

NO. 48267-3-II

**COURT OF APPEALS, DIVISION II 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.

PETITIONER'S REPLY BRIEF

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I. INTRODUCTION

Notwithstanding the State's attempts to introduce extraneous technical matters into this case, the legal issues before the Court are not particularly complex. No doubt, the State would prefer the Court find a discretionary technical determination meriting deference to the Department of Ecology ("Ecology") or Pollution Control Hearings Board ("Board"). But this appeal does not present such issues. Indeed, contrary to the State's *post hoc* assertions, the record shows that the parties agree on the relevant technical questions.

Two questions remain for the Court to decide: (1) Where, as here, it is feasible to derive site-specific numeric water quality-based effluent limits ("WQBELs"), may Ecology nonetheless impose less stringent limits that are not site-specific? and (2) May Ecology issue an NPDES¹ permit that does not require PCB discharge monitoring using the only laboratory analysis method that is capable of detecting compliance with the PCB limits necessary to protect water quality? While the underlying science is complex, these are ultimately questions of statutory interpretation that do not require technical expertise.

The applicable statutes and regulations are themselves clear, as "our legislature has in no uncertain terms prohibited the Department [of

¹ National Pollutant Discharge Elimination System.

Ecology] from issuing permits that allow toxic discharges in violation of applicable standards.” *Puget Soundkeeper Alliance v. Pollution Control Hearings Board*, 189 Wn.App. 127, 138 (2015). Petitioner Puget Soundkeeper Alliance asks this Court to once again affirm that bedrock principle and remand the permit with instructions to abide by it.

II. ARGUMENT

A. The State failed to impose properly derived water quality based effluent limitations for SIM’s untreated stormwater discharge.

The parties agree that Seattle Iron and Metals’ (“SIM’s”) untreated stormwater discharge has a reasonable potential to cause or contribute to violations of water quality standards for copper and zinc. Resp’ts’ Resp. at 13 (citing RP 543:24-544:1; 666:10-20). In their respective briefing the parties describe the “reasonable potential analysis,” which can be either a statistical analysis or a more qualitative analysis. Pet’r’s Opening Br. at 7; Resp’ts’ Resp. at 12-13. In the instant case, SIM’s permit writer decided that there was insufficient discharge data to conduct a valid statistical reasonable potential analysis, but Ecology still made a reasonable potential finding using a qualitative analysis. Resp’ts’ Resp. at 12-13. The parties further agree that because of this reasonable potential, the NPDES permit must impose water quality based effluent limits for copper and zinc. *Id.* (citing RP 666:22 and 40 C.F.R. § 122.44(d)).

The parties disagree about the propriety of the next step Ecology

took: rather than impose site-specific water quality based effluent limits on SIM's untreated stormwater discharge, Ecology imported the numeric copper and zinc benchmark concentrations from the State's Industrial Stormwater General NPDES permit and made those the numeric effluent limits.

The State defends this decision on two grounds. First, it claims that Ecology made a technical determination that it lacked sufficient data to derive site-specific water quality-based effluent limits for SIM. As explained below, this is false; Ecology made no such determination. Second, the State argues that the Industrial Stormwater General Permit benchmarks are water quality-based and, therefore, the limits in SIM's permit are sufficiently protective of water quality. This is also false, as demonstrated by record in this case – including Ecology's statements in the fact sheet issued with the Permit and in testimony to the Board – and the Board's decision on the General Permit on which the State relies.²

² In its response brief, the state argues that the NPDES permit limits for copper and zinc are water quality-based limits, despite the Board's finding that the General Permit benchmarks and the NPDES permit limits are technology-based. Resp'ts' Resp. at 10; AR 264, 273 (Board Decision at 38, 47). See also AR 3358. (fact sheet: "The proposed limits for [the untreated stormwater (S1.B.)] are technology-based and based on our best professional judgment, they are considered AKART."); RP 584:6 – 586:12 (permit writer Abassi describing how he would have derived water quality-based effluent limits if he had recognized Ecology's finding of reasonable potential for the S1.B. discharge).

1. Ecology has sufficient data to derive WQBELs.

The State's first argument - that SIM's permit writer, Mr. Abbasi, determined that he lacked sufficient discharge data to derive water quality based effluent limits tailored to SIM - is a blatant mischaracterization of the evidence in the record. Mr. Abbasi testified that he lacked sufficient data to conduct a statistical reasonable potential analysis, not that the two data points he had "were also insufficient for the calculation of permit *limits*" as the State claims. Resp'ts' Resp. at 13. The State's only evidence in support of its claim is an exchange at the hearing that, with respect to the untreated stormwater discharge, is exclusively about the reasonable potential analysis. *Id.* and RP 534:13-539:8. The State tries to extrapolate this testimony to apply to the calculation of effluent limits by citing Ecology's Permit Writers Manual for the proposition that the coefficient of variation (CV), which is calculated through a statistical process requiring actual discharge data, is necessary to calculate limits. Resp'ts' Resp. at 12 (citing AR 3412). However, Ecology's Permit Writers Manual states that Ecology uses a default CV of 0.6 whenever there are fewer than twenty data points. AR

Soundkeeper believes the Court can resolve this appeal without deciding this question, on the basis that the NPDES permit's S1.B limits do not meet the legal requirements for WQBELs as explained *infra*. However, to the extent that the Court needs to address this question, the Board's finding that the limits are technology-based limits should control because neither party has appealed that finding.

3412 – 3413. Thus, the State has no basis to argue that it needed a site-specific CV to properly derive WQBELs for SIM’s untreated stormwater discharge – certainly, it presented no evidence or testimony supporting this assertion at the hearing.

Not only did Mr. Abbasi *not* testify that he lacked sufficient discharge data to derive water quality based effluent limits for SIM, he testified as to what properly derived water quality-based effluent limits would be for SIM’s untreated stormwater discharge, assuming a finding of reasonable potential.³ RP 577:25 – 581:2. In other words, SIM’s permit writer had all of the information necessary to derive site-specific water quality-based limits right there on the witness stand. Soundkeeper’s expert concurred, deriving these same numbers using formulas from Ecology’s Permit Writers Manual. RP 350:8 – 352:1; 352:12 – 353:3. The Board’s asserted deference to “Ecology’s technical determination that it lacked sufficient monitoring data for SIM’s untreated stormwater discharge to develop site-specific numeric effluent limits” is thus utterly unsupported by

³ While Ecology’s official position is and has been that SIM’s untreated stormwater discharge has the reasonable potential to cause or contribute to violations of water quality standards, Mr. Abbasi’s view at the hearing was that the only reasonable potential analysis is a statistical one, such that he could not make a reasonable potential determination because of insufficient data. RP 570:20-23; 627:16-628:25 (Mr. Abbasi’s supervisor testifying that “Mr. Abbasi . . . didn’t recognize that he did actually make a reasonable potential determination. . .”)

substantial evidence. RP 37-38.

2. The NPDES permit limits for copper and zinc impermissibly fail to protect water quality.

As plainly stated in Mr. Abbasi's testimony, properly derived copper and zinc effluent limits – those that would be protective of water quality – would be more stringent than the NPDES permit limits for the untreated stormwater discharge, which are simply copied from the Industrial Stormwater General Permit benchmarks.⁴ RP 580:25-581:15.

The State nonetheless argues that the General Permit benchmarks are generally protective of water quality, so the NPDES permit limits must be too. For this argument, the State relies on the Board's decision in a 2009 appeal of the General Permit. Resp'ts' Resp. at 14-15 (citing *Copper Dev. Ass'n, Inc. v. Dept. of Ecology*, PCHB Nos. 09-136 through 09-141 (Findings of Fact, Conclusions of Law and Order, Apr. 25, 2011) (hereinafter referred to as *Copper Development*)).

The Board's findings in *Copper Development* regarding how Ecology derived the General Permit's benchmark concentrations – used to

⁴ Properly derived copper effluent limits would be 4.8 µg/L (daily maximum) and 3.1 µg/L (monthly average), whereas the General Permit's copper benchmark and NPDES permit's limit is 14 µg/L. Properly derived zinc effluent limits would be 90 µg/L (daily maximum), and 81 µg/L (monthly average) whereas the General Permit's zinc benchmark and NPDES permit's limit is 117 µg/L. RP 579:23-581:5; RP 336:3 – 340:11; AR 3260.

regulate the approximately 1200 facilities discharging industrial stormwater under the General Permit - demonstrate precisely why those concentrations do not suffice for WQBELs in SIM's individual NPDES permit. *Copper Development* at 4. Ecology determined that the General Permit's copper benchmark would result in a ten percent probability of exceeding the acute water quality standard for copper – assuming a “dilution factor” of five. *Copper Development* at 20. A “dilution factor” represents the amount of mixing of effluent and receiving water, such that measuring compliance with water quality standards after incorporation of a dilution factor is akin to measuring the concentration in the receiving water some distance from the discharge and after the discharge has been diluted with the receiving water. *See* AR 3325. For example, a dilution factor of five means the effluent is 20% and the receiving water is 80%. *See id.*

Thus, the General Permit's copper benchmark assume a dilution factor – which Ecology concedes is not available for SIM's untreated stormwater discharge – and even then, one out of every ten discharges is expected to result in an exceedance of water quality standards. *Copper Development* at 20; RP 580:25-581:15; AR 3358. Such a lax limit is explicitly prohibited by the CWA, 33 U.S.C. § 1311(b)(1)(C), its implementing regulations, 40 C.F.R. § 122.4(d), and state statute which provides: “In no event shall the discharge of toxicants be allowed that

would violate any water quality standard, including toxicant standards, sediment criteria, and dilution zone criteria,” RCW 90.48.520. *Puget Soundkeeper Alliance v. Pollution Control Hearings Board*, 189 Wn.App. at 137-38.

With respect to the zinc effluent limit for SIM’s untreated stormwater, *Copper Development* is even less helpful to the State’s contention that the SB.1 limit is a properly derived WQBEL. In *Copper Development* the Board found that the basis for the zinc benchmark in the General Permit was unclear. *Copper Development* at 24. Here, the Board found that the SB.1 limit is technology-based. AR 264. *See also* AR at 238, 249, 266. (Board Decision at 38. *See also id.* at 12, 23, 36.) The State thus presents no support for its argument that the zinc NPDES permit limit is water quality-based. Soundkeeper’s opening brief explains why the State cannot rely on exclusively technology-based effluent limits for this discharge, which the State does not dispute. Pet’r’s Opening Br. at 35 – 40.

Ultimately, the legality of the S1.B effluent limits for SIM’s untreated stormwater discharge can be resolved by the simple fact that the NPDES permit limits for copper and zinc exceed appropriately derived WQBELs by about 130 to 450%. *See n. 5, supra*. The Board’s order upholding these illegally high limits is outside the statutory authority granted to Ecology by the CWA and state statute, and it is inconsistent with

Ecology's own regulations. *Puget Soundkeeper Alliance v. Pollution Control Hearings Board*, 189 Wn.App. at 138, 149; *Upper Blackstone Water Pollution Abatement Dist. v. U.S. EPA*, 690 F.3d 9, 28 (1st Cir. 2012); *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1163 (9th Cir. 1999); 33 U.S.C. § 1311(b)(1)(C) (a permittee "shall . . . achieve[] . . . any more stringent limitation, including those necessary to meet water quality standards . . ."); 40 C.F.R. § 122.44(d). The Court should remand the NPDES permit to Ecology with instructions to replace the S1.B limits with properly derived WQBELs.

3. The supposed "interim" nature of the S1.B effluent limits is no basis for upholding them.

The State now concedes that the S1.B effluent limits are not part of a compliance schedule to meet final WQBELs.⁵ As the State explains, the limits are "interim" only in the sense that they may be revised in the next iteration of SIM's permit. Resp'ts' Resp. at 18. However, it is no defense that Ecology might get it right in the next five-year permit cycle; the limits in *this* permit must meet federal and state water quality protections.⁶ The

⁵ The State had previously attempted to justify the less-stringent S1.B limits by their relationship to a compliance schedule. AR 3356 (response to Soundkeeper's draft permit comments on effluent limits for employee parking lot and untreated roof runoff); RP 667:9 – 18.

⁶ The State's claim that the S1.B limits were "immediately enforceable" is false. Resp'ts' Resp. at 17. The S1.B limits took effect June 1, 2014, nine months after the NPDES permit went into effect. AR 3260.

Board's characterization of the S1.B limits as "interim" is legally irrelevant.

- C. The permit cannot issue without a requirement for use of Method 1668C to determine compliance with PCB limits.

PCB discharges from SIM are of the utmost concern to Soundkeeper because the facility has been identified as an ongoing source of highly toxic PCBs and because it discharges to the Duwamish River, where a multi-million dollar Superfund cleanup is underway largely due to PCB contamination which makes fish from the River unsafe to eat. Pet'r's Opening Br. at 13-17. Despite recognizing these problems, the Board upheld the use of monitoring Method 608 that can only detect PCBs in SIM's effluent at a concentration more than 29,000 times higher than the WQBEL required by law to ensure against violations of water quality standards for toxics. AR 260, 273 (Board Decision at 34, 47.). The State's argument that its hands are tied when it comes to requiring meaningful PCB monitoring via Method 1668C simply ignores and misreads pertinent federal and state regulations. Rather, the opposite is true: Ecology cannot issue SIM an NPDES permit that allows toxic PCB discharges in violation of applicable standards, which is the de facto result unless the permit requires Method 1668C.

- 1. Method 1668C is a "superseding method published" by EPA.

The State recognizes that Ecology's selection of analytic methods in NPDES permits is subject to WAC 173-201A-260(3)(h). That regulation provides three options:

The analytical testing methods for these numeric criteria must be in accordance with [1] the "*Guidelines Establishing Test Procedures for the Analysis of Pollutants*" (40 CFR Part 136) or [2] **superseding methods published**. [3] [Ecology] may also approve other methods following consultation with adjacent states and with the approval of the USEPA.

WAC 173-201A-260(3) (italics in original, bold emphasis added). The State also acknowledges that EPA developed and published Method 1668C for PCB analysis subsequent to Method 608, and that Method 1668C is far more sensitive than Method 608. Yet, the State contends that Method 1668C is not a "superseding" method because EPA has not approved a prior version of Method 1668 in 40 C.F.R. § 136. Resp'ts' Resp. at 22. Nothing in the regulation or the record supports such a narrow interpretation of the phrase "superseding methods published." The only qualifier in the regulation is that the method must be published, which Method 1668C is.

The plain meaning of the term "supersede" is "to force out of use as inferior" and "to take the place of (someone or something that is old, no longer useful, etc.)" which is in no way restricted to something in the same series as the obsolete thing it takes the place of. *Supersede*, Merriam-

Webster's Collegiate Dictionary (10th ed. 2002); *Supersede*, Merriam-Webster.com. <http://www.merriam-webster.com/dictionary/supersede>.

The narrow reading offered by the State – that a lab method cannot be “superseding” unless EPA adds it to the 40 C.F.R. § 136 list – would render WAC 173-201A-260(3)(h)’s second clause, “or superseding method published,” superfluous contrary to a fundamental rule of statutory/regulatory construction. *State v. J.P.*, 149 Wn.2d 444, 450 (2003) (“Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.” (citations omitted); *State v. Burke*, 92 Wn.2d 474, 478 (1979) (rules of statutory construction apply to regulations). The State’s restrictive reading would also impermissibly frustrate legislative intent and the regulatory scheme, which stress the prohibition of discharges that violate toxicity standards, and the State’s policy to work cooperative with EPA “while at the same time preserving and vigorously exercising state powers to insure that ... standards of water quality within the state shall be determined by the citizenry, through and by the efforts of state government.” RCW 90.48.010, -.520; *Puget Soundkeeper Alliance*, 189 Wn.App. at 138, 148 - 149 (State Environmental Policy Act, Ch. 43.21C RCW, requires strict implementation of narrative toxic water quality criteria, WAC 173-201A-240(1), consistent with the “categorical” prohibition of RCW 90.48.520.) “[D]eference to an

agency is inappropriate where the agency's interpretation conflicts with a statutory mandate." *Puget Soundkeeper Alliance*, 189 Wn.App. at 136.

Furthermore, the record in this case indicates EPA intended Method 1668C to supersede Method 608 to meet modern PCB analysis needs. Method 608 was developed in the 1970s and measures the concentrations of various PCB aroclors. AR 3226 – 3227. Method 1668 was developed by EPA as a congener-based method for use in CWA programs to match the revision of the National Toxics Rule's PCB human health criteria from an aroclor-based criteria to a "Total PCB" based criteria, which necessitates a congener-based analysis. AR 2751, 3227. As EPA explicitly stated in April, 2010, EPA developed Method 1668C "for use in Clean Water Act (CWA) programs" and published Method 1668C "for users who wish to measure PCBs as congeners *now*" despite equally explicit recognition that EPA had yet to add Method 1668 to 40 C.F.R. § 136. AR 2751. EPA thus published Method 1668 to take the place of Method 608, which is generally inadequate to measure compliance with PCB human health criteria.

EPA's deferral of its rulemaking to add Method 1668C to 40 C.F.R. § 136 does not change its status as a superseding method. EPA explicitly stated that its deferral "does not negate the merits of this method for the determination of PCB congeners in regulatory programs or for other purposes . . ." AR 3587.

Indeed, the State's attempt to use the 40 C.F.R. § 136 list to straightjacket itself to use of the inadequately precise approved method would pervert that federal regulation into a rule that directly contradicts the explicit federal policies behind mandating effluent limitations effective to prevent violation of water quality standards, particularly for toxics. 33 U.S.C. § 1251(a)(2) and (3); *Defenders of Wildlife v. Browner*, 191 F.3d at 1163. This cannot be EPA's intention. See AR 2751; *Nat. Res. Def. Council, Inc. v. U.S. EPA*, 966 F.2d 1292, 1300 (9th Cir. 1992) (courts presume EPA dutifully follows Congress's dictates); *Smith v. Brown*, 35 F.3d 1516, 1526 (Fed. Cir. 1994) (regulations must be construed to avoid conflict with a statute if fairly possible).⁷ Given the centrality to the NPDES permit regime of the water quality-protection mandate, 40 C.F.R. § 136 can only have been intended to prevent the use of inferior lab analysis methods of inadequate precision or accuracy that would frustrate the objectives of the regulatory regime. Ironically, frustration of this exact nature results from Ecology's insistence on Method 608 for the permit at issue.

⁷ See also *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) (Court will invalidate an agency regulatory interpretation that is contrary to a federal statute); *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 485 (2001) ("EPA may not construe the statute in a way that completely nullifies textually applicable provisions . . .")

2. Ecology has the discretion to require Method 1668C with EPA approval or deny the NPDES permit, but not to issue the NPDES permit without Method 1668C.

Even if Method 1668C were not a “superseding method,” the NPDES permit cannot issue without it. Without requiring PCB analysis capable of detecting compliance with PCB WQBELs, Ecology has issued a permit that allows toxic discharges in violation of applicable standards – which is strictly forbidden by state statute. *Puget Soundkeeper Alliance*, 189 Wn.App. at 138. Ecology’s own regulations similarly require that “No waste discharge permit can be issued that causes or contributes to a violation of water quality criteria,” WAC 173-201A-510(1), and “[a]ny discharge of any pollutant . . . at a level in excess of that identified and [nominally] authorized by the permit shall constitute a violation of the terms and conditions of the permit.” WAC 173-220-150(1)(c).

The State makes no effort to reconcile these mandates with the undisputedly available option to request EPA permission to use Method 1668C, though it is easy to reconcile the two. See Resp’ts’ Resp. at 22 (recognizing “Ecology does have the option” to seek approval to use methods other than 608 and citing 40 C.F.R. § 136.4). Because of the options available to Ecology in its own regulations on analytic methods and in EPA’s regulation, the State is simply incorrect in asserting that there is some unrelenting requirement to use Method 608. Nor is Ecology under a

mandate to issue SIM an NPDES permit in the first place. See, *e.g.*, *Puget Soundkeeper Alliance*, 189 Wn.App. at 138 and 149. The only immutable requirement is that Ecology cannot issue a permit that fails to ensure compliance with PCB WQBELs. *See id.* at 138.

There is an obvious solution available – Ecology or SIM can request EPA’s permission to use Method 1668C. Indeed, this would address Ecology’s requirement that it “give consideration to the precision and accuracy of the sampling and analytical methods used, as well as the existing conditions at the time.” WAC 173-201A-260(3)(g). Ecology has so far ignored this requirement. RP 63:18-64:14 (Ecology gave no consideration to use of Method 1668C, or its precision relative to the permit effluent limitation). The only expert testimony in the record regarding the precision and accuracy of Method 1668C is Soundkeeper’s expert, Dr. Ann Bailey’s. RP 64:15-71:20. As Dr. Bailey explained, Method 1668C is necessary and appropriate given its precision and the existing conditions. RP 70:8-72:10. Ecology’s accreditation of approximately eleven laboratories for performing Method 1668C analysis – including at least one in Washington State – reinforces this conclusion. RP 72:1-10; RP 653:10-14.

As the State points out, however, requesting EPA’s permission to use Method 1668C in SIM’s NPDES permit is Ecology’s choice to make.

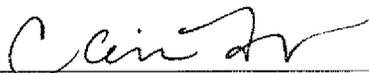
Soundkeeper thus asks the Court not to compel Ecology to seek EPA approval for use of Method 1668C, but to prohibit Ecology from issuing SIM's permit unless such approval is obtained. The NPDES permit's use of a monitoring method that effectively authorizes PCB discharges at 29,000 times the maximum safe discharge level, into a PCB contaminated Superfund site, cannot stand.

III. CONCLUSION

For the foregoing reasons and those set forth in Soundkeeper's opening brief, the Court should find that the Board erred, invalidate the permit, and remand it to Ecology with instructions based on the Court's ruling.

RESPECTFULLY SUBMITTED this 1st day of July, 2016

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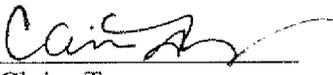
DECLARATION OF SERVICE

I, Claire Tonry, declare under penalty of perjury under the laws of the State of Washington that on this date I caused the foregoing Reply Brief to be served via electronic service on the following persons on July 1, 2016:

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