

No. 94293-5

SUPREME COURT OF THE STATE OF WASHINGTON

PUGET SOUNDKEEPER ALLIANCE,

Petitioner,

v.

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

Respondents.

AMICUS CURIAE BRIEF OF SPOKANE COUNTY

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I. INTRODUCTION

Spokane County appears as *amicus curiae* to address its interest in affirming the Pollution Control Hearings Board decision upholding the use of PCB test Method 608 to determine compliance with NPDES Permit effluent limitations. Soundkeeper contends that this Court must compel the use of Method 1668, even though that method cannot produce reliable or accurate data. But, simply being able to “detect” PCBs at low levels is not enough when it comes to determining compliance with NPDES Permit effluent limits. What is equally important is that the test method be able to produce consistently precise and accurate data using established protocols that are not subject to disagreement or debate. Method 1668 cannot meet these requirements.

The County holds an NPDES Permit for its publicly owned Regional Water Reclamation Facility, which provides state-of-the art, advanced treatment for sewage and industrial wastewater before discharging Class A reclaimed water to the Spokane River. As a sewage treatment plant, the County cannot control all of the PCBs that enter its collection system as unintended byproducts of the manufacturing process.

The County’s Permit contains PCB requirements. The Permit is currently in the process of reissuance, and by its terms, Ecology must impose PCB effluent limits in the reissued Permit. Consequently, this

Court's decision, as to which test method must be used to measure compliance with effluent limits, has significant implications for the County.

The County's experience collecting, reviewing, and analyzing Method 1668 data for over six years confirms that the problems that were identified during EPA's 2010 proposed rulemaking for Method 1668 still exist. The data generated by Method 1668 is not sufficiently reliable or accurate to be used as a compliance or enforcement test method for measuring PCBs at low levels. Both the Environmental Protection Agency and the Washington Department of Ecology, as regulatory agencies responsible for implementing the federal and state Clean Water Acts, properly determined that Method 1668 is not ready to be used for determining compliance with PCB effluent limits. The Board's decision should be upheld.

II. IDENTITY AND INTEREST OF AMICUS

Spokane County incorporates the Statement of Interest in its concurrently filed Motion to File *Amicus Curiae* Brief.

III. ISSUE ADDRESSED BY AMICUS

Spokane County submits this Brief in support of affirming the Board's decision, which held that Ecology properly required the use of Method 608 to measure compliance with NPDES PCB effluent limits.

IV. STATEMENT OF THE CASE

Spokane County incorporates the State of Washington's Statement of the Case contained in its Supplemental Brief and supplements it with the following information. As explained in the Declaration of Kevin Cooke, P.E., submitted with Spokane County's Motion to File *Amicus Curiae* Brief, the County's NPDES Permit¹ requires testing for PCBs using both Method 608 and Method 1668. The reissued Permit will contain PCB effluent limits. As required by the Permit, for the past six years, the County has collected PCB test data using Method 1668 and has participated in the Spokane River Regional Toxics Task Force, which also collects PCB data using Method 1668. (Cooke Dec., at ¶¶ 1-4).

Spokane County's review and analysis of the Method 1668 data has confirmed that while Method 1668 can detect lower concentrations of PCBs in water samples than the concentrations detected using Method 608, the quantitation procedures specified in Method 1668 would need to be modified or extensively refined before it could be used reliably and consistently to determine compliance with PCB effluent limits at low levels. (*Id.*, at ¶ 5, 11).

¹ Spokane County Division of Utilities NPDES Permit No. WA-0093317; <http://www.spokanecounty.org/DocumentCenter/View/16451> (last visited Aug. 29, 2017).

Some of the problems that Spokane County has experienced with Method 1668 are that sample “blanks” containing ultra-pure laboratory water have *always tested positive* for PCBs—even though the “blank” sample water has been carefully protected from contamination and is presumably PCB free. In many analytical procedures, if an amount above non-detect is found in the laboratory blank, then the entire batch of samples run with that blank are considered invalid. When laboratory blanks are run with Method 1668, PCBs are always detected above the detection limits. PCB concentrations in the ultra-pure laboratory water sometimes even exceed PCB concentrations in the County’s effluent. When Method 1668 was used to try to track-down sources of PCBs in sewage, as PCB concentrations in the samples decreased, the data became less reliable because PCB concentrations in the blanks was variable and inconsistent. (*Id.*, at ¶ 7).

To try to understand the uncertainties associated with the Method 1668 PCB laboratory data, the County reviewed EPA’s 2012 Deferral of Action on EPA Method 1668, in which EPA decided not to approve Method 1668 as an approved analytical test method.² The County also reviewed some of the comments made as part of EPA’s proposed rulemaking in 2010. During EPA’s proposed rulemaking, multiple

² 77 *Fed. Reg.* 29,763 (May 18, 2012).

commenters suggested that EPA should first promulgate new detection and quantitation procedures for methods as recommended by the Federal Advisory Committee on Detection and Quantitation Approaches and Uses in the Clean Water Act Program. (*Id.*, at ¶ 8-9).

The County also reviewed numerous scientific studies from reputable institutions and public agencies such as the United States Geological Survey,³ Virginia Department of Environmental Quality,⁴ and the Los Alamos National Laboratory.⁵ In all, the County reviewed 20 different studies, which all employed different methodologies to quantify total PCBs in samples. There was no consensus among them as to which methodology should be used to quantify and report total PCB concentrations, which would be the value that would need to be reported if Method 1668 were used for compliance. (*Id.*, at ¶ 11).

The County's experience collecting and reviewing Method 1668 data for over six years has confirmed that EPA was correct in not

³ U.S. Geological Survey Report, *Concentrations of Loads of Organic Compounds and Trace Elements in Tributaries to Newark and Raritan Bays, New Jersey*, Scientific Investigations Report 2007-5059; <https://pubs.er.usgs.gov/publication/sir20075059> (last visited Aug. 29, 2017).

⁴ Commonwealth of Virginia Department of Environmental Quality Water Division, *TMDL Guidance Memo No. 14-2004* (April 4, 2014) http://www.deq.virginia.gov/Portals/0/DEQ/Water/TMDL/PCB/Guidance%2014-2004/GM14-2004_Final_PCB_Calculation_Guidance.pdf (last visited Aug. 29, 2017).

⁵ Los Alamos National Laboratory, *Polychlorinated Biphenyls in Precipitation and Stormwater Within the Upper Rio Grande Watershed*, May 2012); <http://permlink.lanl.gov/object/tr?what=info:lanl-repo/epr/ERID-219767> (last visited Aug. 29, 2017).

approving Method 1668 due to the numerous uncertainties associated with laboratory data generated using this method. Method 1668 can be used as a screening tool or as part of a pollutant minimization or best management plan, but it is not ready to be used as a compliance or enforcement method for measuring PCBs at low levels.

V. ARGUMENT

A. Method 1668 is Not Sufficiently Reliable or Accurate to be Used for Compliance with NPDES Permit Limits.

The County, like every other sewage treatment plant in the country, cannot eliminate or control all of the PCBs that enter its sewage collection system. Direct production of PCBs stopped in the 1970s; however, since that time, PCBs have been incidentally produced as the unintended byproducts of the manufacturing process. Household and personal care products, such as soap, detergent, shampoo, and even toothpaste contain PCBs.

Materials containing less than 50 parts per million (ppm) are not considered “PCB-contaminated” under the Toxics Substances Control Act (TSCA) (40 C.F.R. § 761.3).⁶ For comparison to Washington’s current PCB water quality standard, 50 ppm is equal to 50,000,000,000 parts per

⁶ City of Spokane, Wastewater Management Department, *PCBs in Municipal Products REVISED*, Ecology Municipal Stormwater Grants of Regional or Statewide Significance, Grant No. G1400545, July 21, 2015, <http://srrttf.org/wp-content/uploads/2015/03/Revised-Product-Testing-Report-7-21-15.pdf> (last visited Aug. 29, 2017).

quadrillion (ppq). The current Washington State human health surface water quality standard for PCBs is 7 ppq.⁷ The County cannot stop PCBs from entering its collection system because TSCA authorizes PCBs to be legally generated at many orders of magnitude above Washington’s PCB surface water quality standard.

Under the Federal Water Pollution Control Act⁸ (hereafter “Clean Water Act”), NPDES Permit effluent limits are enforceable by agency or citizen-suit enforcement actions. 33 U.S.C. § 1319; 33 U.S.C. § 1365. Violating NPDES Permit limits exposes permittees to significant liability. Maximum penalties under the citizen-suit provision of the Clean Water Act are \$51,570.00 per day, per violation. 33 U.S.C. § 1319(d), 33 U.S.C. § 1365(a), 40 C.F.R. § 19.4.

Consequently, permittees must be able to accurately and reliably measure the concentration of the regulated pollutant in its discharge. Being able to “detect” the presence of PCBs is not enough. A test method that consistently produces data that is subject to contamination because even laboratory blanks of ultra-pure lab water contain PCBs, does not provide permittees with the accurate data they need to determine compliance. A test method that generates data that is subject to debate and

⁷ 81 Fed. Reg. 85417, 85430 (Nov. 28, 2016) (Table 1, Line 90, Column C, scientific notation “7E-06” equals .000007). 7 ppq is equal to .000007 micrograms per liter (ug/L).

⁸ 33 U.S.C. § 1251, *et seq.*

that is interpreted multiple, inconsistent ways is certainly not precise or accurate.

As explained in the comments to EPA's proposed rulemaking, there were many problems with the precision and accuracy of Method 1668. Of the 35 comments received on Method 1668, 30 were critical of the method.⁹ For example, the comments prepared by Environmental Standards, Inc.,¹⁰ included an extensive evaluation of Method 1668 and identified many problems with the Method, including the following:

- “Problems observed in the data supplied by laboratories participating in the interlaboratory study have been largely ignored by EPA. The fact that most laboratories that submitted data to EPA for the interlaboratory study was deemed unusable with no apparent changes to the method as a result of ‘learning from the data’ is troubling.”
- “There is no indication in the Study Report that EPA considered whether this method can be implemented correctly and consistently by the commercial laboratory community.”
- “Many of these issues can lead to inaccurate data and poor comparability of results generated amongst the laboratories available for use by the regulated community solely due to lack of clarity in the method and resulting options the laboratories may choose in implementing the method.”
Id., at p. 10.

⁹ 77 Fed. Reg. 29,763.

¹⁰ Environmental Standards, Inc., *Review and Evaluation of EPA Method 1668*, (December 21, 2010); Prepared for Utility Water Act Group, the Federal Water Quality Coalition, General Electric Company, Alcoa, Inc., Georgia Pacific LLC, the Delaware Estuary TMDL Coalition, E.I. du Pont de Nemours and Company, and the National Association of Clean Water Agencies; <https://www.regulations.gov/document?D=EPA-HQ-OW-2010-0192-0192> (last visited Aug. 29, 2017).

After reviewing 20 studies, the County found no consistency among those studies as to how to quantify and report total PCB concentrations using Method 1668. The Virginia Department of Environmental Quality guidance memo discussing the use of Method 1668 for purposes of developing and implementing TMDLs specifically states that “data generated under this guidance should not be used for compliance purposes.”¹¹

In Spokane County’s six years of experience collecting Method 1668 data, every sample blank containing ultra-pure lab water has tested positive for PCBs. PCBs are always detected above the detection limit. Sometimes, PCBs in the ultra-pure lab water even exceed PCB concentrations in the County’s effluent. Method 1668 is not ready to be used for compliance purposes and the law does not require that this Court compel its use.

B. Retaining Method 608 is Consistent with Federal and State Law and Properly Defers to Ecology’s Water Quality Expertise.

Soundkeeper’s argument appears to be that “detection” of PCBs is enough because permittees can then eliminate PCBs or stop discharging

¹¹ Virginia Department of Environmental Quality Water Division, *TMDL Guidance Memo No. 14-2004*, (April 4, 2014), at p. 2; http://www.deq.virginia.gov/Portals/0/DEQ/Water/TMDL/PCB/Guidance%2014-2004/GM14-2004_Final_PCB_Calculation_Guidance.pdf (last visited Aug. 29, 2017).

entirely. But that argument ignores the reality that products containing PCBs are legally sold, used by the public, and ultimately discharged to the sewage collection system at concentrations many orders of magnitude above Washington's water quality standard.

Under federal law, Method 608 is the only approved method for monitoring PCBs. 40 C.F.R. Part 136.1(a). Regulations adopted by the State of Washington to implement Washington's water quality standards specifically recognize that when applying water quality criteria, consideration will be given to the *precision and accuracy* of the sampling and analytical methods used. WAC 173-201A-260(3)(g). Because the words "precision" and "accuracy" are not defined in the regulation, courts look to the dictionary for meaning. *Columbia Riverkeeper v. Port of Vancouver, USA*, 188 Wn.2d 421, 435, 395 P.3d 1031 (2017). The dictionary defines "precision" as "the quality or state of being precise." The word "accuracy" is defined as "freedom from mistake or error: correctness."¹² As discussed in the prior sections of this Brief, the many problems with this Method establish that the method is not precise, correct, or free from error.

While WAC 173-201A-260(3)(h) provides Ecology with discretion to approve other, superseding, published test methods, nothing compels

¹² *Dictionary-Miriam Webster Online* (last checked Aug. 30, 2017).

this Court to require Ecology to do so here when that method is incapable of producing reliable test results.

Soundkeeper's reliance on *Puget Soundkeeper Alliance v. Pollution Control Hearings Board*, 189 Wn. App. 127, 356 P.3d 753 (2015) is misplaced because that case involved interpreting a Permit's "whole effluent toxicity testing" requirements. The present case before this Court does not involve whole effluent toxicity testing requirements. Whole effluent toxicity is specifically regulated by WAC 173-205. WAC 173-201A-240(1) requires acute and chronic testing and WAC 173-205-070 specifically defines compliance for purposes of whole effluent toxicity testing. However, neither of those regulations are applicable here because whole effluent toxicity testing requirements are not the subject of this appeal.¹³

Finally, as this Court has previously ruled, deference must be accorded to Ecology on technical issues that fall within Ecology's technical expertise and Ecology's interpretations of its own regulations are entitled to great weight. *Thorpe v. Inslee*, 188 Wn.2d 282, 290, 393 P.3d 1231 (2017); *Port of Seattle v. Pollution Control Hearings Board*, 151

¹³WAC 173-201A-510(1) does not categorically prohibit a discharge that causes or contributes to a violation of water quality standards: "No waste discharge permit can be issued that causes or contributes to a violation of water quality criteria, *except as provided for in this chapter.*" (emphasis added). WAC 173-201A-510(4) provides flexibility to Ecology in the manner and timing of implementing Washington's water quality standards.

Wash.2d 568, 598-94, 90 P.3d 659 (2004). Determining which sampling methodology is appropriate to measure compliance with NPDES permit limits for PCBs falls squarely within Ecology's water quality technical expertise. The issue involves complex water quality sampling methodologies and data interpretation, as well as the interpretation of Ecology's water quality regulations. The Court should accord Ecology great deference on its decision to utilize Method 608 for PCB compliance monitoring and uphold the Board's decision on this issue.

VI. CONCLUSION

The Board's decision upholding Ecology's decision to utilize Method 608 for PCB compliance monitoring should be upheld.

RESPECTFULLY SUBMITTED this 30th day of August, 2017.

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CERTIFICATE OF SERVICE

I, Michelle Stark, certify as follows:

1. I am over 18 years of age and a U.S. citizen. I am employed as a legal secretary by the law firm of Foster Pepper PLLC.

2. I certify that on this 30th day of August, 2017, I caused a copy of the foregoing document, **AMICUS CURIAE BRIEF OF SPOKANE COUNTY**, to be served via email on the following parties:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct and that this certificate was executed on August 30, 2017, at Seattle, Washington.

s/ Michelle Stark

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