

NO. 47158-2

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

SPOKANE COUNTY; STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Appellants,

v.

SIERRA CLUB, and CENTER FOR ENVIRONMENTAL
LAW & POLICY,

Respondents.

**APPELLANT STATE OF WASHINGTON, DEPARTMENT OF
ECOLOGY'S REPLY BRIEF**

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TABLE OF CONTENTS

I. INTRODUCTION.....1

II. ARGUMENT2

 A. Sierra Club’s Arguments Regarding The Proper Burden
 Of Proof Before The Board And The Board’s Ability To
 Require Additional Conditions In The County’s Permit Is
 Inconsistent With Supreme Court Precedent2

 B. Sierra Club’s Reliance On The Substantial Evidence Test
 Fails To Address The Legal Issues Presented In This
 Case.....5

 C. The Board Improperly Applied The Law By Concluding
 Ecology Should Have Exercised Its Discretion
 Differently Without Finding That Ecology’s Exercise Of
 Discretion Was Invalid9

 D. The Board Properly Rejected Sierra Club’s “River As A
 Whole” Argument.....12

III. CONCLUSION18

TABLE OF AUTHORITIES

Cases

Dep't of Ecology v. Theodoratus,
135 Wn.2d 582, 957 P.2d 1241 (1998)..... 3

Port of Seattle v. Pollution Control Hearings Bd.,
151 Wn.2d 568, 90 P.3d 659 (2004)..... 2, 3, 4, 11

Thomas v. Lehman,
138 Wn. App. 618, 158 P.3d 86 (2007)..... 4

Statutes

33 U.S.C. § 1342(a)..... 13

33 U.S.C. § 1362(12)..... 14

RCW 34.05.570(3)(d)..... 5, 12

RCW 34.05.570(3)(e)..... 6

RCW34.05.570(3)(i)..... 5

I. INTRODUCTION

Sierra Club and the Center for Environmental Law and Policy (collectively “Sierra Club”) rely on an Environmental Protection Agency guidance document to support their argument that the Department of Ecology should have performed a reasonable potential analysis for Spokane County’s state of the art, advanced wastewater treatment facility, without facility specific effluent data. The guidance document Sierra Club relies on gave Ecology the discretion to either do a reasonable potential analysis without facility specific data, or to defer the reasonable potential analysis until the County collects facility specific effluent data that Ecology could use for a reasonable potential analysis. Ecology exercised its permitting discretion and technical expertise and elected to defer a reasonable potential analysis for PCBs until after the County collects facility specific effluent data for PCBs.

The Pollution Control Hearings Board (“Board”) did not find that Ecology exercised its permitting discretion and technical expertise in an invalid manner. Rather, the Board simply concluded that Ecology “should have” exercised its discretion and technical expertise differently. Sierra Club has decided to focus its arguments on the substantial evidence test, whether there is substantial evidence to support the Board’s findings of fact, despite the fact that neither Ecology nor Spokane County have

challenged any of the Board's findings of fact. The issue in this case is a legal issue: did the Board fail to properly apply the law when it concluded that Ecology "should have" exercised its discretion differently without finding that Ecology had exercised its discretion in an invalid manner? As discussed below, Ecology properly exercised its permitting discretion and the Board erred when it failed to give deference to Ecology's technical expertise regarding the appropriate data to use to perform a reasonable potential analysis.

II. ARGUMENT

A. **Sierra Club's Arguments Regarding The Proper Burden Of Proof Before The Board And The Board's Ability To Require Additional Conditions In The County's Permit Is Inconsistent With Supreme Court Precedent**

Sierra Club argues that the Board's deference to Ecology's technical expertise is "significantly tempered" by the Board's de novo review and duty to weigh the evidence. Brief of Respondent at 20. However, the Supreme Court has rejected this argument.

In *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 594, 90 P.3d 659 (2004), the Court held; "[b]ecause the legislature entrusted Ecology with administration of water quality standards; we conclude, in accordance with our prior case law, that we must give great weight to Ecology's interpretation of the laws that it administers." (citing

Dep't of Ecology v. Theodoratus, 135 Wn.2d 582, 589, 957 P.2d 1241 (1998)). The Court held that it respects the Board's "statutory role as independent reviewer of Ecology actions and the trial-like nature of the PCHB hearings" by applying the "clearly erroneous" standard to review the Board's findings of fact. *Port of Seattle*, 151 Wn.2d at 594. As discussed above, this case does not challenge any of the Board's findings of fact, it only challenges conclusions of law and the Board's resulting remand order. However, even when reviewing the Board's findings of fact under the clearly erroneous standard, "deference will be given to Ecology on technical issues based on Ecology's specialized expertise." *Id.* at 595. Despite Sierra Club's arguments to the contrary, neither the Board's de novo review nor its duty to weigh the evidence "significantly temper[s]" the Board's deference to Ecology's technical expertise.

The Board properly interpreted the law when it concluded that it is required to give "deference to Ecology's expertise in administering water quality laws and on technical judgments, especially where they involve complex scientific issues." AR at 2235 (Conclusion of Law (CL) 1) (citing *Port of Seattle*, 151 Wn.2d at 593–94). Unfortunately, the Board failed to properly apply the law when it failed to give Ecology deference regarding the quality and quantity of data necessary to conduct a reasonable potential analysis for the PCBs discharged by a facility that

discharges PCBs “at potentially undetectable levels.” AR at 2228 (Finding of Fact (FF) 16).

The issue in this case involves Ecology’s exercise of its permitting discretion and Ecology’s technical judgment regarding a complex scientific issue—the quality and quantity of data necessary to conduct a reasonable potential analysis. As Sierra Club correctly notes, the Board’s regulations require that the Board must find that a permit issued by Ecology is invalid before the Board orders Ecology to change conditions in the permit. Brief of Respondents at 19 (quoting WAC 371-08-540). *Accord Port of Seattle*, 151 Wn.2d at 592 (Board cannot add conditions simply because it feels such conditions would be more protective of water quality). Ecology’s exercise of its discretion is valid so long as Ecology does not exercise its discretion in a manner that is arbitrary, capricious, fraudulent, or without a factual basis. *Thomas v. Lehman*, 138 Wn. App. 618, 626, 158 P.3d 86 (2007). Consequently, in order to find that Ecology has exercised its discretion in an invalid manner, as it must do before directing Ecology to add conditions to a permit, the Board must first find that Ecology exercised its discretion in a manner that was arbitrary, capricious, fraudulent, or without a factual basis. The Board did not make any such finding, and could not have made such a finding on the record before it. Consequently, the Board erroneously applied the law when it

concluded that Ecology “should have” exercised its discretion differently without first finding that Ecology had exercised its discretion in an invalid manner.¹ Relief is appropriate under RCW 34.05.570(3)(d) and Ecology respectfully requests that the Court reverse Conclusions of Law 10–16 and the Board’s resulting remand order.

B. Sierra Club’s Reliance On The Substantial Evidence Test Fails To Address The Legal Issues Presented In This Case

Ecology’s Opening Brief assigned error to seven of the Board’s conclusions of law and the Board’s resulting remand order. Ecology’s Opening Brief at 3. Accordingly, Ecology argued that the Board failed to properly interpret or apply the law, and requested relief under RCW 34.05.570(3)(d). In its assignments of error, Spokane County argued that the Board erroneously interpreted or applied the law, and its resulting order is arbitrary and capricious. Brief of Appellant Spokane County at 15–16. Accordingly, Spokane County requested relief under RCW 34.05.570(3)(d) (error of law), and (i) (arbitrary and capricious). Neither Ecology nor Spokane County have challenged any of the Board’s findings of fact because the issues presented in this case are legal issues, namely

¹ Based on a definition of “invalid” in Black’s Law Dictionary, Sierra Club suggests that the Board could find Ecology’s exercise of discretion invalid by finding that Ecology’s exercise of discretion was “vain; inadequate to its purpose; not of binding force or legal efficacy; lacking in authority or obligation.” Brief of Respondent at 19–20. Ecology does not agree that this is the appropriate standard to evaluate Ecology’s exercise of discretion on a technical and complex scientific issue, but even if it is, Sierra Club fails to identify where the Board made any such finding. Nor could it, because the Board never made any such finding.

whether the Board erroneously interpreted or applied the law, or acted arbitrarily and capriciously, when it concluded that Ecology “should have” done a reasonable potential analysis without facility specific monitoring data; and whether the Board erroneously interpreted or applied the law, or acted arbitrarily and capriciously, when it concluded that the discharge from the County’s facility has a reasonable potential under the Clean Water Act to cause or contribute to a violation of water quality standards.

While neither Ecology nor Spokane County seek relief under RCW 34.05.570(3)(e) (substantial evidence), Sierra Club’s arguments “rely primarily” on the substantial evidence test. Brief of Respondents at 17–18 (“Respondents’ arguments rely primarily on . . . the substantial evidence test.”). As a result of its decision to primarily rely on the substantial evidence test for its arguments, Sierra Club fails to address the legal issues actually raised by Ecology and Spokane County. Consequently, Sierra Club devotes the majority of its brief arguing about evidence in the record, and most of the evidence Sierra Club relies on is evidence that the Board either implicitly rejected by not making any findings related to the evidence, or evidence that the Board explicitly rejected by making contrary findings and conclusions. For example, Sierra Club attempts to bolster its reasonable potential argument by explaining an exercise its expert “walked the Board through” with the limited PCB data the County

had collected prior to the hearing before the Board. Brief of Respondents at 34–36. As part of this exercise, Mr. deFur manipulated the PCB monitoring data and used the manipulated data to “rough[] the statistical analysis suggested in the *TSD for Toxics Control*.” *Id.* at 34. Despite the fact that the *TSD* requires the use of “appropriate dilution,” AR at 2659 (Hearing Ex. A-20), and despite the fact that the Permit Fact Sheet concluded there is available dilution for the County’s discharge, AR at 3732 (Hearing Ex. ECY-2), Mr. deFur elected to ignore the available dilution. Testimony of Peter deFur, RP (Mar. 26, 2013) 284:4–21. *See also* Brief of Respondents at 33 (arguing it is “inappropriate to consider dilution.”). Mr. deFur’s decision to ignore the available dilution was inconsistent with the statistical analysis he purportedly “roughed” for the Board, but it allowed him to create an inflated PCB concentration for the County’s discharge that he could compare to the dated and incomplete data in the Source Assessment document to offer an opinion that the County’s discharge had a reasonable potential to cause or contribute to a violation of PCB water quality standards.

The Board rejected Mr. deFur’s creative math exercise and specifically rejected his decision to ignore available dilution by concluding that there was “available dilution for the effluent” and citing the discussion of available dilution in the Fact Sheet to support its

conclusion.² AR at 2240 (CL 9). The Board also explicitly rejected any suggestion that the County's discharge would result in a measurable increase in the concentration of PCBs in the Spokane River. AR 2246 (CL 18) (Sierra Club failed to offer evidence rebutting Ecology's conclusion that the discharge from the County's facility would not cause a measurable increase in the concentration of PCBs in the Spokane River).

With respect to Mr. deFur's decision to compare his improperly manipulated "estimates" to the proposed allocations in the Source Assessment document, the Board found that the Source Assessment did not account for the majority of PCB sources to the Spokane River. AR at 2224 (FF 6) (Source Assessment "unable to identify more than 43% of the sources of PCBs being discharged into the Spokane River."). The Board also found that the data in the Source Assessment was dated and did not account for several PCB clean up actions that had occurred after the Source Assessment data was collected. AR at 2224; 2225 (FF 7; 9) (finding that Source Assessment included PCB data collected from September 2003 through May 2004 with some updated stormwater data; and finding that PCB clean up actions took place in 2006, 2007, and pursuant to a 2011 settlement agreement). *See also*, AR at 2241 (CL 11)

² Sierra Club misrepresents this unchallenged conclusion of law when it argues that the Board identified "the lack of available dilution" as one of the qualitative factors that can be used to conduct a reasonable potential analysis without facility-specific monitoring data. Brief of Respondents at 31.

(“Board recognizes that the PCB monitoring data included in the Source Assessment was collected a number of years ago and that several PCB clean up actions have occurred in the Spokane River in the interim.”).

The Board properly rejected Mr. deFur’s unreliable manipulation of the PCB data and the Court should do the same. This does not require a weighing of witness credibility, it simply involves accepting the Board’s unchallenged decision to reject Mr. deFur’s opinion.

C. The Board Improperly Applied The Law By Concluding Ecology Should Have Exercised Its Discretion Differently Without Finding That Ecology’s Exercise Of Discretion Was Invalid

The Environmental Protection Agency (“EPA”) guidance that Sierra Club and the Board relied on to conclude that Ecology “should have” done a reasonable potential analysis without facility specific effluent data gives Ecology the discretion to take one of two paths: 1) do a reasonable potential analysis without facility specific effluent data; or 2) defer a reasonable potential analysis pending the collection of facility specific effluent data. *See* AR at 2656 (Hearing Ex. A-20) (a regulatory authority “*may* decide to develop and impose a permit limit . . . without facility-specific effluent monitoring data”) (emphasis added). In its guidance, “EPA recommends that the more information the [regulatory] authority can acquire to support the [effluent] limit, the better a position

the authority will be in to defend the limit if necessary.” *Id.* at 2657 (emphasis omitted). If the regulatory authority is unable to decide reasonable potential without effluent monitoring data, EPA’s guidance allows the regulatory authority to defer a reasonable potential analysis and require effluent testing as a condition of the permit in order to gather further evidence for a reasonable potential analysis. *Id.*

The Board recognized that EPA’s guidance gives Ecology the discretion to defer a reasonable potential analysis, and properly found that Ecology acted “pursuant to” EPA’s guidance by requiring Spokane County to collect facility specific PCB effluent data that “will allow Ecology to perform a reasonable potential analysis and develop a numeric effluent limit for the following permit cycle.” AR at 2234–35 (FF 25). The Board also found that Ecology exercised its discretion and technical expertise regarding the Department of Health fish advisories and the dated data in the Source Assessment document.

With respect to the data in the Source Assessment, the Board found the data had been collected several years earlier and Ecology’s permit writer wanted more recent data to conduct a reasonable potential analysis. AR at 2231 (FF 21). This was a reasonable exercise of Ecology’s technical expertise and judgment regarding the quality of the data in the Source Assessment, especially since the data failed to account for several

PCB clean up actions in the Spokane River that took place after the Source Assessment data had been collected. *Id.* at 2241 (CL 11). With respect to the fish advisories, the Board found Ecology's permit writer did not consider that data helpful for a reasonable potential analysis because fish migrate. *Id.* at 2230 (FF 21). In other words, it is difficult to evaluate the impact a particular discharge at a specific location will have on fish that move about a river system and accumulate PCBs from a variety of sources. As the Sierra Club's expert acknowledged, PCBs are persistent and "accumulate in sediments behind the dams and in other areas and they'll be retained there for many, many years." RP (Mar. 26, 2013) at 285:4-11. The fish advisories are the result of historic PCB contamination that has accumulated behind the Spokane River dams for "many, many years," and are not particularly helpful in evaluating the impact of Spokane County's new state of the art facility.

As the Sierra Club itself recognizes, the Board must find that Ecology exercised its permitting discretion in an invalid manner before the Board can remand a permit to Ecology with direction to add conditions to the permit. Brief of Respondents at 19. *Accord Port of Seattle*, 151 Wn.2d at 592 (Board cannot add conditions simply because it feels such conditions would be more protective of water quality). The Board erroneously applied the law when it concluded that Ecology "should have"

exercised its discretion differently without first finding that Ecology had exercised its discretion in an invalid manner. AR 2240 (CL 10). Relief is appropriate under RCW 34.05.570(3)(d) and Ecology respectfully requests that the Court reverse Conclusions of Law 10–16 and the Board’s resulting remand order.

D. The Board Properly Rejected Sierra Club’s “River As A Whole” Argument

Sierra Club argues that the Court should uphold the Board’s conclusion that Ecology should have done a reasonable potential analysis without facility specific PCB effluent data because, according to Sierra Club, “the evidence indicates that Ecology in fact knew that the PCB discharge would likely contribute to violations of water quality standards when considering the ‘river as a whole.’” Brief of Respondents at 36. The Court should reject this argument, as the Board did, because the argument is based on a mischaracterization of the evidence and a fundamental misunderstanding of the Clean Water Act.

During Sierra Club’s examination of Richard Koch, Ecology’s permit writer for the County’s permit, Sierra Club read the following portion of Mr. Koch’s deposition into the record: “there is no way any treatment plant singly or collectively could remove enough PCBs *from* the Spokane River to result in compliance with the water quality standards.”

RP (Mar. 25, 2013) 83:11–15 (emphasis added). When asked how he could issue a permit to the County if the County wasn't going to remove enough PCBs from the Spokane River to bring the River into compliance with water quality standards, Mr. Koch correctly responded that the “permit rules allow me to consider the discharge going *into* a segment of the Spokane River and do not require me to consider the river as a system.” *Id.* at 83:16–19 (emphasis added). In response to a follow-up question from the Board during the hearing, Mr. Koch acknowledged that there are pollutants in the river as a whole that are causing water quality violations. *Id.* at 174:6–7.

Mr. Koch's recognition that there are PCBs in the Spokane River that cause the river to violate water quality standards is not an affirmative reasonable potential analysis for the “river as a whole” as suggested by Sierra Club. Brief of Respondents at 13. Likewise, Mr. Koch's recognition that no treatment facility could remove enough PCBs “from” the Spokane River to bring the river into compliance with water quality standards is not an affirmative reasonable potential analysis for the “river as a whole.” The Clean Water Act does not require Spokane County, or any other discharger, to remove the PCBs that are already in the River. The Clean Water Act requires that Spokane County treat the wastewater that it discharges *into* the Spokane River. *See* 33 U.S.C. § 1342(a)

(requiring a permit for the “discharge of any pollutant”), and 33 U.S.C. § 1362(12) (defining “discharge of a pollutant” as the “addition of any pollutant to navigable waters from any point source.”). The National Pollutant Discharge Elimination System permit program under the Clean Water Act regulates the discharge of pollutants *into* navigable waters from point source dischargers, it does not require dischargers to treat pollutants that are already in a navigable water.

The Sierra Club also erroneously argues that Mr. Koch believed a reasonable potential analysis excludes the effects of the County’s discharge on the downstream water quality standards of the Spokane Tribe. Brief of Respondents at 40. Mr. Koch’s actual testimony was that given the complexity of the Spokane River, he wasn’t aware of any model that would allow him to evaluate the effect of the County’s discharge at the time the discharge theoretically reached the boundaries of the Tribe’s reservation. RP (Mar. 25, 2013) 86:3–5; 91:2–19. The Tribe’s reservation is approximately 45 miles downstream of the County’s discharge. *Id.* at 31:12–15. Volatilization can cause the loss of up to 66% of PCBs and “dams along the Spokane River likely modify the dissolved and particulate fractions of PCBs as water moves downstream.” AR at 2346 (Hearing Ex. A-12). In the 45 miles between the County’s discharge and the Tribe’s reservation, the Spokane River goes through two sections of rapids and

over four dams, creating plenty of opportunity for aeration and volatilization. RP (Mar. 25, 2013) 91:6–10. Mr. Koch knew all this turbulence would cause some PCB loss due to volatilization, but did not know how much. *Id.* at 91:10–20. Mr. Koch didn't ignore the Tribe's water quality standards, he was simply unable to evaluate the impact, if any, of the County's discharge on the Tribal standards.³

The Sierra Club also takes several statements from the Fact Sheet out of context to support its assertion that Ecology knew the County's discharge would cause or contribute to a violation of PCB water quality standards. Sierra Club correctly notes that the Fact Sheet explains that “[k]nown wastewater treatment technologies can not reduce influent PCBs adequately to meet current water quality standards for PCBs.” Brief of Respondents at 38 (quoting AR at 3811, Hearing Ex. R-2). However, Sierra Club ignores the fact that this statement in the Fact Sheet was used to explain the need for “an action plan for identifying and controlling sources of toxics Source control is essential.” *Id.* Ecology addressed the need to reduce the levels of PCBs that are in the County's influent by

³ In addition to volatilization caused by the four dams located between the County's discharge and the Tribe's reservation, the Sierra Club's expert acknowledged that PCBs accumulate in sediments behind the dams on the Spokane River and remain there for many, many years. RP (Mar. 26, 2013) 285:4–11. Consequently, PCBs discharged by the County may never reach the Tribe's reservation because they are likely trapped in the sediment behind one of the four dams.

requiring a Toxics Source Control Action Plan in the County's permit. AR at 3680-81 (Hearing Ex. ECY-1).

Sierra Club also notes that the Fact Sheet described the Spokane Tribe's PCB water quality standard as "problematic." Brief of Respondents at 38 (quoting AR at 3788, Hearing Ex. R-2). However, the Fact Sheet explains that the Tribe's standard is problematic because it is "below current method detection limits used in the report '*Spokane River PCBs Source Assessment 2003-2007.*'" AR at 3788 (Hearing Ex. R-2). In other words, the Tribe's standard is problematic because the standard is well below the detection level of approved monitoring techniques and it is therefore nearly impossible to tell whether a discharge complies with the standard.

Sierra Club also incorrectly argues that Ecology acknowledged that the County's discharge would contribute to violations of PCB water quality standards because the Fact Sheet notes that the "PCB concentrations in the water column could be less than the PCB concentration coming across the state line but still above the tribal standard." Brief of Respondents at 38 (quoting AR at 3789 (Hearing Ex. R-2)). However, Sierra Club ignores the fact that the very next sentence provides: "Where it [the PCB concentration] specifically lies

will depend on actual treatment efficiency and source control effectiveness and scope.” AR at 3789 (Hearing Ex. R-2). This is not an acknowledgement that the County’s discharge would contribute to violations of PCB water quality standards. This is an acknowledgement of the need for facility specific monitoring data to evaluate the effectiveness of the County’s advanced treatment technology and source control program. As the Board correctly found, reducing PCB discharges into the Spokane River “requires the implementation of source control activities and use of advanced treatment technology.” AR at 2228 (FF 16).

Finally, the Fact Sheet states that the County’s discharge “has no reasonable potential other than PCBs to cause a violation of water quality standards.” AR at 3805 (Hearing Ex. R-2). As Mr. Koch testified, he put this statement in the Fact Sheet because he didn’t have the data necessary to make a reasonable potential determination for PCBs, and therefore could not say with certainty whether the discharge did or did not have a reasonable potential to violate PCB water quality standards. RP (Mar. 25, 2013) 71:4–21. Consistent with EPA’s technical guidance, Ecology properly deferred a reasonable potential analysis for PCBs and directed the County to collect PCB effluent data that Ecology can use for a reasonable potential analysis.

III. CONCLUSION

For the reasons discussed above and in Department of Ecology's Opening Brief, the State of Washington, Department of Ecology respectfully requests that the Court reverse the Board's Conclusions of Law 10 through 16, and the Board's resulting remand order.

RESPECTFULLY SUBMITTED this 29th day of July, 2015.

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Department of Ecology's Reply Brief

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