision, while other monitoring may serve to estimate the scope of a problem. Additionally, while Method 1668C is the most sensitive method, it is also the most expensive. Therefore, "it is not necessarily appropriate to require this method when [M]ethod 8082A will also return detectible concentrations." AR at 0164.0260. "Information collected through previous monitoring should help the permit writer understand which method to select." *Id.*

Section 4.5.5 further advises permit writers on how to select the appropriate analytical test method and instructs permit writers to "[o]nly include monitoring requirements when necessary for the facility and its specific discharge situation." *Id.* If dischargers are unlikely to have PCBs in their effluent at levels that would violate water quality standards, then "PCB monitoring may not be necessary." *Id.* "While PCB monitoring may be appropriate for some dischargers based on individual facility characteristics, permit writers should consider the value and purpose of requiring PCB monitoring when developing discharge permits." AR at 0164.0261.

Thus, Section 4.5 requires that only Method 608.3 be used to ultimately determine compliance with PCB effluent limits, but the more sensitive test Methods, 8082A and 1668C, can be used for other purposes in the course of the permitting process.

ANALYSIS

PROMULGATING A "RULE" UNDER THE APA

Northwest Pulp & Paper argues that when Ecology added Section 4.5 to the 2018 version of its Permit Writer's Manual, it promulgated a rule that is invalid under RCW 34.05.570(2)(c). Northwest Pulp & Paper argues Section 4.5 is an invalid rule because it was adopted without compliance with statutory rule-making procedures and because Ecology's decision to allow permit

writers to require the use of test methods that are not approved under 40 C.F.R. part 136 exceeds the agency's authority and is arbitrary and capricious. We disagree. Section 4.5 is not a rule, and RCW 34.05.570(2)(c) does not apply.[3]

A. Defining a "Rule" Under the APA

To be valid, a rule must comply with the requirements of the APA. RCW 34.05.375. We may invalidate a rule if it was adopted without compliance with statutory rule-making procedures, if its promulgation exceeded the agency's authority, or if it is arbitrary and capricious. RCW 34.05.570(2)(c). We review the validity of a rule de novo. *Ctr. for Biological Diversity v. Dep't of Fish & Wildlife*, 14 Wn. App. 2d 945, 967, 474 P.3d 1107 (2020).

As a preliminary matter, however, we must determine whether the challenged agency action in this case falls within the APA's definition of a "rule." To determine whether an agency action constitutes a rule under the APA, we look to the Act's statutory definition. *McGee Guest Home, Inc. v. Dep't of Soc. & Health Servs.*, 142 Wn.2d 316, 322, 12 P.3d 144 (2000). The label the agency assigns to the action is not determinative. *Id.*

Under the APA, there are two elements of a rule. For an agency action to qualify as a rule, it must be an "agency order, directive, or regulation of general applicability," and it must fall into one of five enumerated categories. RCW 34.05.010(16); *see also Failor's Pharmacy v. Dep't of Soc. & Health Servs.*, 125 Wn.2d 488, 494, 886 P.2d 147 (1994). An agency action is not a rule if

[3] Northwest Pulp & Paper conceded that if Section 4.5 is not a rule, this rule challenge fails. During oral argument, Northwest Pulp & Paper explained that RCW 34.05.570(4), addressing other agency action, is not a basis it is relying on for this challenge. *See* Wash. Court of Appeals oral argument, *Northwest Pulp & Paper v. Dep't of Ecology*, No. 55164-1-II (Sept. 10, 2021), at 10 min., 55 sec. through 12 min., 42 sec., *audio recording*, TVW, Washington State's Public Affairs Network, https://www.tvw.org/watch/?eventID=2021091014.

it consists of "statements concerning only the internal management of an agency and not affecting private rights or procedures available to the public." RCW 34.05.010(16)(i).

1. Directive of general applicability

An agency action is a directive of general applicability if it is "applied uniformly to all members of a class." *Failor's Pharmacy*, 125 Wn.2d at 495. For example, in *Simpson Tacoma Kraft Co. v. Department of Ecology*, Ecology instituted a numeric limit on the discharge of dioxin and "uniformly applie[d]" that limit to "all entities which discharge dioxin into the state's waters, regardless of which entity or water body is at issue." 119 Wn.2d 640, 648, 835 P.2d 1030 (1992). The Supreme Court concluded that this was a directive of general applicability because Ecology applied the standard "uniformly to the entire class of entities which discharges dioxin into the state's water." *Id.*

How the agency applies the challenged standard, not the outcome of the application, is determinative. The outcomes for individual entities may differ even when a standard is uniformly applied. For example, in *Failor's Pharmacy*, Medicaid prescription service providers challenged amendments to reimbursement payment schedules. 125 Wn.2d at 490. Although the amount that each service provider was reimbursed differed based on factors such as the number of prescriptions they dispensed per year, each amount was determined by the agency applying the same, uniformly applicable, reimbursement schedules. *See id.* at 491-92. Thus, the schedules were directives of general applicability. *Id.* at 495-96.

In contrast, this court has held that an agency action is not a directive of general applicability where the challenged action is a document "written to guide agency staff" that "does not require strict adherence." *Sudar v. Dep't of Fish & Wildlife Comm'n*, 187 Wn. App. 22, 31-32,

347 P.3d 1090 (2015). In *Sudar*, petitioners challenged a policy document that the Department of Fish and Wildlife Commission developed to "guide the Department [of Fish and Wildlife] in its management of state resources," including its "adoption of fishery rules." *Id.* at 25-26. But the policy document itself had "no legally enforceable regulatory effect on fishers." *Id.* at 32. Its objectives were "unenforceable until and unless the Department promulgate[d] rules" implementing them, and a fisher could not be penalized for violating the policy document. *Id.* Department staff were not bound by the policy document either. *Id.* at 33.

In sum, not every agency action carries the force of a rule. Where the agency action provides guidance for agency staff that (1) allows staff to exercise discretion, (2) provides for case-by-case analysis of variables rather than uniform application of a standard, and (3) is not binding on the regulated community, the action does not constitute a directive of general applicability.

a. Section 4.5 does not mandate use of Methods 8082A and 1668C, and instead it contemplates permit writer discretion

When Section 4.5 addresses which testing methods should be used for various purposes, it only employs mandatory language to specify when regulations require use of Method 608.3. The section is clear that Method 608.3 must be used in permit applications and to monitor compliance with numeric effluent limits because these requirements are established in federal regulations.

For all other purposes, Section 4.5 allows for flexibility and discretion in determining which testing methods will be required in an individual permit or permitting process. For example, Methods 8082A and 1668C "*may* be used for permitting purposes to evaluate sources [of PCB pollution], but not for numeric effluent limit compliance." AR at 0164.0250 (emphasis added). "For the purposes of applying [all known and reasonable technologies to control pollution], Method 1668C *may be required*," but this depends on the need to identify individual congeners,

whether the expected concentrations of PCBs can be detected or quantified by Method 608.3, and the specific water treatment goals. AR at 0164.0263 (emphasis added). Permits also "*may require* monitoring using two different methods for two different purposes (e.g., Method 608.3 for monitoring to assess compliance with a numeric effluent limit and Methods 1668C or 8082A for [best management practices] effectiveness monitoring)." AR at 0164.0264 (emphasis added). The Manual advises the permit writer to "consider the result [they] want to achieve and the appropriateness of additional sampling." AR at 0164.0260. Permit writers are expected to "exercise a considerable amount of discretional authority" and "good judgment." AR at 0164.0036-.0037. The plain language of Section 4.5 does not mandate use of Methods 8082A or 1668C. Instead, the decision to require use of these methods is within the permit writer's discretion.

b. Section 4.5 does not contain a uniformly applicable standard

Unlike in *Simpson* and *Failor's Pharmacy*, Section 4.5 does not require permit writers to uniformly impose PCB testing requirements on all entities discharging any amount of PCBs into any body of water. The Manual expressly states that "PCB monitoring may not be necessary" if the PCBs in a discharger's effluent are unlikely to violate water quality standards, and it instructs permit writers to "[o]nly include monitoring requirements when necessary for the facility and its specific discharge situation." AR at 0164.0260.

The decision of whether to require any additional testing for PCBs will depend on multiple site-specific variables. Permit writers should consider the discharging facility's size, the possibility of preexisting pollution in the water, the type of pollutants involved, and what benefit additional monitoring would offer "before requiring PCB characterization in permits." *Id.*

If permit writers do decide to impose additional testing to monitor the presence of PCBs, Section 4.5 instructs them to again consider site-specific variables and to exercise discretion. For example, when evaluating the effectiveness of best management practices, a permit writer's method selection will depend on the expected concentrations of pollutants in the water, the best practices required of the discharger, and the potential sources of PCBs. Section 4.5 advises that "[i]nformation collected through previous monitoring should help the permit writer understand which method to select." *Id.*

The Manual also recognizes that the costs of different testing methods vary substantially, with Method l668C being the most expensive. Therefore, it cautions that while Method 1668C "will return information down to the lowest quantifiable level, it is not necessarily appropriate to require this method when [M]ethod 8082A will also return detectible concentrations." *Id.*

In *Failor's Pharmacy*, outcomes differed for the individual entities being regulated, but the same reimbursement schedules were imposed on all members of the regulated community. Here, individual outcomes differ because permit writers are considering and imposing different obligations within each permit—under the Manual's guidance—after reviewing site-specific conditions. Even though permit writers are instructed to use the guidance in the Manual "'for all PCB monitoring in all water quality permits,'" there is no uniform directive within the Manual that requires permit writers to impose testing Method 1668C or 8082A. Appellants' Opening Br. at 33 (emphasis omitted) (quoting AR at 0449.0003).

The Manual instructs permit writers to "[u]se all valid and applicable data, including data collected using methods not approved under 40 [C.F.R.] Part 136 (e.g. Methods 1668C and 8082A)" to evaluate whether a discharger's effluent has the reasonable potential to violate a water

quality standard and to calculate appropriate numeric effluent limits for permits. AR at 0164.0261-.0262. Northwest Pulp & Paper argues this language "directs and requires permit writers to use unapproved test methods" for these purposes. Appellants' Opening Br. at 25. This language requires only that permit writers use all available data to make the most informed decisions possible. The Manual does not state that permit writers must mandate data collection using Methods 1668C and 8082A where such data does not already exist.

Moreover, a state policy goal is to prevent all discharges that cause or contribute to a violation of water quality standards. RCW 90.48.520; WAC 173-201A-510(1). Requiring permit writers to use all valid and applicable data to evaluate the reasonable potential of a discharge to violate water quality standards is one way to achieve this stated goal. As explained above, Method 608.3 can detect PCBs at a concentration of 0.065 μg/L, but the state numeric criterion for human health is 0.00017 μg/L. If Ecology cannot use data collected using more sensitive test methods, then Ecology cannot know when a permittee is discharging PCBs at a concentration lower than 0.065 μg/L yet higher than the water quality criterion of 0.00017 μg/L. The development of numeric effluent limits for each permit is Ecology's responsibility under the law, and the Supreme Court has affirmed that "Ecology may use any data gathered in the past for its decision making on permits." *Hillis v. Dep't of Ecology*, 131 Wn.2d 373, 400, 932 P.2d 139 (1997).

Section 4.5 does not uniformly require PCB testing, nor does it require uniform application of a specific standard to determine what testing method should be used in a particular circumstance.

c. Section 4.5 has no regulatory effect, instead it is guidance for permit writers

The Manual is intended to *guide* use of the more sensitive testing methods in permitting. Importantly, Section 4.5 has "no legally enforceable regulatory effect" on PCB dischargers, and

dischargers cannot be penalized for violating the Manual. *Sudar*, 187 Wn. App. at 32. Only a violation of a specific NPDES permit condition will subject a discharger to an enforcement action.

Like the policy at issue in *Sudar*, Section 4.5 is "written to guide agency staff," and it "does not require strict adherence" with its guidance. *Id.* at 31-32. Although the Manual's preliminary note requires permit writers to use its listed procedures, the note also contemplates that permit writers may deviate from those procedures. "If a permit writer believes a permitting situation requires a different process than in the manual," then they are instructed to "discuss the alternative process with their supervisor." AR at 0164.0004. This is reiterated in the Manual's introductory section, which explains that the Manual "is not regulation" but it "describes law and regulation pertaining to permitting." AR at 0164.0033. "If the process does not fit a permitting circumstance, the permit writer can explore alternative processes as long as the law and regulation are met." *Id.*

In sum, Section 4.5 is not a directive of general applicability. Its purpose is to guide agency staff in their exercise of discretion as they implement the NPDES permit program and develop site-specific discharge permits. It is not binding on either the regulated community or agency staff.

2. Enumerated categories

Because Northwest Pulp & Paper fails to show that Section 4.5 satisfies the first element of the APA's definition of a "rule," we decline to consider whether Section 4.5 falls into one of RCW 34.05.010(16)'s enumerated categories and satisfies the second element.

We hold Ecology did not adopt a rule when it added Section 4.5 to the Manual.

B. Northwest Pulp & Paper Has Not Established Invalidity Under the APA

Northwest Pulp & Paper argues Section 4.5 is an invalid rule under RCW 34.05.570(2)(c) because the section was added without compliance with statutory rule-making procedures, its

promulgation exceeded Ecology's authority, and it is arbitrary and capricious. Because we hold that Section 4.5 is not a rule, RCW 34.05.570(2)(c) is inapplicable, and we do not consider these arguments.

Although Section 4.5 is not subject to judicial review as a rule, we note that procedural avenues are available for dischargers to challenge an Ecology decision to impose specific requirements to test for PCBs using Method 1668C or 8082A. Dischargers may challenge the issuance, modification, or termination of their permit, including any modification of its conditions or terms, before the Pollution Control Hearings Board. RCW 43.21B.110(1)(c). Dischargers may also challenge the enforcement of any permit condition. RCW 34.05.570(3); RCW 43.21B.110(a)-(b). Additionally, requirements to use more sensitive testing methods outside of the permit's conditions, such as during the permit application process, may constitute other agency action that can be challenged under RCW 34.05.570(4).

CONCLUSION

We hold Ecology did not promulgate a rule under the APA when it added Section 4.5 to its Permit Writer's Manual. Accordingly, we affirm the superior court's order dismissing Northwest Pulp & Paper's petition for judicial review and denying its request for declaratory judgment.

Glasgow, ACJ

Glasgow, A.C.J.

We concur:

Cruser, J.

Veljacic, J.

Veljacic, J.

APPENDIX B

DEPARTMENT OF ECOLOGY
Water Quality Program

July 30, 2018

TO: Ecology Wastewater Permit Writers

FROM: Heather R. Bartlett, Water Quality Program Manager

SUBJECT: June 2018 Permit Writer's Manual Update

The latest revision to the Permit Writer's Manual is attached for your use. It describes Ecology's procedures when issuing permits for wastewater discharges. Permit writers are required to use the procedures in this manual for developing permits. If a permit writer believes a permitting situation requires a different process than in the manual, the permit writer should discuss the alternative process with their supervisor. If a staff member believes a problem or issue needs to be addressed by the manual, they should recommend that their supervisor or Permit Writer's Workgroup (PWG) member bring the issue to Vince McGowan or Eleanor Key.

Heather R. Bartlett
Water Quality Program Manager

Attachment

Chapter 1. Introduction

This manual is a technical guidance and policy manual for permit writers who develop wastewater discharge permits in Washington State. Developing this manual was specified as task element P5 in the 1987 Puget Sound Water Quality Management Plan and subsequent amendments. Maintenance and improvement of the manual is recommended in the final report of the Commission for Efficiency and Accountability in Government (1990).

The first version of this manual was issued in June, 1989. A 23-member advisory committee assisted the Department of Ecology (Ecology) for one year on policy issues identified in the manual. The advisory committee represented those interested in wastewater permits. An internal work group also assisted in the development of this manual.

The primary purposes of this manual are to enhance the quality and consistency of the wastewater discharge permits issued by Ecology and to improve the efficiency of the permitting process.

1. Objectives and Functions

The specific objectives and functions of this Permit Writer's Manual are to:

- Briefly review the legal history of wastewater permitting to provide permit writers with a perspective on their role.
- Define the requirements for permits in Washington. This manual integrates state and federal law, state and federal regulation and Ecology implementation policies. Permits reviewed for 401(a) certification must be consistent with procedures in this manual.
- Ensure statewide consistency in permitting, especially for permits which require best professional judgment (BPJ) determinations.
- Identify state and federal laws, regulations and policies relating to permitting.
- Identify legal opinions of the Attorney General's Offices, rulings of the Pollution Control Hearing Board and rulings of other courts on permitting and permit related issues.
- Gather collective knowledge of Ecology on permit writing.
- Provide a central document to place new information, guidance, and requirements related to permitting.
- Serve as a reference for experienced permit writers.
- Train new permit writers. This manual is identified in the Permit Writers Training Strategy as a component of training for new permit writers. The manual will reduce the training time for new permit writers and the demand on experienced permit writers to train new permit writers.
- Demonstrate to the regulated community and other interested public what the agency does in permitting a wastewater discharge.

4. Inspections and Enforcement

The issuance of a wastewater discharge permit leads to subsequent regulatory activities including inspections and enforcement. Guidance for those functions is provided in the Inspection Manual (Ecology 92-76) and the Compliance Assurance Manual (posted on the Intranet, under the Resources tab, Compliance and Enforcement).

5. Not Regulation

This manual is not regulation and should not be cited as regulatory authority for any permit condition. This manual describes law and regulation pertaining to permitting. These laws and regulations must be followed to issue a legal permit. Where those laws and regulations are not explicit on implementation the manual describes a process for implementation. This process is a program decision (policy) for implementing the laws and regulations and typically has been subject to debate by permit writers and management. If the process does not fit a permitting circumstance, the permit writer can explore alternative processes as long as the law and regulation are met. Alternative processes require section supervisor approval prior to implementation.

6. A Short History Lesson

The point source water pollution control program in this state is based on both Federal and State law which evolved concurrently. The State of Washington began a formal pollution control program in 1945 with the creation of the Pollution Control Commission and enactment of RCW 90.48. The law did not allow strong enforcement. Pollution control was a negotiation process and required the state to demonstrate a water pollution problem and assign the cause of that problem to a specific discharger.

In 1948 the federal government passed the Water Pollution Control Act (PL 80-845). This law provided some funds for the design of municipal wastewater treatment plants and for study of water pollution problems. This law also required the U.S. Surgeon General, in cooperation with the states, to develop water pollution control programs for interstate waters. The Federal Water Pollution Control Act of 1956 (PL 84-660) and its 1961 amendments (PL 87-88) established federal grants for construction of municipal treatment plants.

The Water Quality Act of 1965 (PL 89-234) required states to adopt water quality standards for interstate waters and created a small agency, the Federal Water Pollution Control Administration (FWPCA). These federal laws generally required the states or federal government to demonstrate that a water quality problem had implications for human health or violated water quality standards. Enforcement was minimal because the burden of proof lay with the agencies: they had to demonstrate a direct link between a discharge and a water quality problem before enforcing on a discharger.

Meanwhile, Washington had adopted a waste water discharge permit system in 1955 (Chapter 90.48 RCW). This permit system was apparently not very effective in controlling pollution

Table 14. Methods, Detection and Quantitation Levels Recommended for Effluent Characterization and Effluent Monitoring

Pollutant & CAS No. *(if available)*	Recommended Analytical Protocol	Detection (DL)[1] *µg/L unless specified*	Quantitation Level (QL)[2] *µg/L unless specified*
Conventionals			
Biochemical Oxygen Demand	SM5210-B		2 mg/L
Chemical Oxygen Demand	SM5220-D		10 mg/L
Total Organic Carbon	SM5310-B/C/D		1 mg/L
Total Suspended Solids	SM2540-D		5 mg/L
Total Ammonia (as N)	SM4500-NH3-B and C/D/E/G/H		20

1. **Detection level (DL)** or detection limit means the minimum concentration of an analyte (substance) that can be measured and reported with a 99% confidence that the analyte concentration is greater than zero as determined by the procedure given in 40 CFR part 136, Appendix B.
2. **Quantitation Level (QL)** also known as Minimum Level of Quantitation (ML) – The lowest level at which the entire analytical system must give a recognizable signal and acceptable calibration point for the analyte. It is equivalent to the concentration of the lowest calibration standard, assuming that all method-specified sample weights, volumes, and cleanup procedures have been employed. The QL is calculated by multiplying the MDL by 3.18 and rounding the result to the number nearest to (1,2,or 5) x 10^n, where n is an integer. (64 FR 30417).

   ALSO GIVEN AS:
   The smallest detectable concentration of analyte greater than the Detection Limit (DL) where the accuracy (precision & bias) achieves the objectives of the intended purpose. (Report of the Federal Advisory Committee on Detection and Quantitation Approaches and Uses in Clean Water Act Programs Submitted to the US Environmental Protection Agency December 2007.

4.5 Polychlorinated Biphenyls (PCBs)

PCBs are a persistent, bioaccumulative, and toxic group of manmade compounds found throughout the environment. Federal NPDES permitting regulations require use of analytical test methods approved under 40 CFR Part 136 for assessing compliance with permit limits. The method currently approved for use in PCB analysis under 40 CFR Part 136 is Method 608. Method 608.3, released in December 2016, contains updates for PCBs; however, this method was not published in the Federal Register prior to the change in Executive Administration in January 2017. As is common with new Administrations, Federal Agencies issued a mandatory recall of all actions that were not published in the Federal Register prior to the Administrative change. The final rule was published in August 2017. After the delayed publication, Method 608.3 became the preferred method by Ecology for effluent limit compliance evaluation; however, laboratories have one year to comply with this revised method due to the MDL development procedural changes. Through August 2018, laboratories may still use modified Method 608 for compliance if they have not yet received accreditation for Method 608.3. See 4.5.1 in this chapter for detail on using modified 608 for effluent limit compliance.

As of January 2017, the three methods that are used for permitting purposes are Methods 608, Method 8082A (Update V) and Method 1668C. Methods 8082A and 1668C are not-EPA approved methods under 40 CFR 136. Recent EPA revisions to 608.3 and 8082A refine QA processes and increase method sensitivity. Method 608 (or 608.3) and Method 8082A are methods for reporting Aroclor concentrations (7 individual Aroclors). Method 8082A can also report some congeners. Method 1668C is a very sensitive method for reporting congener

concentrations (209 individual congeners). All three methods sum the results (Aroclors or congeners) to calculate a total PCB concentration. Surface water regulatory standards for chronic aquatic life and human health criteria are set at levels lower than EPA Method 608 (or 608.3) are able to evaluate. The two other methods used to evaluate PCBs, 8082A and 1668C, provide lower analytical limits and may be used for permitting purposes to evaluate sources, but not for numeric effluent limit compliance. Section 4.5.5, Table 18, gives a comparison of the different reporting limits for all methods discussed in this chapter.

4.5.1 Method 608

In response to a Pollution Control Hearings Board decision (Case Number P13-137c) in July 2015, Ecology conducted a phone survey of over 20 labs in Washington to determine achievable detection levels (DLs) and quantitation levels (QLs) for water samples under Methods 608 and 8082A. Labs indicated that DLs and QLs lower than required by Ecology in NPDES permits were achievable with modifications to both methods. Common techniques were reported to lower detection limits: extracting a larger than one liter sample, large volume injection, concentrating the sample extract, and solid phase extraction (SPE). But the relatively high QL for 608 was problematic and bound by the strict requirement that the method-specific standard deviations (e.g., calibration factor or response factor) be less than ten percent for the calibration curve of each Aroclor. Also, some techniques like SPE were allowed with 8082A but not with 608.

Recently, EPA promulgated the Methods Update Rule (December 2016) that includes Method 608.3 for PCB Aroclor determination. This update was recorded into the Federal Register in August 2017 and recognizes advancements in laboratory techniques and technology that were identified by local labs. Specifically, the new method includes more techniques for extraction and clean-up, revised MDL determination procedures to account for lab blank contamination, and sets the calibration curve to twenty five percent standard deviation. Extraction techniques such as separatory funnel, continuous liquid-liquid for extraction and SPE are now included. These modifications have prompted updates to lab standard operating procedures (SOPs), and labs have worked with Ecology's Laboratory Accreditation Unit (LAU) for accreditation beginning August 2017 for NPDES permit requiring analysis using Method 608.3. LAU has granted accredited laboratories a compliance period of one year so that they may implement the new MDL procedures. The end of this compliance period is expected to occur in September 2018. In the interim, laboratories accredited for Method 608 may use the modified procedures discussed earlier in this section to increase the methods sensitivity.

Permit writers must work with permittees to ensure they use the 2016 update for Method 608.3 in NPDES permits as soon as their associated laboratory becomes accredited. This may occur before September 2018. The update sets the DL at 0.065 µg/L and the QL at 0.195 µg/L (3x the DL). These reporting limits apply to all Aroclors even though it is only specified for PCB-1242 in the method. Laboratories may use Aroclor 1242 as an indicator for determination of the method validation statistics. Language in the method states: *"When analyzing the PCBs as Aroclors, it is only necessary to establish an MDL for one of the multi-component analysis (e.g., PCB 1254), or the mixture of Aroclors 1016 and 1260 may be used to establish MDLs for all of the Aroclors" (EPA, Method 608.3)*. The method QL revision in Method 608.3 results from a change in the tolerance for the relative standard deviation from 10% to 20% (for external

Final QAPP elements document the required laboratory analysis QA procedures following the data collection phase. These procedures assess whether or not the collected data meets the specified DQIs in addition to the specific study objective. QA procedures include verification of sampling procedures, data verification and validation, in addition to determining the usability of data collected. Without QA, the data from the study cannot be used to inform the project specific questions related to the sampling event. Also, determining the DQOs prior to implementing a monitoring requirement for a source identification study or pollutant minimization plan can help maintain the cost effectiveness of a study, especially with multiple sampling events spanning several years.

When requiring characterization monitoring, it is important to consider the result you want to achieve and the appropriateness of additional sampling. These listed factors contribute to the selection of an appropriate monitoring method. Information collected through previous monitoring should help the permit writer understand which method to select. Cost of PCB analysis differs substantially from method to method with 608.3 being the least expensive and 1668C the most expensive. The difference lies in the rigorous QC processes for 1668C including the level of reporting. While 1668C will return information down to the lowest quantifiable level, it is not necessarily appropriate to require this method when method 8082A will also return detectible concentrations. The following section provides information to help determine which method is appropriate in your permit.

4.5.5 Selecting the appropriate analytical method

Before requiring any monitoring for PCBs other than priority pollutant scans, permit writers should evaluate their facility and the potential for exceeding the water quality standard. For example, small municipalities with no significant industrial users and without a legacy industry may not have PCBs in their effluent at levels that would likely exceed water quality standards. Therefore, PCB monitoring may not be necessary. This is an acceptable situation. Only include monitoring requirements when necessary for the facility and its specific discharge situation.

Data quality objectives (DQOs) should always be considered prior to placing low level monitoring requirements in a permit for purposes of characterization or source identification. Permit writers should consider the size of the facility, presence of any significant industrial dischargers, legacy source potential, the source and characteristic of the wastewater including pollutants that are or have potential to be discharged from the facility, and the result being achieved with the additional monitoring before requiring PCB characterization in permits. When in doubt, staff should consult with the permitting QA/QC lead inside the program who is familiar with permitting and monitoring challenges associated with this ubiquitous toxicant.

Understanding the potential use of collected data and which method is best suited for the required monitoring are both important considerations. Knowing the distinction between evaluating compliance with numeric effluent limits versus evaluating overall permit compliance is also necessary. While non 40 CFR part 136 methods cannot be used to evaluate numeric effluent limit compliance, a missed sampling event or late submittal of monitoring results from a non 40 CFR part 136 method constitutes an overall permit violation subject to enforcement. The following provides background to help permit writers understand both when and how to use the different methods for permit development, permit management, compliance and assessments.

Permit writers should consult Table 18 for an approximate range of reporting limits for PCB analytical methods. Reporting limits in Table 18 are to be used as general guidance in method selection. Actual reporting limits will depend on the lab performance and sample matrix. The laboratory must be contacted to verify the actual level of reporting achievable for the individual analytical method and sample matrix.

Table 18. Comparison of Reporting Limits for PCB Analytical Methods

EPA Method	DL, µg/L	QL, µg/L
608 (unrevised)	0.25	0.5
608 (revised)	0.05	0.2
608.3	0.065	0.195
8082A (LLOQ)	0.016	
1668C	0.00005	0.00007

As discussed previously, numerical effluent limit compliance must be evaluated using Method 608.3. When conducting monitoring for characterization or source control, the permit writer needs to determine a sufficiently sensitive method that will generate the most unqualified, usable data. The magnitude of PCB contamination differs across the state and can generally be attributed to historical industrial uses and atmospheric deposition. Therefore, effluent characterization and source control methods will differ based on site conditions, the type of facility (e.g. industrial or municipal), and the approximate concentration of contamination expected in the field.

It may not be necessary to have every permitted discharger enter into a characterization or source identification study. For example, minor dischargers (<1 MGD) do not need to complete priority pollutant scans and often have little to no effluent toxics data. This is because minor dischargers are not subject to the same federal regulations as major or industrial dischargers. While PCB monitoring may be appropriate for some dischargers based on individual facility characteristics, permit writers should consider the value and purpose of requiring PCB monitoring when developing discharge permits. If you received NDs on the Method 608.3 analysis, consider site specific needs. Low level PCB monitoring should only be used when working to identify sources or differing magnitudes of contamination.

Evaluating reasonable potential - Use all valid and applicable data, including data collected using methods not approved under 40 CFR Part 136 (e.g. Methods 1668C and 8082A).

- EPA's *Technical Support Document (TSD), Section 3.2* supports the use of all available information when evaluating reasonable potential, including available data and available narrative information.
- Effluent congener data from Method 1668C analysis should undergo 10x blank censoring (see Section 4.5.3) prior to the reasonable potential evaluation in order to sum the individual congener results. This reduces the probability of accounting for false positives in the final sum and avoids artificially high results.
- Evaluating reasonable potential for small dischargers can be done with a narrative site specific review. As with every reasonable potential determination, the process and rational should be included in the fact sheet. Most small dischargers will not have any

monitoring data for PCBs as they are not required to conduct priority pollutant scans. When a small facility discharges to an unlisted water body, evaluate reasonable potential based on non-numeric data (e.g. significant industrial dischargers (SIUs), legacy sources, and other site specific information). If no reasonable potential is found, no further action is required. In the event of a discharge to a 303(d) listed water body with no EPA approved TMDL, again evaluate reasonable potential based on non-numeric data. If no potential is found, no further action is required. In the event of a reasonable potential determination, first implement BMPs with pollutant minimization and adaptive management requirements designed to achieve compliance with water quality standards. Monitoring must be part of this narrative effluent limit to develop a usable data set during the current permit cycle. This should be used in the next permit cycle to develop numeric limits when they are feasible. An AKART determination (see below) may be required at this time. Also, it may be necessary to investigate the applicability of a compliance schedule or variance (see Chapter 6, Section 3.3.13 or Chapter 16, Section 2, respectively).

- The following evaluation of reasonable potential applies to both large municipalities (> 1 MGD) and industrial discharges. When discharging to an unlisted waterbody, evaluate reasonable potential based on existing SIUs, data in the permit application, and all site specific information. This may be a narrative evaluation when the only facility-specific data for PCBs shows non-detects. Document the evaluation and results in the fact sheet. In the event of a discharge to a 303(d) listed surface water body with no EPA approved TMDL, again evaluate potential to exceed based on SIUs, data in the permit application, and all site specific information. When reasonable potential is found and contamination is expected, begin data collection for further characterization and/or effluent limit development. In addition, implement BMPs with pollutant minimization and adaptive management requirements designed to achieve compliance with water quality standards. Monitoring must be part of this narrative effluent limit to develop a usable data set during the current permit cycle. Increasingly sensitive analytical methods may be necessary for quantification purposes. This data must be used in the next permit cycle to develop numeric limits when they are feasible. An AKART determination (see below) may be required at this time. Also, it may be necessary to investigate the applicability of a compliance schedule or variance (see Chapter 6, Section 3.3.13 or Chapter 16, Section 2, respectively).

Requiring monitoring to complete a permit application – Use only 40 CFR Part 136 methods (e.g. Method 608.3).

- 40 CFR 122.21(e)(3) says the application shall not be considered complete unless 40 CFR Part 136 approved methods are used.
- Review the laboratory's accompanying QA/QC report supplied with the required application monitoring for accurate reporting limits and methods. Handle qualified data in accordance with Section 4.3.

Calculating numeric effluent limits - Use all valid and applicable data, including data collected using methods not approved under 40 CFR Part 136 (e.g. Methods 1668C and 8082A). Refer to Section 4.3 for discussion related to qualified data manipulation.

- PCB analytical method selection will depend on expected concentrations in the sampled media, the BMPs required or selected, and the potential sources of PCBs on and to the site or facility. For example:
    - A PCB Aroclor Method (608.3 or 8082A) would typically be required where it is sufficiently sensitive to evaluate the effectiveness of the BMP. For example, a source tracing program aimed at finding and addressing PCB sources to stormwater at individual industrial properties based on PCB concentrations in catch basin solids, which are routinely detectable using Method 8082A.
    - Method 1668C would typically be required for source identification when the potential sources are likely to have different congener profiles, are more diffuse, or where the media sampled is unlikely to show detections using 608.3 or 8082A. Where the sources of PCBs on an individual property are not known, PCB congener data may be useful in identifying sources on and to the site. Congener data may be effective in track down sampling within a collection system, too. Blank censoring is also used to evaluate sources through effectiveness monitoring. Section 4.5.3 discusses censoring congeners that are less than 10x the laboratory blank for verifying the presence or absence of the molecule in a sample. Other data quality objectives, such as source identification, could use different censoring techniques that use different multipliers (e.g. 3x or 5x). The QAPP must specify if a different multiplier is used to censor data. Otherwise, use the 10x multiplier as the default value. Use of these different censoring strategies equate to varying levels of confidence in the analysis and should be explained both in the fact sheet and required QAPP. These data may be used to evaluate trends over time and to quantify reductions in influent, effluent and/or receiving waters.
- Use of surrogate parameters to evaluate the effectiveness of BMPs may be appropriate in lieu of PCB analysis if a surrogate parameter is available and appropriate. A correlation between the surrogate parameter and PCB concentration must be made on a site-specific basis to apply this effectiveness evaluation. For example, it might be possible to develop a correlation between TSS reduction and PCBs.
- Monitoring of media other than water can provide appropriate surrogate data using a less sensitive method. For example, evaluation of PCB concentrations in sludge/biosolids in municipal wastewater treatment can be an indicator of the effectiveness of pollution prevention and pretreatment efforts to reduce PCB concentrations in discharges to both the treatment facility and receiving water.
- If a reasonable potential is found, numeric effluent limits are required when it is feasible to calculate them. BMPs may also be required in this case, but must not be used in-lieu of numeric limits. Permits with both numeric limits and BMPs may require monitoring using two different methods for two different purposes (e.g., Method 608.3 for monitoring to assess compliance with a numeric effluent limit and Methods 1668C or 8082A for BMP effectiveness monitoring).
- Where it is infeasible to calculate numeric limits (e.g. stormwater and satellite CSO treatment plants), non-Part 136 methods may be used for evaluating BMPs, conducting adaptive management, and source identification. See Chapter 7, Section 5.1, for more information on feasibility.

Comparison of PCB Reduction Efforts

Summary

PCBs, while banned from production in the late 1970s, are considered a legacy pollutant and can still be produced inadvertently in small concentrations through different chemical processes. Both the San Francisco Bay and Delaware River Basin have PCB TMDLs that work towards achieving their applicable water quality (WQ) criterion. There are no PCB TMDLs on either the Spokane or Duwamish Rivers at this time. The toxics minimization approach in both San Francisco Bay and the Delaware River Basin involve implementation of both narrative and numeric requirements through the discharge permitting process. Ecology has elected to adopt this process to regulate discharges of PCBs and make progress toward achieving the state's WQ criterion.

While pollutant loading from various pollutant transport pathways differs in orders of magnitude between each of the four watersheds, implementation of best management practices (BMPs) for source control has been identified as a primary step to ultimately reduce both point and non-point pollutant loading. Selection of appropriate BMPs depends on individual characterization of each watershed, the relevant transport pathways and identified sources. As part of a comprehensive approach, implementation of interim and final numeric effluent discharge limits will ensure discharge load reductions while influent source identification, control and remediation efforts continue. ***Used together, numeric effluent limits and adaptively managed BMP implementation are expected to result in near-term and long-term measurable progress toward attaining applicable WQ criteria.***

The following summarizes the PCB reduction approaches undertaken in the Spokane River, Duwamish River, San Francisco Bay and Delaware River watersheds.

	Spokane River	Duwamish River	San Francisco Bay	Delaware River Basin
WQ Criterion	170 pg/L	170 pg/L	170 pg/L	16 pg/L
Interstate Involvement	WA/ID	none	none	PA/DE/NJ/NY
Primary Sources/ Transport Pathways	Groundwater, Stormwater, Industrial Discharge	Sediments, Stormwater, CSOs, Air Deposition	Stormwater, Sediments	Industrial Discharge, Sediments
TMDL	No, Collaborative Process	No, Collaborative Process	Yes (2009)	Yes (2003/2006)
Estimated Initial Point Source Loading	192-384 mg/d	Not available	9,100 mg/d	42,582 mg/d
Effluent Limits	Narrative (2011-2016) Interim (2016-2026) Final (2026 -)	Variable	Numeric Final, per Order No. R2-2011-0012	Narrative (2009-2014) Interim (2014-2029) Final (2029-)
Use of Method 608 (Limit Compliance)	Yes*	Yes*	Yes	Yes*
Use of Method 8082 (Characterization)	---	Yes	---	---
Use of Method 1668 (Characterization)	Yes	Yes	Yes	Yes
Sustained BMP Implementation	Yes, Annual Report	Yes, Varies by permittee & permit type	Yes, Annual Report	Yes, Annual Report

Brief Answer

Ecology may require or allow the use of the most current accepted revision of EPA Method 1668 (USEPA, 2010) at contaminated sites, instead of the standard analytical method, EPA Method 8082 (USEPA, 2007b), to analyze PCB mixtures in soil, sediment, tissue, or water matrices. This may happen when one or more of the following applies:

- There is a need to test for PCB congeners that EPA Method 8082 does not test for (i.e., congeners other than Aroclors or the 19 PCB congeners listed in Table 1, below).
- There is a need to detect concentrations below what EPA Method 8082 is able to detect (i.e., ppt vs. ppm or ppb), such as when evaluating compliance with the current surface water cleanup level of 0.000064 ug/L.
- There is a need to test for coplanar dioxin-like PCB congeners and use the toxicity equivalency factors (TEF) specified in WAC 173-340-708(8)(f) or Section 6.3.2.3 of SCUM II (Ecology, 2015b) to calculate dioxin-like PCB toxicity equivalency quotient (TEQ).

Discussion

The MTCA and SMS rules specify standard analytical methods and under what circumstances Ecology may require or approve alternate methods. The following discussion: a) identifies the applicable sections of each rule; b) identifies the standard and alternate test methods for PCB mixtures; and c) explains when each of those methods is most appropriate.

Standard analytical methods

The **MTCA rule** specifies standard analytical methods and testing requirements for contaminated sites in WAC 173-340-830(3).

- For PCB mixtures, the standard analytical method is **EPA Method 8082**, which is included in EPA, SW-846 (WAC 173-340-830(3)(a)(i)).

The **SMS rule** specifies standard analytical methods and testing requirements for sediment at contaminated sites in WAC 173-204-600(3). The rule references the method and requirements in the Puget Sound Estuary Protocols (PSEP, 2015), which are defined in WAC 173-204-200(21).

- For PCB mixtures, the standard analytical method is **EPA Method 8082**, which replaced EPA Method 8081 in EPA, SW-846 (USEPA, 1997; USEPA, 2007a).
- For coplanar PCB congeners, the standard analytical method is **EPA Method 1668** (USEPA, 1997).

Generating the Right PCB Data: Determination of Aroclors *Versus* PCB Congeners – 8075

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ABSTRACT

Polychlorinated biphenyls (PCBs) are a major environmental concern due to their ubiquity and tendency to bio-accumulate, as well as their persistence and toxicity. As the cleanup of waste and contaminated soil progresses at U.S. Department of Energy (DOE) sites, the costs for accurate PCB data are increasing. PCBs are actually a broad name for a group of 209 individual compounds known as congeners. PCBs were originally produced in the United States as specific mixtures of congeners known as Aroclors[1]. PCBs can be analyzed and quantified either as Aroclor mixtures or as individual congeners. Aroclor analysis, which is the more common analytical method applied to PCBs, has been in use for decades, and in general, most cleanup regulations are based on total PCB concentrations using Aroclor analyses. Congener analysis is relatively new to environmental cleanup and restoration due to both technical issues and associated cost. The benefits of congener analysis are that it allows a more direct analysis of the risk of the PCBs. The World Health Organization (WHO) has identified twelve specific congeners as *dioxin-like* with toxicity ranging from 0.00003 to 0.1 times the standard 2,3,7,8-Tetrachlorodibenzo-p-dioxin (2,3,7,8-TCDD) toxicity. This paper defines Aroclors and congeners and compares the current application and usefulness of the two analytical methods for environmental restoration and cleanup. A strategy for the best use of the two methods to optimize overall characterization cost is presented. As part of the strategy, a method using the data from Aroclor analyses to calculate 2,3,7,8-TCDD toxicity equivalent concentrations is also presented.

INTRODUCTION

Polychlorinated biphenyls (PCBs) represent a class of synthetic organic molecules that are characterized by two benzene rings linked together (biphenyl) with from 1 to 10 of the hydrogen atoms replaced by chlorine atoms. There are 209 distinct PCB congeners. PCBs are problematic due to their relative persistence in the environment and the evidence that at least some of the PCB compounds exhibit certain toxicity and potential carcinogenic or mutagenic activity. In 1976, the U.S. Environmental Protection Agency (EPA), through the *Toxic Substances Control Act* (TSCA), prohibited manufacturing and commercial use of PCBs and regulated PCB disposal [1].

PCBs have found their way into the environment in several ways: one pathway has been inadvertently spilling or releasing commercial PCB mixtures known as Aroclors[1]. In the United States, all PCBs were produced by a single manufacturer under the trade name Aroclor. There are several specific Aroclor mixtures, each with a known distribution of various PCB congeners.

[1] Aroclor is a trade name of Monsanto.

Formal congener nomenclature can get unwieldy so a numbering scheme (BZ #) [2] has been defined that assigns a unique number from 1-209 to each individual PCB congener.

Use at Hanford

The history of the Hanford Site goes back to the early 1940s when the site was established as part of the Manhattan Project. From that time through the 1970s, Aroclors were used commercially in electrical substations, transformers, capacitors, hydraulic fluid, roofing material, paints, coatings, and caulking [3]. Residual concentrations of Aroclors have been detected in the sludge in Hanford's waste tanks, as well as the Hanford Site's soil and various disposal-facility samples. As more waste-handling facilities are closed, PCBs will surely be considered in various risk-based decisions affecting cleanup.

Chemical Analysis Methods

Two methods are typically used to analyze for PCBs in environmental samples. The total PCB or Aroclor method (e.g., SW-846 Method 8082) [4] extracts PCBs from a sample, analyzes the extract by gas chromatography (GC), and then uses a certain subset of peaks to determine the concentration of the PCB mixture. A pattern-recognition technique is used to qualitatively determine whether or not an Aroclor mixture is present; then a set of standards using that particular Aroclor is used for quantification. This method can measure the total amount of PCBs present in a sample, but has only limited ability to identify and quantify each of the 60-80 individual PCB congeners within any Aroclor mixture. Rather, the analyst uses the presence and ratio of a select subset of individual PCB congeners to identify which Aroclor is represented. The total amount of material can be related to a total amount of Aroclor. Individual PCB congener concentrations are not reported.

If total PCBs are requested, or if the detected PCBs do not conform to a known Aroclor mixture, then another set of up to 19 PCB congeners may be used for total PCB quantification and the result is reported as *individual congeners or total PCBs*. It is critical for the requestor to discuss the application of the results with the laboratory analyzing the sample so that the format of the results correlates with the environmental requirement (i.e., total PCB, Aroclor, or individual congener).

The second approach is the congener-specific method (e.g., USEPA Method 1668a) [5]. This process uses a high-resolution gas chromatograph/mass spectrometer (GC/MS) to determine the concentration of each individual PCB congener in the sample. There are no presumptions regarding the PCB source material, whether it is an Aroclor or PCBs from combustion or some other source. The results are concentrations of each individual congener, subject to some technical limitations on the ability to resolve a handful of co-eluting congeners.

The two methods differ considerably in reported parameters, detection limits, availability and cost. The total PCB/Aroclor method is readily available and relatively inexpensive, but may not provide detection limits required for making decisions about closure-related activities. On the other hand, the congener-specific method can provide low detection limits for individual constituents. However, it is nearly an order of magnitude more expensive than the other method.

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