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

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

Appellants,

v.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,

Respondents.

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STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY'S  
RESPONSE TO APPELLANTS' OPENING BRIEF

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## I. INTRODUCTION

Appellants Northwest Pulp & Paper Association et al. (NWPP) challenge an update to the Department of Ecology's Permit Writers Manual as an agency action that should have undergone formal rulemaking. Ecology staff use this Guidance Manual, together with state and federal regulations and other technical guidance, to develop National Pollutant Discharge Elimination System (NPDES) permits that regulate wastewater discharges from facilities around the state. Contrary to NWPP's contentions, the Guidance Manual is not an order, directive, or regulation of general applicability under RCW 34.05.010(16). The Guidance Manual does not mandate or dictate outcomes uniformly applicable to all members of the regulated community. Nor does it fall under any of the enumerated categories of agency action that would classify the Guidance Manual as a rule. Rather, the Guidance Manual merely sets out processes that permit writers use to decide, in the exercise of their best professional judgment, the conditions they will include, or not include, in permits pursuant to preexisting requirements of state and federal law. An agency practice is not a rule when it simply interprets and applies a statute.

NWPP also claims that two of the three test methods that appear in the Guidance Manual for the measurement of Polychlorinated biphenyls (PCBs) cannot be used for any purpose under the federal Clean Water Act regulations. NWPP bases its argument, in part, on the Washington Supreme Court's decision in a case involving a NPDES

permit issued to Seattle Iron and Metals.<sup>1</sup> In *Seattle Iron and Metals*, however, the Court reviewed the use of the test method for PCBs listed in the federal regulations for the specific purpose of determining compliance with a numeric discharge limit. The Court upheld the requirement to use the listed method for that particular purpose, but did not restrict the use of other methods for other permitting purposes. Ecology's use of other PCB test methods in permits for purposes other than compliance with numeric limits is consistent with the Court's decision. In fact, the Environmental Protection Agency (EPA) has issued guidance encouraging the use of more than one method in permits to measure PCBs when appropriate.

The Guidance Manual imposes no mandatory standard or requirement on permittees. Instead it assists Ecology staff in writing permits that implement the requirements of state and federal law and regulation. Therefore the Guidance Manual does not meet the definition of a rule. All the methods discussed in the Guidance Manual for measuring PCBs were developed by EPA and continue to be endorsed by EPA for use in Clean Water Act permits. For these reasons, the superior court's decision in this case should be upheld, and this appeal dismissed.

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<sup>1</sup> *Puget Soundkeeper All. v. Dep't of Ecology*, 191 Wn.2d 631, 424 P.3d 1173 (2018) (hereinafter *Seattle Iron and Metals*).

## II. RESTATEMENT OF THE ISSUES

1. Is Chapter 6, Section 4.5 (Section 4.5)<sup>2</sup> of the Guidance Manual an order, directive, or regulation of “general applicability” within the meaning of RCW 34.05.010(16) when it merely sets out options for permit writers to consider when applying their best professional judgment to writing site-specific permits?

2. Is Section 4.5 of the Guidance Manual excluded from the definition of a “rule” in RCW 34.05.010(16) because it does not subject a permittee to a penalty or administrative sanction, nor establish, alter or revoke any qualification, requirement or standard found in state and federal law and regulation for receiving a permit or otherwise enjoying a benefit?

3. Is Section 4.5 of the Guidance Manual consistent with Ecology’s authority under state and federal law and regulation, where it sets out options for permit writers to consider the use of test methods developed by EPA for PCB measurement for purposes other than testing for compliance with numeric effluent limits?

4. Did Ecology act arbitrarily and capriciously by including in Section 4.5 of the Guidance Manual options consistent with EPA’s recommendations regarding the use of test methods 1668 and 8082 for purposes other than compliance with numeric effluent limits?

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<sup>2</sup> The disputed section of the manual, Section 4.5, is found at AR 0164.0249–264. Citations to AR are to the Administrative Record filed in this case. The first four numbers correspond to the document number, the second four numbers after the period correspond to the page number within that document.

### III. RESTATEMENT OF THE CASE

#### A. Polychlorinated biphenyls (PCBs)

PCBs are a group of 209 chemical compounds, each of which have the same chemical base, but slightly different structures. Each of the 209 compounds are a distinct “congener” within the family of PCBs. AR 0922.0004. PCB “Aroclors” are specific mixes of congeners that were once intentionally commercially produced. AR 0922.0004. PCBs exhibit toxicity and potential carcinogenic or mutagenic activity. AR 0922.0001.

PCBs are of major environmental concern because of their toxicity, ubiquity, and persistence in the environment. AR 0922.0004. EPA prohibited PCB manufacture and commercial use in 1976. AR 0922.0004. Despite this prohibition, PCBs are still found in the environment, and may also be created in small quantities as a result of chemical processes. AR 0749.0001. PCBs are present in Washington. Extensive programs exist in both the Duwamish River and the Spokane River watersheds for the purpose of reducing PCB pollution. *See, e.g.*, AR 0143.0004–07 (describing PCBs in the Lower Duwamish River) and AR 0113.0003–06 (describing PCBs in the Spokane River).

#### B. The Clean Water Act Establishes the NPDES Permit Program for Wastewater Discharges

The federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. §§ 1251–1388, 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 Cty. v. Dep't of Ecology*, 511 U.S. 700, 704, 114 S. Ct. 1900, 128 L.Ed.2d 716 (1994). It is the public policy of the state to maintain the highest possible standards to insure the purity of state waters. RCW 90.48.010. Ecology has jurisdiction to control and prevent the pollution of state waters. RCW 90.48.030. The Legislature has designated Ecology as the agency responsible for administering the Clean Water Act in Washington. RCW 90.48.260(1).

Under the Clean Water Act, standards for the water quality of surface waters are set by each state, and must be approved by EPA before they become effective. 40 C.F.R. § 131.21(e). Water quality standards take into account the beneficial uses of a body of water, the maximum concentration of pollutants that may be present in the water, and protection of the existing quality of the water. *American Paper Inst., Inc. v. U.S. E.P.A.*, 996 F.2d 346, 349 (1993). If a state fails to set standards for surface waters, or if EPA considers the standards inadequate, EPA will promulgate standards for that state. 33 U.S.C. § 1313. Water quality standards can be numeric limits for specific pollutants, or can be expressed as a "narrative" limit, which is descriptive rather than numeric (such as "no toxics in toxic amounts"). *American Paper*, 996 F.2d at 348.

Washington's water quality standards include a numeric limit for PCBs. WAC 173-201A-240, tbl. 240. During the time the PCB work group was developing its revision to the Guidance Manual at issue in this

case, EPA issued a new proposed rule for numeric water quality standards for Washington. 80 Fed. Reg. 55063–77 (Sept. 14, 2015). EPA’s proposed rule lowered the water quality standard for PCBs from .00017 µg/Liter to .000007 µg/Liter. EPA ultimately finalized the rule with the lower standard, making the new water quality standard for PCBs in Washington waters .000007 µg/Liter. 81 Fed. Reg. 85437 (Nov. 28, 2016).

The Clean Water Act and state Water Pollution Control Act, RCW 90.48, prohibit the discharge of any pollutant to surface waters unless the discharge is made pursuant to the terms of a waste discharge permit. 33 U.S.C. § 1342(a); RCW 90.48.160; *American Paper*, 996 F.2d at 348–49. Under the NPDES permit program, permits must contain requirements necessary to achieve state water quality standards. 40 C.F.R. § 122.44(d)(1); WAC 173-220-130(b)(i). Ecology administers the NPDES discharge permit program in Washington, applying both state and federal regulation to facilities that discharge pollutants. RCW 90.48.260(1)(a).

“[W]ater quality standards by themselves have no effect on pollution; the rubber hits the road when the state-created standards are used as the basis for specific effluent limitations in [] permits.” *American Paper*, 996 F.2d at 350. An effluent limitation is any restriction on timing, quantity, rate, or concentration of pollutants discharged into the waters of the state. 33 U.S.C. § 1362(11); 40 C.F.R. § 122.44(k). Effluent limitations may be numeric limits that identify the amount of a specified

pollutant that may be contained in a facility's discharge. *American Paper*, 996 F.2d at 350. However, where setting numeric limits are infeasible, other types of limitations designed to reduce discharges may be incorporated into permits in their place. 40 C.F.R. § 122.44(k)(3); *cf.* *Citizens Coal Council v. U.S. E.P.A.*, 447 F.3d 879, 895 (6th Cir. 2006) (stating "the CWA does not mandate the use of numeric limitations only."). Effluent limitations also include schedules of compliance and the implementation of best management practices at a facility that are designed to prevent the discharge of pollutants. *Id.*<sup>3</sup> A waste discharge permit must contain effluent limitations that reflect the pollution reduction achievable by a facility using technological controls. *American Paper*, 996 F.2d at 349. In addition to these technology-based limits, permits must also contain more stringent limitations when necessary for the facility's discharge to comply with state water quality standards. *Id.* These limits are termed water quality-based limits. *Id.* Again, no wastewater discharge permit can be issued unless it contains effluent limitations necessary to achieve water quality standards.

NPDES permits contain monitoring requirements of various kinds. 40 C.F.R. § 122.44(i). Monitoring for compliance with a numeric effluent limitation is one type of monitoring. For this type of monitoring, a facility must use a test method listed in 40 C.F.R. part 136 that is sufficiently sensitive to identify and measure a pollutant. 40 C.F.R. §

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<sup>3</sup> See AR 1307.0001–003 for examples of best management practices.

122.44(i)(1)(iv); WAC 173-201A-260(3)(h). This compliance monitoring in effect measures the release of harmful chemicals that has already occurred, and is the type of monitoring that was at issue in *Seattle Iron & Metals*. *Seattle Iron & Metals*, 191 Wn.2d at 641.

As the *Seattle Iron & Metals* Court recognized, however, this type of monitoring (compliance monitoring) is “just one of the ways in which discharge permits ensure compliance . . .” *Seattle Iron & Metals*, 191 Wn.2d at 641. The Court said that “[r]equiring the permittee to implement specific water treatment practices that are designed to reach the required PCB cap is, as logic would dictate, a more effective method of preventing unlawful discharges *before* they can occur.” *Id.* at 641 (emphasis in the original). PCB testing can also be used to analyze the presence of specific PCB congeners<sup>4</sup> to determine PCB sources at a facility, or to measure the effectiveness of best management practices. AR 0277.0028.

Where a pollutant does not have a test method listed in 40 C.F.R. part 136, a permitting authority may specify the test method in the permit itself. 40 C.F.R. § 122.44(i)(1)(iv)(B); AR 0277.0028. While 40 C.F.R. part 136 specifies a test method for total PCBs and certain specific Aroclors,<sup>5</sup> it does not contain a test method for measuring individual congeners.

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<sup>4</sup> As previously mentioned, “congener” refers to an individual PCB compound, one of the 209 different possible compounds. AR 0922.0004.

<sup>5</sup> Again, “Aroclors” are specific mixes of PCBs containing specific identified congeners. AR 0922.0004.

A facility either applying for or renewing a NPDES permit is required to submit an permit application. 40 C.F.R. § 122.21(a), (d); WAC 173-220-040(1), -180(2). Applications for a state-issued NPDES permit must require, at a minimum, the information required by 40 C.F.R. § 122.21. 40 C.F.R. § 122.21(a)(2)(iv). In addition to this *minimum* requirement, however, applicants must also provide any information Ecology reasonably requires for assessment of the discharges at the facility, including additional quantitative data. 33 U.S.C. § 1342(a)(2); 40 C.F.R. § 122.21(g)(13). Thus the Clean Water Act regulations establish minimum requirements for information that must be included in a permit application, but do not limit agencies from collecting information beyond that minimum. *See also* 33 U.S.C. § 1370 (states may not be less stringent than the federal regulations, but are authorized to adopt additional standards necessary to protect state waters); 40 C.F.R. § 122.21(g)(13).

**C. Test Methods Developed by EPA for Identification and Quantification of PCBs**

Two test methods, Methods 608 and 8082, were developed by EPA for PCB testing, and are typically used to identify and measure amounts of some specific Aroclors, and/or to measure the amount of total PCBs in a sample. 40 C.F.R. pt. 136, tbl. 1C; AR 0922.0005. Method 608 is the approved test method for measuring compliance of a wastewater discharge with a numeric PCB limit, if such a limit is included in a facility's NPDES permit. Method 8082 was developed to analyze water, soil, and sediments under the Resource Conservation and Recovery Act,

which addresses the management of hazardous wastes, and is the approved test method for measuring PCBs in soil and sediments.

AR 0319.0071. Method 8082 is the standard method used for measuring PCB mixtures under the state Model Toxics Control Act. AR 0797.0002.

A third test method, Method 1668, was also developed by EPA and is used to identify and measure specific PCB congeners.<sup>6</sup>

AR 0922.0005. Method 1668 has been published by EPA, and has been successfully used around the country in studies tracing congeners.<sup>77</sup> Fed. Reg. 29758, 29763 (May 18, 2012).<sup>7</sup> Identifying specific congeners can be helpful in determining the source of PCB contamination.

AR 0277.0028. Both Method 8082 and 1668 are used in PCB testing under the state Sediment Management Standards, WAC 173-204.

AR 0797.0002.

The three PCB test methods developed by EPA vary in their ability to detect PCBs in low amounts. Method 1668 is the most sensitive method, able to detect and measure PCBs at lower amounts than Method 8082 and Method 608, the latter being the least sensitive. AR 0164.0261, Table 18.<sup>8</sup>

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<sup>6</sup> Improvements to these methods, which occurred over the time relevant to the Guidance Manual update, are referenced throughout the record. Method 608.3 is the current version of Method 608 approved by EPA for permit compliance monitoring (82 Fed. Reg. 40836 (Aug. 28, 2017)). Method 8082 has also been updated, and may be referenced in places in the record as Method 8082A. Versions of Method 1668 may appear as 1668a or 1668C.

<sup>7</sup> See AR 0749.0001–02 (Comparison of PCB Reduction Efforts).

<sup>8</sup> In the table, the minimum detection limit (DL) is the “minimum concentration of an analyte (substance) that can be measured and reported with a 99% confidence that the analyte concentration is distinguishable from the method blank results.” 40 C.F.R. § 136.2(f). In other words, this is the limit at which the target chemical can be reliably

State regulations provide that the test methods to be used to monitor compliance with numeric NPDES permit limits must be those found in federal regulation. WAC 173-201A-260(3)(h) (“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.”). Method 608 is the PCB test method listed in 40 C.F.R. part 136 for the purpose of monitoring compliance with a numeric PCB permit limit. In *Seattle Iron and Metals*, the Supreme Court affirmed that the methods published in 40 C.F.R. part 136 are the methods required to be used in permits to monitor discharges for compliance with numeric PCB limits. *Seattle Iron and Metals*, 191 Wn.2d at 645. The Court found Ecology’s use of Method 608 was consistent with the plain meaning of RCW 90.48.520, which authorizes Ecology to incorporate conditions into permits which require all known, available, and reasonable methods to control toxicants in a permittee’s wastewater. *Id.* This standard is referred to as AKART. At the same time, the Court acknowledged that EPA developed Method 1668 for use in addition to other test methods, and intended Method 1668 to be used in Clean Water Act programs. *Id.* One important use for Method 1668 is for the identification of specific PCB congeners, because 40 C.F.R. part 136 does not list a method for identifying PCB congeners.

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detected, but not necessarily reliably quantified. AR 0143.0026 (*Puget Soundkeeper Alliance v. Dep’t of Ecology*, No. 13-137c, 2015 WL 4597294 (Wash. Pollution Control Hearings Board July 23, 2015)). The practical quantitation limit (QL) a statistical calculation which results in a reliable measure of the amount of the pollutant. *Id.*

AR 0277.0028. Where no test method is listed in 40 C.F.R. part 136 for a pollutant, the permit must specify what method is to be used. 40 C.F.R. § 122.44(i)(1)(iv)(B).

**D. Ecology’s Permit Writers Manual**

Ecology has maintained the Guidance Manual as a technical guidance and policy manual for permit writers since 1989.

AR 0164.0031. The Guidance Manual sets out procedures for permit writers to use when developing permits for wastewater discharges.

AR 0164.0004. Even as the manual sets out procedures for permit writers to follow, “[i]f the process does not fit a permitting circumstance, the permit writer can explore alternative processes as long as the law and regulation are met.” AR 0164.0033.

“The primary purposes of this manual are to enhance the quality and consistency of the wastewater discharge permits issued by Ecology and to improve the efficiency of the permitting process.” AR 0164.0031. The Guidance Manual states clearly that it “is not regulation and should not be cited as regulatory authority for any permit condition.”

AR 0164.0033. The Guidance Manual integrates state and federal law and regulation, and implements those laws and regulations.

AR 0164.0033. It also functions as a reference and a training tool for Ecology staff. AR 0164.0031.

The Guidance Manual is not used in a vacuum, but is instead one of several tools that permit writers use to develop permits. Permit writers

are expected to reference state and federal law and regulation, as well as EPA guidance and other relevant materials in permit development. AR 0164.0032. Permit writers also have access to online spreadsheet and template tools to assist them with writing permits. AR 0164.0037.

The Guidance Manual is updated regularly to account for changes and interpretations of state and federal law. Ecology created a working group to update the Guidance Manual in 2015 to respond to new developments in the law and technical guidance.

In July 2015, the Pollution Control Hearings Board issued its decision in an appeal of the wastewater discharge permit Ecology issued to Seattle Iron and Metals, AR 0143.0001–049 (*Puget Soundkeeper Alliance v. Dep't of Ecology*, No. 13-137c, 2015 WL 4597294 (Wash. Pollution Control Hearings Bd. July 23, 2015)). One of the issues in the appeal was what test method should be required for PCB testing to determine the facility's compliance with the numeric limit for PCBs in its permit. The Board concluded that Ecology was required to use Method 608, the only method listed by EPA in 40 C.F.R. part 136, in the facility's permit to determine Seattle Iron & Metals' compliance with its numeric effluent limit. AR 0143.0034–35; 0143.0048. While affirming the use of Method 608 to determine compliance with a discharge permit's numeric effluent limit for PCBs, the Board encouraged Ecology to consider requesting EPA approval to use the more sensitive Method 8082 for permit compliance purposes. AR 0143.0048.

Also in 2015, in response to a federal district court order, EPA filed with that court and distributed to Ecology its permitting recommendations for facilities that discharge PCBs into the Spokane River Watershed. AR 0277.0027–34. EPA recommended a best management practices approach to controlling and abating discharges of PCBs at facilities on the Spokane River, rather than the use of numeric effluent limits. AR 0277.0027. EPA also recommended that PCB congeners be monitored using Method 1668 in order to assess how effective the management practices were in reducing PCB concentrations in wastewater. AR 0277.0029. EPA stated that “permitting authorities have the flexibility to require the use of EPA Method 1668C for monitoring of PCB congeners.” AR 0277.0028.

In response to the Board decision and the EPA guidance, as well as to other developments in PCB detection methods, in late 2015, Ecology created a work group of permit writers to address PCBs by developing recommendations related to test methods, data management, and best management practices. AR 0501.0013. One question before the work group was whether or not Ecology should seek EPA approval for the use of Method 8082 for permit compliance purposes. AR 0854.0001. Ecology ultimately determined it would not seek approval for either Method 8082 or Method 1668.

The workgroup continued discussion and development of revisions to the Guidance Manual throughout 2016 and 2017.

AR 0222.0001–05. The updated Guidance Manual including Section 4.5 was issued in July 2018. AR 0164.0004.

#### IV. STANDARD OF REVIEW

NWPP challenges Ecology’s Guidance Manual as a rule, arguing that the Guidance Manual is invalid because it was not adopted using rulemaking procedures, that it exceeds the statutory authority of the agency, and that it is arbitrary and capricious. RCW 34.05.570(2)(c). Whether the Guidance Manual falls under the Administrative Procedure Act’s (APA) definition of a rule is a question of statutory interpretation that this Court reviews *de novo*. *Dep’t of Ecology v. Campbell & Gwinn LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). In reviewing the agency action, the Court will sit in the same position as the superior court, applying the standards of the APA to the record. *Tapper v. Employment Security Dep’t*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993). NWPP bears the burden of showing compelling reasons why the Guidance Manual conflicts with Ecology’s statutory authority. *Cf. Wash. Public Ports Ass’n v. Dep’t of Revenue*, 148 Wn.2d 637, 646, 62 P.3d 462 (2003).

As the agency designated by the Legislature to regulate state water resources, Ecology’s interpretation of relevant statutes and regulations is entitled to great weight. *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 593, 90 P.3d 659 (2004). Where both Ecology and the Pollution Control Hearings Board agree on an issue, the Court is loath to override the judgment of both agencies, whose combined

expertise merits substantial deference. *Seattle Iron & Metals*, 191 Wn.2d at 646 (citing *Port of Seattle*, 151 Wn.2d at 600).

## V. ARGUMENT

An agency's practice does not qualify as a rule under the APA when it simply applies and interprets a statute. *Loyal Pig, LLC v. Dep't of Ecology*, 13 Wn. App. 2d 127, 145, 463 P.3d 106 (2020) (citing *Budget Rent A Car Corp. v. Dep't of Licensing*, 144 Wn.2d 889, 896, 31 P.3d 1174 (2001)). Federal and state law already require that NPDES permits contain effluent limitations sufficient to prevent wastewater discharges that would violate water quality standards. The Guidance Manual simply provides procedures for permit writers to use to include in NPDES permits effluent limitations that ensure the federal and state standards are met. NWPP complains that Section 4.5 is an illegal rule because it applies to all facilities that discharge PCBs. But it is the Clean Water Act and RCW 90.48 that require that a permit for a facility discharging an identified pollutant include in its NPDES permit effluent limitations to prevent discharges of that pollutant from violating water quality standards. This statutory requirement was unchanged by the Guidance Manual update.

### A. **The Permit Writers Manual is a Guidance Manual and Does Not have the Attributes of a Rule**

An agency policy is only subject to challenge as a rule “when it imposes an independent regulatory mechanism that operates with the force

of law.” *Sudar v. Dep’t of Fish & Wildlife Comm’n*, 187 Wn. App. 22, 33, 347 P.3d 1090 (2015) (citing *Budget Rent A Car*, 144 Wn.2d at 898). Ecology’s Guidance Manual does not impose a regulatory mechanism operating with the force of law on permittees. Instead, it provides options-based methodologies to internal Ecology staff who write NPDES permits that comply with preexisting state and federal standards and guidelines.

In order for an agency action to qualify as a rule, two elements are required. *Failor’s Pharmacy v. Dep’t of Social and Health Services*, 125 Wn.2d 488, 494, 886 P.2d 147 (1994).

First, the action must be ‘any agency order, directive, or regulation of general applicability.’ In addition, the action must also fall into one of five enumerated categories: (a) the violation of which subjects a person to a penalty or administrative sanction; (b) which establishes, alters, or revokes any procedure, practice, or requirement relating to agency hearings; (c) which establishes, alters, or revokes any qualification or requirement relating to the enjoyment of benefits or privileges conferred by law; (d) which establishes, alters, or revokes any qualifications or standards for the issuance, suspension, or revocation of licenses to pursue any commercial activity, trade, or profession; or (e) which establishes, alters, or revokes any mandatory standards for any product or material which must be met before distribution or sale.

*Id.* (internal citation omitted); *see* RCW 34.05.010(16). Here NWPP argues that the Guidance Manual is an order, directive or, regulation of general applicability, and that it falls under RCW 34.05.010(16)(a), (c) and (d). Neither is true.

**1. The Guidance Manual is not an order, directive, or regulation of general applicability**

The Guidance Manual is not an order, directive, or regulation of general applicability for two reasons. First, it is directed at agency staff, not the public. Second, it preserves the agency's ability to consider site-specific conditions, rather than establishing a binding norm applicable to an entire class.

The Guidance Manual is not an order, directive, or regulation of general applicability because it is directed at staff, not the public, much like the policy statement on the allocation of fish on the Columbia River this Court examined in *Sudar*. *Sudar*, 187 Wn. App at 25. The Court there found that the fish allocation policy was a directive to agency staff, not the public, and therefore it was not an order, directive, or regulation of general applicability within the meaning of RCW 34.05.010(16). *Id.* at 32. The purpose of the fish allocation policy was to guide agency staff tasked with promulgating rules to regulate fish catch on the river. *Id.* The Court stated that the policy had no legally enforceable regulatory effect on the fishers themselves. *Id.* Finally the Court found the policy itself unenforceable until the rules for which the policy provides guidance were promulgated. *Id.* Because the policy reached only agency staff, the Court found it was not of general applicability to fishers.

Similarly, the Guidance Manual is a directive to Ecology staff, not to permittees. Its purpose is to guide agency staff in the development of wastewater discharge permits. It does not have legal enforceable effect on

permittees until the processes used by permit writers to evaluate discharges at a facility result in the issuance of a NPDES permit, which is then subject to administrative and judicial review. RCW 43.21B.110. The NPDES permit, not the manual, contains enforceable conditions based on the requirements of state and federal law and regulation. Therefore, consistent with *Sudar*, the Guidance Manual is not of general applicability.

Second, the Guidance Manual is not an order, directive, or regulation of general applicability because it preserves the agency's ability to consider site-specific conditions and thus does not establish binding norms. Where an agency document preserves an agency's ability to consider site-specific conditions, that document fails to establish a new binding standard. *Nat'l Mining Ass'n v. Sec'y of Labor*, 589 F.3d 1368, 1371 (11th Cir. 2009) (citing *Ryder Truck Lines, Inc. v. United States*, 716 F.2d 1369, 1377 (11th Cir. 1983)).<sup>9</sup> There, in analyzing whether a Procedure Instruction Letter promulgated by the Secretary of Labor's Mine Safety and Health Administration created a mandatory standard that should have been promulgated in a rule, the Eleventh Circuit stated that "whether a particular agency proceeding announces a rule or a general policy statement depends upon whether the agency action establishes a binding norm." *Id.* The court stated that the Procedure Instruction Letters at issue, which allowed case-by-case exceptions to the regulations, are

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<sup>9</sup> Our state APA is intended to be interpreted consistently with decisions of other courts interpreting the federal APA. RCW 34.05.010. Therefore federal precedent interpreting the federal Administrative Procedure Act may serve as persuasive authority here. *King Cty. v. Central Puget Sound Growth Mgmt. Hearings Bd.*, 138 Wn.2d 161, 179, 979 P.2d 374 (1999).

“by their very nature contingent on the individual facts in the various cases that arise and thus not a binding norm.” *Id.* at 1372. “As long as the agency remains free to consider the individual facts in the various cases that arise, then the agency in question has not established a binding norm.” *Id.* at 1371. That is the case here, where the Guidance Manual makes clear that a permit writer must develop permits based on site specific facts and information.

Similarly, in *National Association of Home Builders*, the D.C. Circuit also looked at whether protocols for endangered species surveys, bound the agency to a particular result by cabining its discretion. *Nat’l Ass’n of Home Builders v. Norton*, 415 F.3d 8, 17 (D.C. Cir. 2005). Even though the protocols included some mandatory language regarding how surveys could be conducted to maximize accuracy and minimize impact to an endangered species, the court rejected the argument that the protocols were binding because of the voluntary nature of the language in the protocols. *Id.* at 15.

NWPP relies in part on a law review article to affirmatively sweep all agency bulletins, announcements or manuals under the definition of a rule. The article, however, does not support NWPP’s argument and instead speculates that the APA’s use of the word “directive” “presumably” refers to anything directive in nature. William R. Andersen, *The 1988 Washington Administrative Procedure Act – An Introduction*, 64 Wash. L. Rev. 781, 790 (1989).

Like the protocols at issue in *Norton* and *National Mining Association*, the Guidance Manual also maintains a broad scope of discretion within the parameters of state and federal law. While NWPP refers to the Guidance Manual as having “dictates” “prescriptive requirements” and “mandates” *requiring* the use of methods 8082 or 1668 in permits,<sup>10</sup> a look at the actual language in the Guidance Manual shows that it is permissive, and relies on the best professional judgment of permit writers to choose from permit options relevant to a given facility.

Throughout Section 4.5, the Guidance Manual emphasizes the site-specific nature of a permit writer’s analysis. *See, e.g.*, AR 0164.0261 (“While PCB monitoring may be appropriate for some dischargers based on individual facility characteristics, permit writers should consider the value and purpose of requiring PCB monitoring when developing discharge permits.”). The Guidance Manual provides that before Ecology staff requires testing for PCBs in the first instance, the permit writer must evaluate the facility in question and its potential to violate the PCB water quality standard. AR 0164.0260. For facilities that do not have PCBs in their effluent at levels that may exceed standards, PCB monitoring may not be necessary at all. *Id.* The guidance states that monitoring requirements should only be included in permits when necessary. *Id.* This language alone defeats NWPP’s argument that the Guidance Manual

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<sup>10</sup> *See, e.g.*, Appellant’s Opening Brief at 1, 24, 31,33, 43

categorically mandates the use of particular test methods for all permitted facilities.

The case-by-case procedures outlined in the Guidance Manual are based on information specific to a given facility and the water body to which that facility will discharge. This information is known to the permit writer through the permit application and additional data provided by the applicant, and then analyzed in a series of steps and decision points. *See generally* flow charts at AR 0164.0041–43. Because the case-by-case analysis is based on facts applicable to a specific facility, the Guidance Manual process does not establish a “binding norm” requiring that it go through APA rulemaking.

Section 4.5 addressing PCBs provides guidance and options to Ecology staff on how they should consider both the information they have on the permitted facility, and the most current updates to methods available to test for pollutants. The Guidance Manual grants the discretion to the permit writer regarding the content of the permit, not dictating any particular decision, but rather stating that when a decision is made, it needs to be documented clearly. *See, e.g.*, AR 0164.0254 (stating “[t]he permit should provide clear direction about how to report data qualifiers [] if requiring the data be submitted . . . .”); AR 0164.0255–56 (noting “if results show higher concentrations where blank contamination has little effect on the data analysis, permit writers should confirm that 1668C is the most appropriate method. A less sensitive method may be appropriate in this instance.”).

NWPP's reliance on *Failor's Pharmacy* and *Simpson Tacoma Kraft Co. v. Dep't of Ecology*, 119 Wn.2d 640, 835 P.2d 1030 (1992) is misplaced. In *Failor's Pharmacy* the Court examined the Department of Social and Health Services' development of a two-tiered reimbursement schedule that added to and refined a reimbursement regulation grounded in federal law. *Failor's Pharmacy*, 125 Wn.2d at 491–96. But unlike here, the reimbursement schedule was applied directly and uniformly *to the regulated community*, not directed to agency staff. Second, the Court found that the reimbursement schedule added to and refined the reimbursement methodology, and was not merely applying existing regulations. *Id.* at 496. On those grounds, the Court held that the reimbursement schedule should have undergone rulemaking. *Id.* at 497. But the case does not apply here, where the Guidance Manual applies only to agency staff, and does not add to or change any standard or requirement applicable to a permitted facility through the Clean Water Act or RCW 90.48.

*Simpson Tacoma Kraft* is similarly inapposite. There the Court examined Ecology's inclusion of a numeric limit for dioxin in NPDES permits. *Simpson Tacoma Kraft*, 119 Wn.2d at 641. Ecology had calculated a value for a numeric water quality standard for dioxin, but had not undergone rulemaking to include the standard in the applicable regulation. *Id.* at 643–44. But importantly, the calculated value was applied directly and uniformly to the regulated community. *Id.* at 647–48. Here, in contrast, current state water quality standards do contain a

numeric limit for PCBs (.000007 µg/Liter), and the Guidance Manual procedures merely provide options for Ecology staff for including effluent limitations in NPDES permits where necessary to prevent PCB discharges that would violate the standard, and to meet the preexisting requirements of state and federal law and regulation.

Critically, the Guidance Manual is not applicable to the regulated community. Instead it sets out procedures for permit writers to follow when developing NPDES discharge permits. Because the Guidance Manual is not of general applicability applied uniformly to a class, it does not meet the definition of a “rule” under RCW 34.05.010(16).

**2. The Guidance Manual does not establish, alter or revoke any qualification or standard for the issuance, suspension, or revocation of NPDES permits, it simply applies existing law and regulation**

An agency order, directive, or regulation of generally applicability constitutes a rule only if it “establishes, alters or revokes any qualifications or standards for the issuance, suspension, or revocation of licenses to pursue any commercial activity, trade or profession.”

RCW 34.05.010(16)(d). Ecology agrees that an NPDES discharge permit is such a license. RCW 34.05.010(9); RCW 90.48.160, .260. But Section 4.5 does not establish, alter or revoke any qualification or standard applicable to permittees applying or reapplying for NPDES permits. Section 4.5 does not change the standards found in the Clean Water Act and RCW 90.48, but instead provides options for Ecology staff to

consider when applying those standards to wastewater discharges through the effluent limitations in NPDES permits.

It is not disputed that Section 4.5 is a new section of the Guidance Manual. It was added in response to decisions of the Pollution Control Hearings Board and the courts, and also in response to new guidance from EPA, because one of the purposes of the Guidance Manual is to be a central document where such information can be collected.

AR 0164.0031.

To measure compliance with a permits numeric effluent limitation, federal and state regulation require the use of a test method listed in 40 C.F.R. part 136. For PCBs, Method 608 (updated now to Method 608.3) is the listed method. Both the Guidance Manual and EPA's recommendations make the requirement to use Method 608 for compliance testing clear. AR 0164.0249–50; .0256; AR 0277.0027–28. When applied properly and with an approved Quality Assurance Project Plan (Quality Assurance Plan), however, other methods can yield quantitative data required by the regulations to be used in setting effluent limitations to control the discharge of pollutants, including analysis of the sources of PCB contamination and the effectiveness of best management practices incorporated into permits as effluent limitations. The Guidance Manual properly reflects that use of these other methods for these purposes, rather than for compliance monitoring, may be appropriate in some circumstances.

Data collected under a NPDES permit must be of sufficient quality and validity in order for that data to be used to guide permitting decisions for a facility. The Guidance Manual contains extensive discussion on including a Quality Assurance Plan in permits when those permits include methods 8082 and 1668 to ensure that the data collected meets analytical standards for validity. AR 0164.0254–60. This ensures that only valid data are used in future permit conditions. The inclusion of a Quality Assurance Plan assures proper study design for the use of these methods, whether for best management practice evaluation, or PCB source identification, or for another specified purpose. The Guidance Manual sets out requirements for analysis to reduce false positives and artificially high results. AR 0164.0261. A Quality Assurance Plan also sets out the statistical tests required for data analysis that will result in valid, usable data for permitting purposes. Particularly in relationship to data produced using Method 1668, the Guidance Manual admonishes that the quality assurance and quality control (referred to in the document as QA/QC) “must be rigorous.” AR 0164.0255. The Guidance Manual also states the permit writers should never use raw data generated in a Method 1668 analysis to derive a total for the sum of all PCB congeners in a sample. AR 0164.0255.

This attention to study design and properly qualifying data ensures that valid data generated by the selected test method is used for appropriate purposes. First, the use of a Quality Assurance Plan allows a facility to specify the goals and procedures of a study, which includes the

use of field and laboratory blanks to ensure the integrity of the data generated. AR 0164.0255. The use of a study design also allows more targeted testing than compliance monitoring, which samples only the total combined discharge from a facility.

The Guidance Manual provides that Ecology staff may use all valid applicable data, including data collected using Methods 1668 and 8082, to perform a reasonable potential analysis for a facility.<sup>11</sup> AR 0164.0261. This is consistent with federal regulation, which allows Ecology to collect information reasonably required in order for Ecology to assess the discharges at a facility. 33 U.S.C. § 1342(a)(2); 40 C.F.R. § 122.21(g)(13).

This is also consistent with the Court of Appeals decision in *Spokane Cty. v. Sierra Club*, No. 47158-2-II, 2016 WL 4366951 (Wash. Ct. App. Aug. 16, 2016) (unpublished).<sup>12</sup> The Court there found that Ecology has discretion in how it conducts a reasonable potential analysis, and also that Ecology can issue permits requiring testing and data collection. *Id.* at \*9. In its decision, the Court affirmed the Pollution Control Hearings Board's conclusion that Ecology should have used all data available to it to perform a reasonable potential analysis for PCBs when developing the discharge permit for the Spokane County Regional

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<sup>11</sup> A reasonable potential analysis is an analysis done as part of permit development to determine what pollutants a facility has a reasonable potential to discharge in excess of water quality standards. 40 C.F.R. § 122.44(d)(1).

<sup>12</sup> Unpublished opinions of the Court of Appeals have no precedential value and are not binding on this court. GR 14.1. However, if filed after March 1, 2013, such opinions may be considered persuasive authority as this court deems appropriate. GR 14.1.

Water Reclamation Facility. AR 0113.0021–22 (*Sierra Club v. Dep’t of Ecology*, No. 11-184, 2013 WL 4490310 (Wash. Pollution Control Hearings Bd. July 19, 2013)).

**3. State and federal law and regulations, not the Guidance Manual, establish the qualifications and requirements related to the enjoyment of the benefit or privilege of NPDES permits**

An agency order, directive or regulation of generally applicability may be a rule if it “establishes, alters, or revokes any qualification or requirement relating to the enjoyment of benefits or privileges conferred by law.” RCW 34.05.010(16)(c). The Guidance Manual does not establish qualifications or requirements for the enjoyment of benefits, but simply provides practices for incorporating state and federal law into permits. Federal regulations require that permits contain effluent limitations necessary to achieve water quality standards. 40 C.F.R. § 122.44(d)(1). This is the standard that NPDES permits must meet and nothing in the Guidance Manual changes this standard.

NWPP relies on *Hillis v. Dep’t of Ecology*, 131 Wn.2d 373, 932 P.2d 139 (1997) and *Hunter v. University of Washington*, 101 Wn. App. 283, 2 P.3d 1022 (2000), but these cases are not applicable here. Unlike the changes to water rights processing in *Hillis*, the Guidance Manual adds no new priorities or prerequisites that permittees must overcome. Appellant’s Opening Brief at 39. Neither does the Guidance Manual add

eligibility restrictions beyond those found in state law as was the case for veterans in *Hunter*. Appellant's Opening Brief 39–40.

In *Hillis* this Court examined changes to how Ecology processed water rights applications that resulted in a new priority system for processing applications. *Hillis*, 131 Wn.2d at 379. The new system, however, added prerequisites to nonemergency water right applications that resulted in some applications be delayed for years. *Id.* The Court found that the prerequisites impacted the applicants' right to have their application processed. *Id.* at 399.

Here, however, a facility's right to apply for a permit is not affected by the Guidance Manual update. Federal and state regulation provide that a permit can only be issued if it includes effluent limitations sufficient to protect water quality. NWPP points to no new prerequisites that the Guidance Manual applies to this regulatory standard. To the extent NWPP argues that the procedures applicable to Ecology staff change the regulatory standard, this argument fails because the Guidance Manual merely provides permit writers procedures on how to include properly apply preexisting state and federal standards to a specific facility. NWPP does not allege that its members have denied permits, because as NWPP had to concede, permits for facilities on the Spokane River that were set to expire have been administratively extended. Appellants' Statement of Grounds for Direct Review at Supreme Court at 12–13. Thus those facilities have not been denied access to the benefit of permit coverage, because the previous permits are still in effect.

In *Hunter*, the Court determined that the University of Washington had added eligibility requirements to a tuition reduction program that applied to veterans. *Hunter*, 101 Wn. App. at 290. The Court found the new additional requirements went beyond the requirements contained in the governing statute, and were thus invalid. *Id.* at 291. In the case of the Guidance Manual, again, it adds no new requirements. The Guidance Manual only sets out procedures for incorporating effluent limitations into NPDES permits that are necessary for the discharges to meet water quality standards. Therefore the Guidance Manual does not establish, alter or revoke any qualification or requirement related to the enjoyment of a benefit or privilege.

**4. The Guidance Manual does not subject anyone to penalties or any other sanction**

An agency order, directive or regulation of generally applicability may be a rule if a violation of the directive or regulation “subjects a person to a penalty or administrative sanction.” RCW 34.05.010(16)(a). As discussed above, the Guidance Manual provides processes for Ecology staff writing permits, and has no regulatory effect on discharging facilities. To the extent NWPP is arguing that permit conditions developed using the procedures found in Section 4.5 may potentially subject facilities to new liabilities in the future, that argument fails.

First, as discussed above, there are no new liabilities imposed on facilities by the Guidance Manual. Further, wastewater that is discharged

from a facility in compliance with a NPDES permit provides a shield from enforcement and from Clean Water Act citizen suits for that facility. 33 U.S.C. § 1342(k); *Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co.*, 12 F.3d 353, 357 (2nd Cir. 1993). Compliance with permit conditions shields the permit holder from liability under the Clean Water Act if the permit holder complies with the express terms of the permit. *Piney Run Preservation Ass'n v. County Com'rs of Carroll Cty, MD*, 268 F.3d 255, 259 (4th Cir. 2001). Thus, the permit shield operates to prevent enforcement against a facility that is discharging in compliance with its NPDES permit.

NWPP finds fault with the Guidance Manual stating that noncompliance with a permit may be subject to enforcement. Appellant's Opening Brief at 43. But such enforcement is not by virtue of the Guidance Manual. Rather, RCW 90.48.144(1) authorizes Ecology to issue enforcement for a violation of terms of a permit. If a permit requires a particular sampling regime and the permittee fails to conduct that sampling, that is a permit violation that Ecology may enforce. Such enforcement action is appealable to the Pollution Control Hearings Board. RCW 43.21B.110(1)(a)–(b).

Further, NWPP's insistence that the Guidance Manual may impose future liability on a facility is speculative at best. Ecology is authorized to collect and utilize all the information it reasonably requires to ensure that permits meet the standard found in federal regulation, that a discharge must not cause or contribute to a violation of water quality

standards. 40 C.F.R. § 122.21(g)(13); 40 C.F.R. § 122.44(d)(1)(iii). If such data and information lead to the inclusion of additional effluent limitations in a subsequent permit, including the imposition of a numeric limit, the Pollution Control Hearings Board is the forum in which to challenge the reasonableness of the new conditions included when the permit is issued. RCW 43.21B.110(1)(d).

The standards for liability found in NPDES permits are found in state and federal law and regulation and are not changed nor added to by the guidance in Section 4.5. Therefore the Guidance Manual does not subject a facility to a penalty or an administrative sanction. NWPP's real concern is that its members may ultimately be found to violate the numeric water quality standard for PCBs, but this concern arises from the operation of federal and state law, not from Ecology's Guidance Manual.

**B. Options Permit Writers May Choose From the Guidance Manual are Consistent with State and Federal Law and Regulation and Do Not Exceed Ecology's Authority**

As discussed above in Section V.A.2, the Guidance Manual does not require permit writers to use test methods 1668 and 8082 in all NPDES permits, nor for any and all purposes. In fact, the Guidance Manual states that only necessary monitoring requirements should be included in permits. AR 0164.0260. The Guidance Manual sets out the factors to consider as permits are developed by permit writers. Those factors include understanding of the potential uses for collected data, and when and how to use different methods for the different purposes of

permit development, permit management, compliance and assessment.  
AR 0164.0260.

NWPP's concern about the unreliability of the data generated using test methods 1668 and 8082 is addressed through the Guidance Manual's process that includes the use of a Quality Assurance Plan in cases where methods 1668 and 8082 are incorporated into permits. Appellants Opening Brief 45–46. The Quality Assurance Plan provides that any such data collection is conducted under a study design that includes analytical procedures necessary to ensure that only valid data be used for permit development.

In *Seattle Iron and Metals*, the decision under review was the proper method for testing compliance with a numeric PCB limit in a wastewater discharge. *Seattle Iron and Metals* did not address the use of other methods EPA had developed for purposes other than compliance monitoring. EPA endorsed the use of methods 8082 and 1668 for studies designed to identify sources of PCB, and for testing the performance of best management practices. EPA did so based on its determination that permitting authorities have the flexibility to require the use of these additional methods in permits for purposes other than numeric limit compliance monitoring. AR 0277.0028. This includes the ability to identify specific PCB congeners as necessary to assess the effectiveness of management practices, and to identify the sources of PCBs at a facility. AR 0277.0028. There is no test method for the identification of PCB congeners listed in 40 C.F.R. part 136, so the permit itself must

include the required test method. 40 C.F.R. § 122.44(i)(1)(iv)(B); AR 0277.0028. The Guidance Manual simply follows the federal regulations and EPA's guidance in this respect.

The requirement that methods listed in 40 C.F.R. part 136 are the only methods that can be used for measuring compliance with pollutant-specific numeric effluent limitations was also at the heart of the challenge to a modification of Seattle Iron & Metals' permit, an appeal that the Pollution Control Hearings Board decided separately from the appeal that led to the *Seattle Iron & Metals* Supreme Court decision. While the Board's decision in *Seattle Iron & Metals* was pending, Ecology modified the facility's permit to require the use of Method 608 for measuring compliance with the numeric PCB limit. *Puget Soundkeeper Alliance v. Dep't of Ecology*, No. 15-050, 2016 WL 2349250, at \*2 (Wash. Pollution Control Hearings Bd. Jan. 6, 2016). Originally the permit had required compliance monitoring using Method 8082. *Id.* at \*3. Ecology staff believed that they had the discretion to require the use of Method 8082 for compliance monitoring if the facility agreed to use that method. *Id.* at \*5. Staff later determined this was a mistake, and modified the permit to properly require the use of the method listed in 40 C.F.R. part 136 for compliance monitoring. *Id.* The Board agreed, stating that the analytical method used for compliance monitoring must be in accordance with 40 C.F.R. part 136, unless approval was received from EPA for another method. *Id.* at \*6. This is consistent with the decision the

Board made in *Seattle Iron & Metals. Seattle Iron & Metals*, 191 Wn.2d at 636.

NWPP points to no authority that precludes a state regulator from utilizing information obtained from other PCB testing methods. The federal regulations specifically allow states to seek more than the minimum information listed in the federal regulations. 33 U.S.C. § 1370; 40 C.F.R. § 122.21(a)(2)(iv).

NWPP seeks to limit Ecology's ability to access the information necessary to properly condition permits to prevent a violation of water quality standards. States have the ability to be more stringent than federal law and regulation when it comes to protection of their waters. 33 U.S.C. § 1370. NWPP's cramped interpretation leads to the absurd result that Ecology would be unable to collect the data necessary to properly condition NPDES permits to protect water quality, even when Ecology is aware that a facility is discharging PCBs.

The Guidance Manual and Section 4.5 are consistent with Ecology's authority to develop NPDES permits protective of water quality. The Guidance Manual does not conflict with the Clean Water Act, RCW 90.48, nor with state and federal law and regulations.

**C. Ecology's Revisions to its Permit Writers Manual are Consistent with State and Federal Law and this Court's Prior Opinion and Therefore Not Arbitrary and Capricious**

An action is arbitrary and capricious if it is "willful, unreasoning, and taken without regard to attending facts or circumstances." *Ass'n of*

*Wash. Spirits & Wine Distributors v. Wash. State Liquor Control Bd.*, 182 Wn.2d 342, 358, 340 P.3d 849 (2015). The scope of review under the standard “is very narrow, and the party asserting it carries a ‘heavy burden.’” *Id.* at 359. “Where there is room for two opinions, an action taken after due consideration is not arbitrary and capricious even though a reviewing court may believe it to be erroneous.” *Hillis*, 131 Wn.2d at 383.

Ecology’s obligation under state and federal law is to issue a permit with effluent limitations sufficiently stringent so that discharges from the facility will not violate water quality standards. Where a facility is known to or may be discharging PCBs, Ecology can only issue a permit if that permit contains limitations to control pollutants. To do so, Ecology must use all the tools at its disposal, including the ability to design studies and use methods necessary to identify the source of PCBs at a facility and to test the efficacy of best management practices. Ecology cannot ignore what is known or suspected regarding PCBs at a facility. Rather, Ecology is required to take that information and utilize it to incorporate into NPDES permits conditions protective of water quality.

As the Supreme Court held in *Seattle Iron & Metals*, prevention of a discharge of PCBs in the first instance is more effective than simply measuring PCBs in effluent. *Seattle Iron & Metals*, 191 Wn.2d at 641. The use of best management practices to prevent the discharge of pollutants is one means to accomplish this, and the use of methods 8082

or 1668 to determine whether those practices are effective is a necessary corollary to their use.

NWPP asserts that in the Guidance Manual update Ecology's intent was to circumvent the requirement found in the Clean Water Act regarding the required use Method 608 for measuring permit compliance. Appellant's Opening Brief at 48. Nothing could be further from the truth. As discussed above, Section 4.5 is clear that only Method 608 should be used for permit compliance monitoring. *See, e.g.*, AR 0164.0256 ("Permit writers should continue to use the most sensitive methods approved by EPA for compliance with numeric effluent limits, which is Method 608.3").

The PCB workgroup was created in order to provide recommendations for addressing PCBs in the permitting process. AR 0841.0001. Between 2015 and release of the Guidance Manual update, Ecology staff surveyed analytical laboratories to determine their achievable detection limits. AR 0404.0002. Workgroup members also extensively reviewed the EPA recommendations for Spokane River permitting. AR 0058.0001-03; AR 0142.0001-02. The workgroup produced a draft set of recommendations that were presented to management in 2016. AR 0851.0001-03; AR 0099.01-07; AR 0468.0001. The draft was not finalized at that time, but ultimately the updated Guidance Manual was approved in June 2018. AR 0252.0001; AR 0164.004.

Development of Section 4.5 took several years and included robust discussion among Ecology's knowledgeable and experienced staff. The extensive back and forth, which included public comment from stakeholders (as acknowledged by NWPP), is the exact opposite of a process that is arbitrary and capricious. Appellant's Opening Brief at 23. The technical processes used to implement the requirements of state and federal law are complex, and the Guidance Manual succeeds in providing permit writers with processes that allow them to issue NPDES permits that comply with the law. Even as it provides such processes, the Guidance Manual allows permit writers to use different processes if appropriate. The Guidance Manual update was well within Ecology's technical expertise, and Ecology gave the update extensive consideration. Ecology's use of the Guidance Manual as a proper exercise of its authority should be upheld.

## **VI. CONCLUSION**

The pollutant standards that NPDES permits must meet are set in state and federal regulation. The Guidance Manual creates no new standard that purports to be a binding norm. It simply implements the plain language of the Clean Water Act and RCW 90.48. The Guidance Manual is just that – guidance. Therefore, NWPP cannot meet its burden

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to show that the Guidance Manual is a rule nor can it show that Section 4.5 conflicts with Ecology's statutory authority. Ecology asks this Court to affirm the superior court's decision upholding the Guidance Manual.

RESPECTFULLY SUBMITTED this 18th day of September 2020.

ROBERT W. FERGUSON  
Attorney General

A handwritten signature in black ink, appearing to read "Phyllis J. Barney". The signature is fluid and cursive, with the first name being the most prominent.

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