

NO. 45609-5

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**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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PUGET SOUNDKEEPER ALLIANCE; RE SOURCES FOR  
SUSTAINABLE COMMUNITIES; and FRIENDS OF THE EARTH,

Petitioners,

v.

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

Respondents.

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**RESPONDENT DEPARTMENT OF ECOLOGY'S RESPONSE TO  
PETITIONERS' OPENING BRIEF**

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## I. INTRODUCTION

The Department of Ecology (Ecology) issues water quality permits to industrial facilities that place limits on the amount of pollutants such facilities may discharge to state waters. These limits are based on state water quality standards. The permit issued to the B.P. Cherry Point Refinery (BP) imposes numeric limits for specifically named substances, and a requirement to conduct a Whole Effluent Toxicity test (WET test). The WET test is designed to address the “narrative” (non-numeric) regulatory prohibition against the discharge of toxicants above natural background levels. A WET test exposes live organisms to discharge from the facility and measures whether the discharge has a toxic effect on those organisms. When a WET test indicates what may be such a toxic effect, the permit requires BP to investigate further and perform additional testing.

In its ruling on the validity of BP’s permit, the Pollution Control Hearings Board (Board) deferred to Ecology’s scientific expertise and experience with WET testing, and ruled that Ecology could lawfully determine that a single, initial WET test failure does not necessarily indicate that a water quality standard is violated. An initial test failure may be an inconclusive or transient result, and does not prove the presence of a toxicant. Because of this, the Board concluded that a permit allowing

an initial WET test failure did not violate the Clean Water Act. The Board's decision is supported by Ecology's experience with WET testing and reflects the deference due Ecology on complex scientific and technical issues. It should be affirmed.

## **II. RESTATEMENT OF ISSUE ON APPEAL**

Is Ecology required by the Clean Water Act to treat a single, initial acute WET test failure, which may be inconclusive or transient, as a violation of water quality standards, or does the Act allow Ecology to treat an initial failure as a triggering event for further testing?

## **III. RESTATEMENT OF THE CASE**

### **A. State Standards To Protect Water Quality**

The federal Water Pollution Control Act (Clean Water Act) is a "comprehensive water quality statute designed to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." *PUD No. 1 of Jefferson Cnty. v. Dep't of Ecology*, 511 U.S. 700, 704 (1994) (internal quotations omitted). The Clean Water Act, 33 U.S.C. §§ 1251–1387, and the state Water Pollution Control Act, RCW 90.48, require an industrial facility that will discharge pollutants to surface waters to obtain a permit. 33 U.S.C. § 1342; RCW 90.48.160. These National Pollution Discharge Elimination System (NPDES) permits contain limits on the amount of pollutants that a facility may discharge. 40 C.F.R. § 122.44(d);

RCW 90.48.260; WAC 173-220-130(1)(b). The limits are established “to achieve compliance with applicable effluent limitations and standards, water quality standards, and other legally applicable requirements.” WAC 173-220-140(1). Effluent limitations and standards are promulgated by the Environmental Protection Agency (EPA), water quality standards by individual states. 33 U.S.C. § 1311; 40 C.F.R. § 122.44(d).

State water quality standards can be expressed as numeric limits for specific substances or compounds. *See* WAC 173-201A-240 Table 240(3); AR 664–66.<sup>1</sup> Alternatively, a water quality standard can be expressed as a “narrative” limit, which is descriptive rather than numeric. Relevant here is the narrative limit on the introduction of toxic substances:

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, as determined by the department.

WAC 173-201A-240(1). To evaluate compliance with this narrative standard, Ecology may require a permittee to employ tests. WAC 173-

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<sup>1</sup> Citations to AR are to the Bates stamp numbered page of the Administrative Record before the Board. Where the AR is a deposition transcript, citations pincite to line number(s).

201A-240(2). To test for acute or chronic toxicity Ecology requires permittees to periodically conduct a WET test. WAC 173-205.<sup>2</sup>

**B. The WET Rule Is Applied To Detect Toxicity**

**1. The acute WET test assesses BP's discharges for acute toxicity.**

A WET test exposes living organisms to a facility's discharge (also termed effluent) and measures their biological response. AR 568. An acute WET test exposes the organisms (1) to a test control (nontoxic water), (2) to 100% (full strength) effluent, and (3) to effluent diluted to the acute critical effluent concentration. WAC 173-205-070(1)(a). The acute critical effluent concentration is the level of dilution the effluent achieves at the edge of the mixing zone that surrounds the discharge pipe. WAC 173-205-020. BP's acute critical effluent concentration is 3.6% of its whole effluent.

Ecology issued NPDES Permit No. WA0022900 (Permit) to BP in February 2012. AR 658. Previous testing conducted on BP's discharge (called "effluent characterization") led to Ecology's determination that BP's effluent has a reasonable potential to cause toxicity in the receiving water. WAC 173-205-050(2)(a)(i); AR 568. Because of this potential, the

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<sup>2</sup> BP's permit contains both acute and chronic WET testing provisions. This appeal challenges only the acute WET test condition, Permit Condition S7. Both acute and chronic testing exposes live organisms to effluent dilutions then measures the results. Generally, acute tests measure the mortality of test organisms, chronic tests measure effects on growth or reproduction. AR 796-804.

Permit requires BP to conduct acute WET testing and contains an acute WET toxicity limit. AR 131. The limit is no acute toxicity detected at BP's acute critical effluent concentration (3.6% of whole effluent). *Id.* This means that BP is in compliance with the Permit when the most recent acute WET test shows no statistically significant difference in the response of the test organisms between those tested at 3.6% of whole effluent and those tested in the nontoxic water control. WAC 173-205-070. When there is a statistically significant difference between the two groups, the sample may contain toxic substances, and the WET limit has been exceeded.

**2. WET tests must be statistically valid.**

For a WET test to be valid, it must pass a rigorous statistical analysis. AR 450–52. Ecology's whole effluent toxicity coordinator, Randall Marshall,<sup>3</sup> maintains a database of WET test results. AR 475:1–6. Consistent with WAC 173-205-070(5)(c), Mr. Marshall puts every test report through a quality assurance examination to make sure the test was properly conducted, and that the statistical analysis was correctly run. *Id.*

Ecology's Permit Writer's Manual lists several reasons why test results may be inconclusive or non-determinative. AR 450–52. Species

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<sup>3</sup> Mr. Marshall wrote the WET regulations, WAC 173-205, in 1993. Since that time, he has authored multiple guidance documents on the WET test, as well as implementation language for permits. AR 474–78; 515:15–17.

sensitivity may vary in response to the many components of any particular effluent. *Id.* A test may show statistical invalidity due to chance, or show a false positive result. *Id.* Results may also show that a laboratory did not follow the test method properly. WAC 173-205-070(5)(c); AR 450–52.

A test may also produce anomalous results. *Id.* “Anomalous” is one specific type of test failure. An anomalous result is one that does not follow an appropriate “dose-response relationship.” AR 823. Typically, as the concentration (or “dose”) of the toxicant increases, the adverse effect on the test organism should increase. *Id.* If the toxic effect does not increase as the concentration of effluent increases, then the test is considered to be anomalous in most cases. AR 451. Mr. Marshall explained that anomalous results happen more often than actual toxicity occurs in a discharge. AR 996:22–997:2. Under Ecology’s rule, anomalous test results are not analyzed against the WET limit, and do not trigger permit requirements for follow-up testing. WAC 173-205-070(5)(c); Condition S7.D (AR 685–86); AR 997:18–998:17.

**3. If toxicity is indicated, the WET rule is designed to identify the toxic substance and remove it.**

Consistent with the Clean Water Act, Ecology’s Permit Writer’s Manual states that the goal of the WET rule “is the eventual elimination of the discharge of toxics in toxic amounts.” AR 444. Mr. Marshall

testified, “[t]he WET test is intended not to just simply label samples as toxic or not, but to find the toxicity when it is unknown and provide a method for discovering what may have caused that toxicity.” AR 478:16–19. A WET test is also a method for assessing the toxic interaction of pollutants, which is necessary because a wastewater effluent discharge may contain many different possible substances. AR 790. To achieve this goal, the WET rule describes follow-up testing required when an acute toxicity test exhibits a statistically significant difference between the control and the effluent at the acute critical effluent concentration. WAC 173-205-090. The permittee must immediately conduct a series of follow-up WET tests weekly for four weeks. WAC 173-205-090(1).

At times, toxicity might simply go away after the first WET test. AR 998:17. If follow-up testing shows no statistical difference between effluent and control in any of the weekly tests, the toxicity may be considered transient. WAC 173-205-100(1). Transient toxicity is not anomalous or a “fluke” result. AR 866:22–868:9. As Mr. Marshall described, if the toxicity is transient, Ecology does not necessarily conclude that the toxicity was nonexistent in the first sample. *Id.* If the test was valid through the statistical review, toxicity may be present in the sample, but it was not an ongoing presence. *Id.* However, the goal of the WET test, to identify a toxic substance, cannot be met because the effect is

no longer present. When toxicity is transient, the permittee must nevertheless report to Ecology the possible causes of the toxicity and preventive measures the permittee has taken. WAC 173-205-100(1).

When a follow-up test shows a statistical difference in test response between effluent and control, a permittee is required to submit a plan to identify the toxic substance and its source.<sup>4</sup> WAC 173-205-100(2). To do this, the permittee conducts a toxicity identification/reduction evaluation, a TI/RE (also called a TRE). WAC 173-205-100(2). A TI/RE is a “site-specific study conducted in a stepwise process designed to identify the causative agents of effluent toxicity, isolate the sources of toxicity, evaluate the effectiveness of toxicity control options, and then confirm the reduction in effluent toxicity.” AR 877 (internal citations omitted).

**4. BP’s Permit is consistent with the WET rule’s requirements for follow-up testing.**

As originally written, Permit Condition S7 set a WET test limit, then prescribed a series of actions BP would be required to take if the limit was exceeded during testing. AR 684–87. As stated above, BP would be in compliance with its acute WET limit when tests showed no statistically significant difference in survival between the control and the tests run at

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<sup>4</sup> The Board held that a violation of the acute WET limit in this follow-up testing is a violation of the permit limit. AR 1108–09.

the acute critical effluent concentration. AR 684. If a statistically significant difference was found, the Permit stated that the test does not comply with the effluent limit for acute toxicity. AR 684. A non-compliant test would trigger a requirement to conduct additional tests starting within one week. Condition S7.D, AR 685. The Permit did not state that a WET test exceedance was a permit violation.

If an initial WET test exceedance occurred, BP was required to perform follow-up testing weekly for four consecutive weeks. *Id.* If all of the additional tests complied with the permit limit, BP was required to submit the transient toxicity report. AR 686. If any follow-up test violated the acute toxicity limit, Ecology required a TI/RE plan to identify the toxic substance and its source. *Id.*

As with any condition in a NPDES permit, BP was required to comply with the acute toxicity provision and its follow-up test requirements. 40 C.F.R. § 122.41(a). If BP complied with the process and performed the follow-up tests, Ecology considered BP to be in compliance with the permit.<sup>5</sup> Compliance was not based on the effluent passing or failing a single WET test.

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<sup>5</sup> This is what Soundkeeper refers to as “compliance with the process is compliance with the permit.” As discussed below, the Permit has been modified such that this phrase is no longer applicable, although Soundkeeper still uses it.

**C. Procedural History Of The Acute WET Test Permit Condition**

Both Soundkeeper and BP appealed the Permit to the Pollution Control Hearings Board. AR 31–34; 98–105. Soundkeeper argued that Condition S7 of the Permit was “unlawful because it [did] not make a failure of the acute WET test a permit violation.” Pet’r Br. at 15. The Board addressed this argument in its Order on Motions for Summary Judgment on Legal Issues 12, 14, & 15, PCHB No. 12-027c (July 26, 2013). The Order found that Ecology “exercised its technical expertise to evaluate at what point a non-compliant WET test indicates a violation of water quality standards, concluding that an initial WET test violation may be transient, not continuing, or simply inconclusive.” AR 1108. The Board found Ecology’s conclusion consistent with EPA guidance. *Id.* The Board deferred to Ecology’s use of a single WET limit exceedance as a trigger for follow-up testing designed to determine whether toxicity is continually present. *Id.* The Board found the requirement to conduct follow-up testing to be a valid exercise of Ecology’s permitting discretion. *Id.*

The Board disagreed with Ecology, however, as to the meaning of follow-up tests showing continually present toxicity. *Id.* Once toxicity was established by WET limit exceedances during subsequent testing, the Board held the toxicity violates water quality standards and the Permit.

AR 1109. While the Permit could set out the strategy for bringing the effluent back into compliance, the Board remanded the Permit to Ecology to clarify that ongoing exceedances of the WET limit are Permit violations, and enforceable. *Id.*

Soundkeeper appealed the Board's decision that a single WET test failure is not a violation of Washington's water quality standard for acute toxicity. Ecology did not appeal the portion of the Board's Order adverse to Ecology. Instead, Ecology modified and reissued BP's Permit to comply with the Board's Order. Condition S7 of the current Permit states that test failures during follow-up testing are violations of the acute limit. App. A at 30. The Permit has been modified consistent with the Board's decision unequivocally concluding that "an ongoing excursion of the WET limit of the Permit is a violation of the water quality standards, and consequently, a violation of the Permit." AR 1109. In addition, follow-up testing, investigation, and planning remain part of the Permit to determine what substance might be responsible for the toxic response shown by a WET test.<sup>6</sup> Soundkeeper is well aware that Ecology has modified the Permit because it has appealed it under Case No. PCHB 13-162. App. B.<sup>7</sup>

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<sup>6</sup> The revised Permit and procedural history subsequent to the Board's decision described above are not part of the Administrative Record in this appeal. The Court may take judicial notice of "facts capable of immediate and accurate demonstration by resort to easily accessible sources of indisputable accuracy and verifiable certainty." *State ex rel. Humiston v. Meyers*, 61 Wn.2d 772, 779, 380 P.2d 735 (1963). BP's current permit

Under the Washington Administrative Procedures Act, RCW 34.05, a final decision of an environmental board may be directly reviewed by the Court of Appeals. RCW 34.05.518(1). Direct review requires that the environmental board issue a certificate of appealability and that the court accept review. Here the Board issued a certificate of appealability on November 6, 2013. CP 42–47.<sup>8</sup> This Court accepted review February 27, 2014.

#### IV. STANDARD OF REVIEW

The burden of demonstrating the invalidity of the agency’s action is on the party asserting invalidity, in this case Soundkeeper. RCW 34.05.570(1)(a). The issue being appealed by Soundkeeper was decided by the Board on summary judgment. AP 1103. “[W]here the original administrative decision was on summary judgment, the reviewing court must overlay the APA standard of review with the summary judgment standard.” *Verizon Northwest, Inc. v. Washington Emp’t Sec. Dep’t*, 164 Wn.2d 909, 916, 194 P.3d 255 (2008) (citing *Alpine Lakes Prot. Soc’y v. Dep’t of Natural Res.*, 102 Wn. App. 1, 14, 979 P.2d 929 (1999)). “Summary judgment is appropriate only where the undisputed

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as modified is available on Ecology’s website at: <https://fortress.wa.gov/ecy/industrial/UIPermit/WaterPermits.aspx>; scroll down to BP Cherry Point Refinery – Blaine – Oil Refinery and click on NPDES Permit WA0022900.

<sup>7</sup> “Courts may take judicial notice of records from a different proceeding to establish the truth of the matters contained therein.” *Welch Foods, Inc. v. Benton Cnty.*, 136 Wn. App. 314, 324, 148 P.3d 1092 (2006).

<sup>8</sup> Citations to CP are to Clerk’s Papers at Thurston County Superior Court.

facts entitle the moving party to a judgment as a matter of law.” *Id.* The decision is reviewed directly, based on the record before the Board. *Alpine Lakes*, 102 Wn. App. at 14. The record before the Board on summary judgment in this case is the briefing of the parties, with attached declarations and exhibits.

The propriety of summary judgment is a question of law, and therefore the substantial evidence standard used for other factual findings is not appropriate. *Verizon*, 164 Wn.2d at 916 n.4. The facts in the administrative record are reviewed in the light most favorable to the nonmoving party, and the law evaluated *de novo* under the error of law standard. *Id.* at 916. Under this standard, substantial weight is accorded to an agency’s interpretation of a statute within its expertise, and to rules that the agency promulgated, although the Court may substitute its view of the law for that of the agency. *Id.* at 915.

Ecology has jurisdiction to control and prevent pollution of the surface and ground waters of the state of Washington, and is the state water pollution control agency for all purposes of the federal Clean Water Act. RCW 90.48.030; RCW 90.48.260(1). Ecology has the complete authority to establish and administer a comprehensive state program compatible with the federal NPDES program under the Clean Water Act. RCW 90.48.260(1)(a). Pursuant to these authorities, Ecology promulgated

both state Water Quality Standards, WAC 173-201A, and the Whole Effluent Toxicity Testing regulations (WET rule), WAC 173-205.

The Board was appointed by the Legislature to adjudicate appeals arising out of Ecology actions. *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 597, 90 P.3d 659 (2004). Board members are qualified by experience or training in matters pertaining to the environment. *Id.* at 592. Where both Ecology and the Board agree on a question, a reviewing court should be “loath to override the judgment of both agencies, whose combined expertise merits substantial deference.” *Id.* at 600.

## V. ARGUMENT

An initial WET test failure does not necessarily mean that a discharge is in fact toxic. The test results may be wrong. In addition, an ongoing presence of effluent toxicity is necessary to investigate the source of toxicity and how to reduce or eliminate it. Because of this, Ecology’s permit did not treat an initial WET test failure as a permit violation, but instead treated it as a triggering event for further testing. The Board, in its decision, affirmed this approach, but reasoned that subsequent test failures must be treated as permit violations. The Board’s decision is supported by the facts and not contrary to law. The Board properly granted deference to

Ecology on this highly technical question, and the Board's Order should be upheld.

**A. Soundkeeper Argues An Issue Not Before This Court When It Seeks Invalidation Of Old Permit Language No Longer Applicable To BP**

Soundkeeper, confusingly, states that it is not asking this Court to revisit the Board's finding in its favor regarding WET limit violations occurring during follow-up testing, yet then proceeds to reargue the issue anyway. Pet'r Br. at 20 n.7; 13–15; 20–27 (Soundkeeper asks the Court to overturn the original language of the Permit. Pet'r Br. at 27). The Permit's prior language has been modified as required by the Board's remand, and no longer operates as Soundkeeper describes.

For instance, Soundkeeper states that the Permit does not require actual compliance with the acute toxicity standard. Pet'r Br. at 14. Soundkeeper prevailed on that issue below, and that issue is not in contention in this appeal. The issue has been resolved outside of this appeal, because Ecology revised BP's Permit, and the current Permit states that if any of the follow-up tests show a statistically significant difference between the test concentration and the control, the test result is a violation of the acute limit. App. A at 30. This is consistent with the Board's decision that such ongoing exceedances are permit violations. AR 1109.

Soundkeeper next contends that the previous acute toxicity condition (again, as that condition was phrased in the previous version of BP's Permit) subjects BP to no enforcement consequences. Pet'r Br. at 20. The Board's decision addressed this issue, remanding the Permit to clarify that ongoing exceedances are enforceable by Ecology. AR 1109. The modified permit makes ongoing exceedances a violation of the acute limit, which subjects BP to enforcement.

Finally, Soundkeeper argues that a toxic discharge may continue indefinitely under the Permit because performance of the follow-up procedure is all that determines Permit compliance. Pet'r Br. at 23. This is incorrect because the revised Permit states that a WET test exceedance in follow-up testing is a violation of the acute limit. Thus while additional testing, investigation, and planning remain part of the Permit to determine what substance might be responsible for the toxic response shown by a WET test, Soundkeeper is incorrect when it states that follow-up testing is all that is required for Permit compliance.

**B. WET Tests Measure An Effect—Toxicity—Which Is Affected By Many Variables**

Toxicity is unlike a single compound for which a numeric limit can be derived. Toxicity cannot be purified or weighed. Whole Effluent Toxicity Test Methods, Final Rule, 67 Fed. Reg. 69,952, 69,965 (Nov. 19,

2002) (AR 839). “Toxicity is only defined by its effects on organisms, and it is these effects that are directly measured in the toxicity test.” *Id.*

A WET test uses living organisms as test subjects, introducing a potential for variability between and within tests because, just as toxicity cannot be purified, live organisms cannot be calibrated. *Edison Electric Inst. v. Environmental Prot. Agency*, 391 F.3d 1267, 1270 (D.C. Cir. 2004).<sup>9</sup> “[T]he use of living specimens introduces a significant potential for variability between and within tests.” *Id.* at 1269. In a WET test, toxicity is both measured and defined by the test itself. *Id.* at 1270. Because of this, and unlike an individual pollutant for which there is a numeric limit, there is no “true value” against which to compare a WET test result. *Id.* A range of toxicants may produce a range of responses, and a single response pattern may be due to different reasons, some indicating toxicity, some not. 67 Fed. Reg. at 69,962 (AR 836). While EPA endeavored to account for this variability through statistical analysis, ultimately “WET tests will be wrong some of the time, which is why EPA warned against using a single test result to institute an action for a civil penalty.” *Edison*, 391 F.3d at 1272 (citing 67 Fed. Reg. at 69,968 (AR 842)). This is not to suggest that a WET test is unreliable or

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<sup>9</sup> The court in *Edison* was reviewing test procedures for chronic WET tests, but its conclusions regarding test variability introduced by the use of live test organisms and the character of toxicity are equally applicable to both chronic and acute testing.

inappropriate for use in the regulatory context. In *Edison*, the D.C. Circuit Court of Appeals found that WET tests exhibit precision and predict instream effects accurately, even though they “are not without their flaws.” *Id.* at 1271, 1273, 1274. As discussed above, Ecology has more than 20 years of experience administering WET tests, and maintains a robust database of WET test results.

**C. Ecology’s Permit Meets The Goals And Requirements Of The Clean Water Act**

The elimination of pollution from discharge is one goal of the Clean Water Act. 33 U.S.C. § 1251(a)(3). Consistent with this goal, BP’s Permit contains numeric limits for specific substances, and requires testing for both acute and chronic toxicity. AR 664–68; 684–89. These limits are in the Permit so that a facility’s discharge meets water quality standards. 40 C.F.R. § 122.44(d). The Board’s decision clarified that when an exceedance of a WET test during follow-up testing is shown, this violates a water quality standard, and thus the Permit. Permit Condition S7 does not, as Soundkeeper claims, “allow BP’s discharges to periodically fail the acute WET test.” Pet’r Br. at 2.

Condition S7 uses WET testing to identify when acutely toxic substances may be discharging from the facility, and sets procedures designed to identify the specific toxic substance so that BP can eliminate

that substance from its discharge. As Mr. Marshall testified, “toxicity is an effect. You can’t get your hands on it. It is ephemeral. What you need to do is translate that effect into a substance.” AR 1075:9–11. The purpose of a WET test is to first find a toxic effect then, second, discover its cause. AR 1074:16–19. When the results of an acute WET test show a statistically significant difference in response between the control and the effluent at the acute critical effluent concentration, then a toxic effect has been shown. Mr. Marshall’s intention, in crafting the WET permit language, was to give permittees the “elbow room” necessary to do the work of identifying what, if any, toxic substance is actually causing a toxic effect. AR 1078:9–10.

Because of the unique character of the WET test—the use of live organisms to test an effect—Ecology determined that an initial WET test failure, while providing relevant and important information regarding the possible presence of effluent toxicity, does not prove that a facility discharged a toxic substance. If the test organisms die, the cause may be reasons other than toxicity from the facility. The permit appropriately treats the initial WET test failure as an indicator of potential toxicity that triggers further testing, not as definitive proof that a toxic discharge has occurred. Given that a test failure may be inconclusive, or even wrong, the permit does not violate the Clean Water Act.

To fully achieve and maintain water quality, Ecology applies various implementation and enforcement strategies. WAC 173-201A-500. For instance, compliance schedules may be authorized to allow a permittee time to come into compliance with water quality standards under certain circumstances. 40 C.F.R. § 122.47(a)(1); WAC 173-201A-510(4). Compliance schedules are developed to ensure final compliance with all water quality-based effluent limits in the shortest practicable time. WAC 173-201A-510(4)(a). A second type of tool employed in general permits is the use of benchmarks to trigger adaptive management mechanisms designed to result in permit compliance. RCW 90.48.555(8). A benchmark is not a numeric effluent limitation, but is a threshold or indicator value used to trigger actions designed to achieve compliance with water quality limits.

The WET test is a third type of permit tool to achieve compliance with water quality standards. The WET provisions, much like other permit tools such as compliance schedules and benchmarks triggering adaptive management, are implemented to reasonably manage complex circumstances and discharges. These tools do not violate the Clean Water Act but instead achieve its purpose of eliminating pollutants from our nation's waterways.

The Permit WET provision at issue here provides a path forward after a failed WET test, a procedure sought by both the regulated and the environmental community. AR 516:9–13. Both communities wanted to know what would happen at a facility based on the results of a WET test. *Id.* The Permit’s WET condition provides BP a procedure to obtain an answer to the question of whether a toxicant is being discharged from its facility. AR 509:16–21. What Soundkeeper mischaracterizes as political motivation to shield dischargers is, in fact, Ecology’s attempt to encourage a facility to conduct the follow-up testing to determine if a toxicant is actually present in its effluent, and what that toxic substance is.<sup>10</sup> Pet’r Br. at 25, 36; AR 509:6–21. Because a single, non-determinative WET test failure does not definitively establish that an effluent contains a toxic substance, the Permit properly does not make a single test failure a violation.

**D. The Board Properly Affirmed Ecology’s Permitting Discretion**

The Board correctly noted that “Ecology’s position that an exceedance of a WET limit, by itself, is not subject to enforcement is based in part on the difficulty of assessing whether the toxicity problem evidenced in an initial WET test is transient or continuing, or conclusive

---

<sup>10</sup> Mr. Marshall also testified that administrative efficiency was served by permit language that told a permittee what their next steps to investigate toxicity needed to be without Ecology having to issue an administrative order. AR 516:14–19.

as to the toxicant that may be a problem.” AR 1104. The Board recognized that the technical and scientific question at issue in Condition S7 was whether an initial non-compliant WET test would reliably establish a violation of the water quality standard for toxicity. AR 1108. On this complex technical issue, the Board deferred to Ecology, and upheld Permit Condition S7 to the extent the Permit allowed a permittee to be in compliance with the Permit requirements while conducting follow-up tests after an initial WET test indicated an exceedance. *Id.* The Board found Ecology’s approach to a single non-determinative WET test valid, and within Ecology’s permitting discretion. *Id.*

The Board does not, as Soundkeeper claims, create any exception to state water quality standards. Pet’r Br. at 29. Rather, the Board’s decision takes into account that an initial WET test limit exceedance may or may not be the result of the discharge of a toxicant. If follow-up testing shows toxicity, BP will not be excused from compliance with the Permit. The Permit simply takes into account the non-determinate nature of the initial toxicity test. The Board did not err in affirming Permit Condition S7 as to the initial WET test.

**E. The Permit Does Not Conflict With Water Quality Standards Or The WET Rule**

As discussed above, BP may not discharge pollutants to surface waters in violation of water quality standards. While a WET test showing no toxicity is compliant with the narrative water quality standard prohibiting the discharge of toxic substances, the standard is not necessarily violated in the case of a single failed WET test. This is why the WET rule and the Permit direct BP to conduct a TI/RE to identify the substance that is the source of the toxicity.

Washington's narrative water quality standard for toxicity states that toxic substances with the potential to cause toxicity in receiving waters shall not be introduced above background. WAC 173-201A-240(1). Mr. Marshall did not state, as Soundkeeper claims, that a violation of a WET limit indicates a violation of WAC 173-201A-240(1). Pet'r Br. at 11 (citing AR 474:20–476:24, AR 500:8–501:24, AR 506:1–507:8). Rather, Mr. Marshall confirmed that the WET test is how Ecology measures compliance, not what the meaning of a violation of an initial WET limit might mean vis-a-vis the level of a toxic substance in the sample. What he did say was that the work had to be done to identify the toxicant and solve the problem. AR 509:6–10, 16–21.

Soundkeeper is arguing that a single, initial WET test failure always and dispositively means that a toxic substance is being discharged from BP. It does not. Soundkeeper's argument requires one provision of the WET rule to be read in isolation, and ignores the rest of the regulation, which Ecology crafted to identify and eliminate toxic substances from discharges.

The rules of statutory construction apply to regulations. *Overlake Hosp. Ass'n v. Dep't of Health*, 170 Wn.2d 43, 53, 239 P.3d 1095 (2010) (quoting *City of Seattle v. Allison*, 148 Wn.2d 75, 81 (2002)). Regulations should be read together to achieve a harmonious total scheme. *Cf. State ex rel. Peninsula Neighborhood Ass'n v. Dep't of Transp.*, 142 Wn.2d 328, 342, 12 P.3d 134 (2000) (internal quotes omitted). The regulatory framework in the WET rule accounts for the highly technical nature of a WET test. When a WET test exceedance is used to trigger follow-up testing and toxicant elimination, it is consistent with both the WET rule and with the state water quality standard that prevents the discharge of toxicant substances to state waters.

BP's Permit, as originally written, followed the WET rule closely. The rule contains a well-defined and detailed process for the identification of a toxicant. WAC 173-205-090, -100; AR 516:6-22. Including that level of detail in the Permit made the process of toxicant identification the

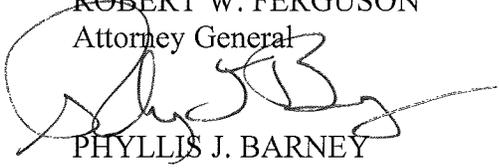
point of the Permit provision, which benefits both the environment and the permittees. AR 516:20–517:3. BP’s Permit complies with state law and the Clean Water Act.

## VI. CONCLUSION

The Pollution Control Hearings Board correctly held that the law allows an initial WET test failure to be used as a trigger for further procedures aimed at determining if a violation of the toxicity standard has occurred. BP’s Permit is consistent with the requirements of the Clean Water Act and state law. For the foregoing reasons, Ecology respectfully requests that this Court affirm the Board’s Order.

RESPECTFULLY SUBMITTED this 28<sup>rd</sup> day of June 2014.

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NO. 45609-5-II  
**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

PUGET SOUNDKEEPER  
ALLIANCE; RE SOURCES FOR  
SUSTAINABLE COMMUNITIES; and  
FRIENDS OF THE EARTH,

Petitioners,

v.

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

Respondents.

CERTIFICATE OF  
SERVICE

Pursuant to RCW 9A.72.085, I certify that on the 23rd day of June 2014, I caused to be served Respondent Department of Ecology's Response to Petitioners' Opening Brief in the above-captioned matter upon the parties herein as indicated below:

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the foregoing being the last known address.

I certify under penalty of perjury under the laws of the state of  
Washington that the foregoing is true and correct.

DATED this 23rd day of June 2014, in Olympia, Washington.

  
TRICIA KEALY  
Legal Assistant

# APPENDIX A

Issuance Date: February 14, 2012  
 Modification Date: December 2, 2013  
 Effective Date: March 1, 2012  
 Expiration Date: March 1, 2017

NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM  
 WASTE DISCHARGE PERMIT No. WA0022900

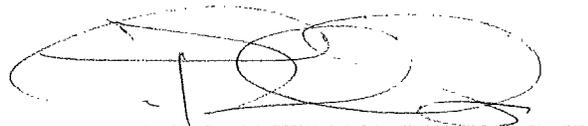
State of Washington  
 DEPARTMENT OF ECOLOGY  
 Olympia, Washington 98504-7600

In compliance with the provisions of  
 The State of Washington Water Pollution Control Law  
 Chapter 90.48 Revised Code of Washington  
 and  
 The Federal Water Pollution Control Act  
 (The Clean Water Act)  
 Title 33 United States Code, Section 1251 et seq.

BP Cherry Point Refinery  
 4519 Grandview Road  
 Blaine, Washington 98230

Facility Location: 4519 Grandview Road Blaine, Washington 98230	Receiving Water: Strait of Georgia			
		Latitude	Longitude	
	Outfall 001	48.860833	122.757222	
	Outfall 006	48.866111	122.752222	
	Receiving Water: Terrell Creek			
		Latitude	Longitude	
	Outfall 002	48.859167	122.731944	
	Outfall 003	48.8925	122.743056	
	Outfall 004	48.8925	122.747778	
	Outfall 005	48.8825	122.747778	
	Outfall 007	48.891944	122.726389	
	Industry Type:	Petroleum Refinery		

is authorized to discharge in accordance with the special and general conditions which follow.



Garin Schriever, P.E.  
 Industrial Section Manager  
 Waste 2 Resources Program

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S7. ACUTE TOXICITY

A. Effluent Limit for Acute Toxicity

The effluent limit for acute toxicity is:

**No acute toxicity detected in a test concentration representing the acute critical effluent concentration (ACEC).**

The ACEC means the maximum concentration of effluent during critical conditions at the boundary of the acute mixing zone, defined in Section S1.F of this permit. The ACEC equals 3.6 % effluent.

B. Compliance With the Effluent Limit for Acute Toxicity

Compliance with the effluent limit for acute toxicity means the results of the testing specified in subsection C. show no statistically significant difference in survival between the control and the ACEC.

If the test results show a statistically significant difference in survival between the control and the ACEC, the test does not comply with the effluent limit for acute toxicity. The Permittee must then immediately conduct the additional testing described in subsection D. The Permittee will comply with the requirements of this section by meeting the requirements of subsection D.

The Permittee must determine the statistical significance by conducting a hypothesis test at the 0.05 level of significance (Appendix H, EPA/600/4-89/001). If the difference in survival between the control and the ACEC is less than 10%, the Permittee must conduct the hypothesis test at the 0.01 level of significance.

C. Compliance Testing for Acute Toxicity

The Permittee must:

1. Begin compliance testing by **May 1, 2012**. Perform the acute toxicity tests with 100% effluent, the ACEC, and a control, or with a full dilution series.
2. Submit a written report of all test results to Ecology within sixty (60) days after completion of the test.

The Permittee must perform compliance tests **quarterly** using each of the species and protocols listed below on a rotating basis:

Acute Toxicity Tests	Species	Method
Topsmelt 96-hour static-renewal test	<i>Atherinops affinis</i>	EPA-821-R-02-012

Acute Toxicity Tests	Species	Method
Mysid 48-hour static test	<i>Americamysis bahia</i>	EPA-821-R-02-012

D. Response to Noncompliance with the Effluent Limit for Acute Toxicity

If a toxicity test conducted under subsection C. determines a statistically significant difference in response between the ACEC and the control, using the statistical test described in subsection B., the Permittee must begin additional testing within one week from the time of receiving the test results. The Permittee must:

1. Conduct one additional test each week for four consecutive weeks, using the same test and species as the failed compliance test.
2. Test at least five effluent concentrations and a control to determine appropriate point estimates. One of these effluent concentrations must equal the ACEC. The results of the test at the ACEC will determine compliance with the effluent limit for acute toxicity as described in Subsection B.
3. Return to the original monitoring frequency in Subsection C. after completion of the additional compliance monitoring.

**Anomalous test results:** If a toxicity test conducted under subsection C. indicates noncompliance with the acute toxicity limit and the Permittee believes that the test result is anomalous, the Permittee may notify Ecology that they believe the compliance test result is anomalous. The Permittee should conduct one additional test then wait for notification from Ecology before completing the additional testing required above. The Permittee must submit the notification with the report of the compliance test result and identify the reason for considering the compliance test result to be anomalous.

If Ecology determines that the test result was not anomalous, the Permittee must complete all of the additional monitoring required in this subsection. Or,

If the one additional test fails to comply with the effluent limit for acute toxicity, then the Permittee must complete all of the additional monitoring required in this subsection. Or,

If Ecology determines that the test result was anomalous, the one additional test result will replace the anomalous test result.

If all of the additional testing complies with the permit limit, the Permittee must submit a report to Ecology on possible causes and preventive measures for the transient toxicity event, which triggered the additional compliance monitoring. This report must be based upon a review of all pertinent and recent facility records, including:

1. Operating records
2. Monitoring results
3. Inspection records
4. Spill reports
5. Weather records
6. Production records
7. Raw material purchases
8. Pretreatment records, etc.

If any toxicity test conducted under subsection D. 1. shows a statistically significant difference in response between the ACEC and the control, using the statistical test described in subsection B, then the test result is a violation of the acute limit.

E. Sampling and Reporting Requirements

1. The Permittee must submit all reports for toxicity testing in accordance with the most recent version of Department of Ecology Publication No. WQ-R-95-80, *Laboratory Guidance and Whole Effluent Toxicity Test Review Criteria*. Reports must contain toxicity data, bench sheets, and reference toxicant results for test methods. In addition, the Permittee must submit toxicity test data in electronic format (CETIS export file preferred) for entry into Ecology's database.
2. The Permittee must collect 24-hour composite effluent samples or grab samples for toxicity testing. The Permittee must cool the samples to 0 - 6 degrees Celsius during collection and send them to the lab immediately upon completion. The lab must begin the toxicity testing as soon as possible but no later than 36 hours after sampling was completed.
3. The laboratory must conduct water quality measurements on all samples and test solutions for toxicity testing, as specified in the most recent version of Department of Ecology Publication # WQ-R-95-80, *Laboratory Guidance and Whole Effluent Toxicity Test Review Criteria*.
4. All toxicity tests must meet quality assurance criteria and test conditions specified in the most recent versions of the EPA methods listed in subsection C. and Ecology of Ecology Publication # WQ-R-95-80, *Laboratory Guidance and Whole Effluent Toxicity Test Review Criteria*. If Ecology determines any test results to be invalid or anomalous, the Permittee must repeat the testing with freshly collected effluent.
5. The laboratory must use control water and dilution water meeting the requirements of the EPA methods listed in subsection C. or pristine natural water of sufficient quality for good control performance.
6. The Permittee must conduct whole effluent toxicity tests on an unmodified sample of final effluent.

7. The Permittee may choose to conduct a full dilution series test during compliance testing in order to determine dose response. In this case, the series must have a minimum of five effluent concentrations and a control. The series of concentrations must include the acute critical effluent concentration (ACEC). The ACEC equals 3.6 % effluent.
8. All whole effluent toxicity tests, effluent screening tests, and rapid screening tests that involve hypothesis testing must comply with the acute statistical power standard of 29% as defined in WAC 173-205-020. If the test does not meet the power standard, the Permittee must repeat the test on a fresh sample with an increased number of replicates to increase the power.
9. Reports of individual characterization or compliance test results must be submitted to Ecology within 60 days after completion of the test.

**S8. CHRONIC TOXICITY**

A. Testing When There Is No Permit Limit for Chronic Toxicity

The Permittee must:

1. Conduct chronic toxicity testing on final effluent **once** in the last summer and **once** in the last winter prior to submission of the permit renewal application.
2. Submit the results to Ecology with the permit renewal application.
3. Conduct chronic toxicity testing on a series of at least five concentrations of effluent and a control. This series of dilutions must include the acute critical effluent concentration (ACEC). The ACEC equals 3.6% effluent.
4. Compare the ACEC to the control using hypothesis testing at the 0.05 level of significance as described in Appendix H, EPA/600/4-89/001.
5. Perform chronic toxicity tests with all of the following species and the most recent version of the following protocols:

Saltwater Chronic Test	Species	Method
Topsmelt 7-day survival and growth	<i>Atherinops affinis</i>	EPA/600/R-95/136
Echinoderm embryo-larval development test	<i>Strongylocentrotus Purpuratus</i> or <i>Dendraster excentricus</i>	EPA/600/R-95/136

The laboratory must conduct the sea urchin and sand dollar (echinoderm) test in accordance with EPA/600/R-95/136 and the echinoderm development test conditions in the most recent version of Ecology Publication No. WQ-R-95-80,

# **APPENDIX B**

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DEPARTMENT OF ECOLOGY  
OFFICE OF DIRECTOR

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POLLUTION CONTROL HEARINGS BOARD  
FOR THE STATE OF WASHINGTON

PUGET SOUNDKEEPER ALLIANCE; )  
RE-SOURCES FOR SUSTAINABLE )  
COMMUNITIES; and FRIENDS OF THE )  
EARTH, )  
Petitioners, )  
v. )  
DEPARTMENT OF ECOLOGY; and BP )  
CHERRY POINT REFINERY, )  
Respondents, )

PCHB No.  
NOTICE OF APPEAL

The appealing parties are

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San Francisco, CA 94104

NOTICE OF APPEAL - 1

cc:  Inf. Database Coord.  
 Rev/Rec - Cost Recovery

File - Pwr to ATG  
 ATG Docket Clerk

Initial: GC 12/30/13 *Grain Schriever w/2R 1 ind*

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SEATTLE, WASHINGTON 98112  
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2 The representative of the appealing parties is

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4 Smith & Lowney, PLLC  
2317 E. John St.  
5 Seattle, WA 98112  
(206) 860-2124  
6 Fax (206) 860-4187

7 This appeal is of the March 1, 2012, modification of NPDES Permit No. WA0022900,  
8  
9 initially issued by the Washington Department of Ecology to BP Cherry Point Refinery on  
10 February 14, 2012. A copy of the challenged permit is attached to this notice of appeal.

11 Petitioners consider the challenged permit to be unlawful because it fails to ensure that  
12 discharges will not cause or contribute to violations of water quality standards. In particular,  
13 Petitioners challenge the acute toxicity provisions of condition S7 as inconsistent with provisions  
14 of state and federal law, including 33 U.S.C. § 1311(b)(1)(C) and 1342, 40 C.F.R. § 122.44,  
15 RCW 90.48.520, and WAC chapters 173-201A and 173-205. Petitioners assert that the  
16 challenged permit's provisions for an acute whole effluent toxicity ("WET") effluent limitations  
17 is inconsistent with applicable law because it authorizes discharges that fail the compliance test  
18 for acute toxicity. Petitioners assert that the permit must prohibit discharges that fail the  
19 compliance test for acute toxicity.  
20  
21

22 Ecology issued the challenged permit modification after the Board's resolution on  
23 summary judgment and settlement of PCHB No. 12-027c. One of the issues in that case, which  
24 the Board addressed in its summary judgment order of July 26, 2013, was a challenge to the  
25 acute toxicity provisions of the pre-modification permit. Petitioners' petition for judicial review  
26 of the Board's July 26, 2013, is currently pending in Thurston County Superior Court while the  
27  
28

29 NOTICE OF APPEAL - 2

SMITH & LOWNEY, P.L.L.C.  
2317 EAST JOHN STREET  
SEATTLE, WASHINGTON 98112  
(206) 860-2883

1 Court of Appeals considers the petitions for direct review filed by the parties. *See* Thurston  
2 County Superior Court No. 13-2-01990-3, Certificate of Appealability, November 6, 2013.  
3 Despite this pending judicial review, Ecology modified the permit, in compliance with the  
4 parties' settlement and, assertedly, with the Board's summary judgment order on the acute  
5 toxicity effluent limitation issue. Petitioners' claim that the Board and Ecology, in its issuance  
6 of the modified condition S7, continue to misinterpret or misapply the applicable law, an issue  
7 that will be resolved in the course of the pending judicial review. Petitioners file this appeal to  
8 preserve their rights to challenge condition S7 as modified after the conclusion of judicial  
9 review. Petitioners intend to ask for a stay of the instant appeal until judicial review of the  
10 Board's summary judgment order in PCHB No. 12-027c is complete.  
11

12  
13 The permitted facility is approximately 6 miles north of Ferndale, Washington, and  
14 processes approximately 209 bbls per day of crude oil. The facility's wastewater treatment plant  
15 treats various wastewater streams, including process water, ballast water from tankers, tank  
16 water draws, and stormwater from the process areas of the site. Treated process wastewater is  
17 discharged to the Strait of Georgia on a continuous basis, with an average discharge between 2.8  
18 and 6.4 MGD. With respect to these process wastewater discharges, the challenged permit  
19 includes conditions for WET effluent limitations that allow the permittee to discharge toxic  
20 effluent in violation of applicable law.  
21

22  
23 Petitioners seek an order from the Board declaring that the challenged permit is invalid  
24 and directing Ecology to modify or reissue the permit to satisfy applicable legal requirements  
25 and as otherwise instructed by the Board.  
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Dated this 24<sup>th</sup> day of December, 2013.

SMITH & LOWNEY, PLLC

By: *RASA*  
Richard A. Smith, WSBA #21788  
Attorneys for Petitioners

CERTIFICATE OF SERVICE

I, Jessie Sherwood, declare that on December 24<sup>th</sup>, 2013, I had this Notice Of Appeal served by U.S. mail on the Department of Ecology, Attn: Appeals Processing Desk, P.O. Box 47608, Olympia, WA 98504-7608, and BP Cherry Point Refinery, 4519 Grandview Rd., Blaine WA 98230.

*Jessie Sherwood*  
Jessie Sherwood

# WASHINGTON STATE ATTORNEY GENERAL

**June 23, 2014 - 2:41 PM**

## Transmittal Letter

Document Uploaded: 456095-Response Brief.pdf

Case Name:

Court of Appeals Case Number: 45609-5

**Is this a Personal Restraint Petition?** Yes  No

### The document being Filed is:

Designation of Clerk's Papers  Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: \_\_\_\_\_

Answer/Reply to Motion: \_\_\_\_\_

Brief: Response

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_\_

Hearing Date(s): \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: \_\_\_\_\_

### Comments:

No Comments were entered.

Sender Name: Tricia R Kealy - Email: [Tricia.Kealy@atg.wa.gov](mailto:Tricia.Kealy@atg.wa.gov)

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