

NO. 94293-5

SUPREME COURT OF THE STATE OF WASHINGTON

PUGET SOUNDKEEPER ALLIANCE,

Petitioner,

v.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY; and
STATE OF WASHINGTON, POLLUTION CONTROL HEARINGS
BOARD,

Respondents.

**STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY'S
ANSWER TO AMICI CURIAE BRIEFS OF SPOKANE
RIVERKEEPER AND SQUAXIN ISLAND TRIBE**

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I. INTRODUCTION

The Department of Ecology issued a National Pollutant Discharge Elimination System (NPDES) wastewater discharge permit to Seattle Iron and Metals that set limits on the amount of polychlorinated biphenyls (PCBs) Seattle Iron is allowed to discharge from its facility to the Lower Duwamish River. Puget Soundkeeper Alliance (PSA) appealed the Permit to the Pollution Control Hearings Board, arguing that a different, more sensitive, testing method should have been required in the Permit for testing PCBs in the discharge. The Board concluded, and in an unpublished opinion the Court of Appeals agreed, that Ecology had lawfully required the use of Method 608 in the Permit for PCB monitoring, as it is the only test method approved by the Environmental Protection Agency (EPA) in federal regulation.

Amici, Spokane Riverkeeper and Squaxin Island Tribe incorrectly equate the detection sensitivity of the test method mandated by federal and state regulation with the enforceable effluent limit in Seattle Iron's Permit. The sensitivity of a test method is not the same as a discharge limit on a pollutant that is protective of water quality and human health. The federal regulation defines what test method is "sufficiently sensitive" under the Clean Water Act. The only EPA-approved method "sufficiently sensitive" for PCB monitoring is Method 608, which Ecology requires in the Permit.

Ecology agrees with Amici that PCBs are serious environmental pollutants. But the selection of the test method for PCBs in routine discharge monitoring is dictated by federal and state law, and therefore this narrow issue is not a matter of substantial public interest. If, as Amici argue, there is a problem with using Method 608 to test for PCBs, that problem must be remedied by EPA, since only EPA can approve another testing method. PSA's Petition should be denied.

II. ARGUMENT

As explained in Ecology's Answer to PSA's Petition for Review (Answer to Petition), use of Method 608 to test for PCBs in Seattle Iron's NPDES Permit is required by federal regulation. Because the NPDES permit program is federally delegated, Ecology does not have discretion to require a different testing method. While, as the Board noted, Ecology could request that EPA approve a different method, Ecology has not done so to date and the Court of Appeals properly refused to order Ecology to do so, because such a request is voluntary not mandatory.

The Amici here do not challenge the Court of Appeals' legal conclusions. Instead, Amici make a variety of policy arguments in support of using a more sensitive test method. These policy arguments—however valid—cannot change the plain language of the applicable regulations.

Thus, Amici's arguments fail to establish error or any basis for review by this Court.

A. Use of Method 608 Does Not Allow Seattle Iron to Violate Permit Effluent Limits for PCBs

Riverkeeper attempts to equate the enforceable numeric effluent limitation for PCBs established in Seattle Iron's Permit with the test detection limit. Amicus Curiae Memorandum of Spokane Riverkeeper in Support of Petition for Review at 2, 9. This is a false equivalency.

No discharge that violates water quality standards is permissible under either federal or state law and none is authorized in Seattle Iron's Permit. 33 U.S.C. § 1311(b)(1)(C); RCW 90.48.520. Discharges permitted under the NPDES permit program must be conditioned with effluent limitations as required in order to meet water quality standards. 40 C.F.R. § 122.44(d); WAC 173-220-130(1)(b)(i). Any discharge of a pollutant in excess of a specified permit limit is a violation of that permit and of RCW 90.48.

The Board's decision in this case set the discharge limit for PCBs in Seattle Iron's discharges at .00017 µg/L. *Puget Soundkeeper Alliance v. Dep't of Ecology*, PCHB No. 13-137c, at 46-47 (July 23, 2015) (Board Decision) (Attached as Appendix B to Answer to Petition). While the discharge limit may be below the detection limit of Method 608, it is

nevertheless the limit on the amount of PCBs Seattle Iron can discharge. Exceedances of any discharge limit are subject to enforcement. As PSA presented at hearing, Seattle Iron at times has violated its Permit limits by discharging PCBs at levels above its effluent limit, and Ecology has issued a Notice of Violation accordingly. AR 1327–29.¹ Ecology may also issue enforcement based on PCB testing conducted by its own Toxics Cleanup Program, or another governmental entity, as part of the ongoing work in the Lower Duwamish River.

There is no “relaxed standard” for PCBs in Seattle Iron’s Permit. Discharges from Seattle Iron that violate the effluent limit of .00017 µg/L are subject to enforcement, and such discharges are Permit violations. The use of Method 608 as a test method does not change the enforceability of the discharge limit. There is no debate here that PCBs are harmful nor is there any debate with regard to the discharge limit. The sole issue presented is whether Ecology properly required the testing method dictated by federal regulations. This issue does not warrant review because it is settled by the plain language of the federal regulation. *See* Answer to Petition at 8–10.

¹ Citations to AR are to the Administrative Record for this matter.

B. Method 1668C's Sensitivity Is Insufficient to Reliably Quantify PCBs at the New Human Health Criteria Limit

The use of Method 1668C, the method preferred by PSA, over another PCB testing method, in and of itself, does not ensure compliance with water quality standards as Squaxin Island hopes. Amicus Curiae Squaxin Island Tribe Brief in Support of Puget Soundkeeper Alliance's Petition for Discretionary Review at 15. Any test method has its drawbacks, and EPA deferred its approval of Method 1668C based on criticisms it received when it first proposed Method 1668C's use for routine testing. AR 3587. Placing significant reliance solely on the sensitivity of any given test does not provide regulatory certainty with regard to permit compliance. For example, Method 1668C does not provide reliable PCB detection at the new human health criteria limit. This is because the practical quantitation limit for Method 1668C is well above the new human health criteria for PCBs.

Squaxin Island provides a detailed discussion on the setting, in 2016, of the new human health criteria for PCBs in state water quality standards in order to argue on behalf of the use of Method 1668C. Squaxin Island Amicus Brief at 3–5, 9–16. As Squaxin Island describes, new human health criteria, promulgated by the EPA, became effective in Washington on December 28, 2016. 81 Fed. Reg. 85,417, 85,418

(Nov. 28, 2016). The new human health criteria for PCBs in Washington is .000007 µg/L. 81 Fed. Reg. 85,431.

Petitioner notes that Method 1668C has a practical quantitation limit of .000022 µg/L.² Petition at 9. Method 1668C's practical quantitation limit, the point at which a pollutant can be reliably quantified, is well above the new human health limit (.000007 µg/L) for PCBs. Additionally, when measuring for PCBs in water, Method 1668C has a method detection limit between .000007 µg/L and .000030 µg/L.³ AR 2751. Only the lowest number in the range of the method detection limit of Method 1668C barely reaches the new human health criteria. Method 1668C thus does not represent a reliable solution for measuring PCBs at the new human health criteria limit as Squaxin Island hopes.

As Squaxin Island describes, the new human health criteria was set by EPA. Despite the fact that EPA set this new limit for PCBs in Washington's water quality standards, EPA has not amended its regulations to permit use of a testing method that is sensitive enough to measure down to this level.

² The practical quantitation limit is the limit at which it is possible to reliably measure the amount of a pollutant. Board Decision at 26 (¶ 49).

³ The method detection limit is the lowest level at which the concentration of a substance can reliably be detected. Board Decision at 26 (¶ 49).

C. Federal Regulation Defines “Sufficiently Sensitive” for Test Methods

Squaxin Island also argues that the Court of Appeals decided not to require sufficiently sensitive test methods to determine compliance with the Clean Water Act. Squaxin Island Amicus Brief at 16. However, as correctly noted by the Court of Appeals, Clean Water Act regulations define “sufficiently sensitive” for purposes of test methods. *Puget Soundkeeper Alliance v. Dep’t of Ecology*, No. 48267-3-II, slip op. at 15. (Feb. 22, 2017) (Opinion).

Monitoring requirements in the Clean Water Act regulations require the use of “sufficiently sensitive test procedures (i.e., methods) approved under 40 CFR part 136 for the analysis of pollutants.” 40 C.F.R. § 122.44(i)(1)(iv). Under this regulation, a test is sufficiently sensitive when:

(2) The method has the lowest [method detection limit] of the analytical methods approved under 40 CFR part 136 ... for the measured pollutant or pollutant parameter.

40 C.F.R. § 122.44(i)(1)(iv)(A)(2). The only method approved under 40 C.F.R. part 136 for PCBs is Method 608. In correctly holding that the Permit issued to Seattle Iron was lawful, the Court of Appeals stated

“Method 608 is the only approved method for PCBs, and therefore it necessarily is the method with the lowest minimum level.” Opinion at 15.

The Court of Appeals correctly held that requiring Method 608 for routine monitoring in the Seattle Iron Permit is, by federal regulatory definition, requiring the use of a sufficiently sensitive test method. There is no basis for this Court to review this decision.

D. The Question of Whether the Board Lacked Authority to Order Ecology to Consult with EPA to Use an Alternate Test Method is Not Before This Court

Squaxin Island also attempts to raise an issue that is not before this Court. This Court will not consider arguments raised only by amicus. *Citizens for Responsible Wildlife Mgmt. v. State*, 149 Wn.2d 622, 631, 71 P.3d 644 (2003).

WAC 173-201A-260(3)(h) states:

The analytical testing methods for these numeric criteria must be in accordance with the "*Guidelines Establishing Test Procedures for the Analysis of Pollutants*" (40 C.F.R. Part 136) or superseding methods published. The department may also approve other methods following consultation with adjacent states and with the approval of the USEPA.

The Board found that it “lacks the authority to require Ecology to petition EPA to allow the use” of an alternate test method for PCB testing pursuant to the second sentence of the regulation.⁴ Board Decision at 48 (¶ 29).

Squaxin Island claims the Court of Appeals “reads the second part of [this] state regulation out of existence” by failing to require Ecology engage in this discretionary approval process. Squaxin Island Amicus Brief at 18. However, the Court of Appeals acknowledged the Board’s lack of authority to order this discretionary pathway for method approval in its Opinion, stating:

Under WAC 173–201A–260(3)(h), Ecology also could use Method 1668C in NPDES permits if it approved that method after consulting with adjacent states and with the approval of the EPA. But the regulation states that Ecology “may” give such approval, WAC 173–201A–260(3)(h), and the Board noted that it had no authority to require Ecology to seek EPA approval of a different method.

Opinion at 14 n.13. PSA has not challenged the Board’s finding regarding its lack of authority to order Ecology to seek EPA’s approval of a method other than Method 608. Thus, this argument does not provide a basis upon which review may be granted.

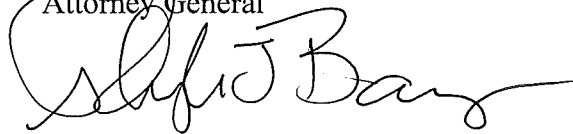
⁴ The Board Decision was discussing Method 8082, the PCB test method with a sensitivity that falls between Method 608 and Method 166C, but the principle is the same: The Board lacks the requisite authority to require Ecology to undertake a discretionary approval procedure.

III. CONCLUSION

The Court of Appeals committed no error when it concluded that Ecology was required to follow federal and state regulations that mandate the use of Method 608 for PCB testing in NPDES permits. PSA's Petition should be denied.

RESPECTFULLY SUBMITTED this 20th day of June 2017.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the state of Washington that on June 20, 2017, I caused to be served the Department of Ecology's Answer to Amici Curiae Briefs of Spokane Riverkeeper and Squaxin Island Tribe in the above-captioned matter upon the parties herein via U.S. mail and using the Appellate Court Portal filing system, which will send electronic notification of such filing to the following:

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