

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 OPENING BRIEF

SMITH & LOWNEY PLLC
Richard A. Smith, WSBA # 21788
Claire E. Tonry, WSBA # 44497
2317 East John Street
Seattle, Washington 98112

Attorneys for Puget Soundkeeper Alliance

TABLE OF CONTENTS

I. Introduction	1
II. Assignments of Error	2
III. Issues Presented	3
IV. Statement of the Case	4
A. Statutory and Regulatory Background	4
1. The Clean Water Act	4
2. Washington State water pollution control law	9
B. The Duwamish River	12
C. Seattle Iron & Metals Corp.'s discharges and Soundkeeper's litigation	15
D. The NPDES Permit	19
1. Condition S1.A for treated wastewater (outfall 001).....	19
2. PCB laboratory analysis methods for outfall 001	20
3. Condition S1.B for untreated stormwater discharge (outfall 002)	23
E. The Board Decision	24
V. Argument	30
A. The Standard of Review.....	30
B. State and federal law require the imposition of numeric WQBELs on copper, zinc, and mercury in Condition S1.B for the untreated stormwater (outfall 002) discharge	32

C. The technology-based S1.B effluent limitations cannot be affirmed as “interim limits.”	37
D. Ecology’s imaginary “technical determination” of inability to properly calculate numeric S2.B WQBELs warrants no deference.	40
E. The permit cannot issue without a requirement for use of Method 1668C to determine compliance with PCB WQBELs.	42
VI. Conclusion	50

Attachment 1: *Puget Soundkeeper Alliance v. State of Washington, Department of Ecology and Seattle Iron & Metals Corp.*, PCHB No. 13-137c, Findings of Fact, Conclusions of Law, and Order (July 23, 2015) (“Board Decision”)

Attachment 2: Statutes and regulations

Attachment 3: *Puget Soundkeeper Alliance v. Seattle Iron & Metals Corp.*, W.D. Wash. No. 12-1201, Dkt. Nos. 1, 16

Attachment 4: *Puget Soundkeeper Alliance v. State of Washington, Department of Ecology and Seattle Iron & Metals Corp.*, PCHB No. 15-050, Order Granting Respondents’ Motion for Summary Judgment (January 6, 2016)

Attachment 5: Excerpts of administrative record (CP Sub# 21)

TABLE OF AUTHORITIES

Cases

<i>Ackels v. U.S. Evtl. Prot. Agency</i> , 7 F.3d 862, (9th Cir. 1993).....	6, 33
<i>Am. Mining Cong. v. U. S. Evtl. Prot. Agency</i> , 965 F.2d 759 (9th Cir. 1992)	5
<i>Ass'n to Protect Hammersley, Eld, and Totten Inlets v. Taylor Res., Inc.</i> , 299 F.3d 1007 (9th Cir. 2002)	4
<i>Burton v. Lehman</i> , 153 Wn.2d 416, 103 P.3d 1230 (2005).....	31
<i>Chevron U.S.A. v. Hammond</i> , 726 F.2d 483 (9th Cir. 1984).....	9
<i>Defenders of Wildlife v. Browner</i> , 191 F.3d 1159 (9th Cir. 1999)	6, 33, 40
<i>Divers' Environmental Conservation Organization v. State Water Resources Control Board</i> , 145 Cal.App.4th 246, 254 (2006)	7
<i>Dot Foods, Inc. v. Dep't of Revenue</i> , 166 Wn.2d 912, 215 P.3d 185 (2009).....	31
<i>In the Matter of the Petition of Boeing Company</i> , 2006 Cal. ENV LEXIS 121 (Cal. Water Res. Control Bd. 2006).....	7
<i>Monongahela Power Co. v. Marsh</i> , 809 F.2d 41 (D.C. Cir. 1987)	4
<i>Natural Resources Defense Council, Inc. v. Costle</i> , 568 F.2d 1369 (D.C. Cir. 1977).....	12
<i>Northwest Environmental Advocates v. EPA</i> , 2006 U.S. Dist. LEXIS 69476 (N.D. Cal. 2006)	8, 9
<i>Oklahoma v. EPA</i> , 908 F.2d 595, (10th Cir. 1990), <i>rev'd on other grounds sub nom. Arkansas v. Oklahoma</i> , 503 U.S. 91, 117 L. Ed. 2d 239, 112 S. Ct. 1046 (1992).....	12, 33
<i>Or. Natural Desert Ass'n</i> , 172 F.3d.....	4-5

<i>Port of Seattle v. Pollution Control Hearings Bd.</i> , 151 Wn.2d 568, 90 P.3d 659 (2004).....	30, 32
<i>Pronsolino v. Nastri</i> , 291 F.3d 1123 (9th Cir. 2002).....	5, 15
<i>PUD No. 1 of Jefferson County v. Washington Dep't of Ecology</i> , 511 U.S. 700, 714 – 719 (1994).....	6
<i>Puget Soundkeeper Alliance, et al. v. Ecology</i> , PCHB No. 02-162.....	19, 40
<i>Puget Soundkeeper Alliance v. Ecology</i> , PCHB No. 15-050.....	18, 22, 30, 40
<i>Puget Soundkeeper Alliance v. Pollution Control Hearings Board</i> , 189 Wn.App. 127 (2015)	1, 6, 10, 11, 12, 32, 35-36, 37, 43, 47, 48, 49, 50
<i>Puget Soundkeeper Alliance v. Seattle Iron & Metals Corp.</i> , W.D. Wash. No. 12-1201.....	17
<i>Roller v. Dep't of Labor & Indus.</i> , 128 Wn.App. 922 (2005)	31
<i>Save the Valley, Inc. v. EPA</i> , 223 F.Supp.2d 997 (S.D. Ind. 2002).	8
<i>Sierra Club, et al., v. Ecology, et al., PCHB No. 11-184, Findings of Fact, Conclusions of Law, and Order (July 19, 2013)</i>	7
<i>Silverstreak, Inc. v. Dep't of Labor & Indus.</i> , 159 Wn.2d 868, 154 P.3d 891 (2007).....	32
<i>State v. J.P.</i> , 149 Wn.2d 444, 69 P.3d 318 (2003).....	31
<i>Trustees for Alaska v. EPA</i> , 749 F.2d 549 (9th Cir. 1984)	6
<i>Upper Blackstone Water Pollution Abatement Dist. v. U.S. Env'tl. Prot. Agency</i> , 690 F.3d 9, 28 (1st Cir. 2012).....	6
<i>U.S. EPA v. California ex rel. State Water Resources Control Board</i> , 426 U.S. 200 (1976).....	5

Federal Statutes

33 U.S.C. § 1251..... 1, 4
 33 U.S.C. § 1251(a) 1, 4, 7, 10, 35
 33 U.S.C. § 1251(b).....8-9
33 U.S.C. § 1288..... 4
33 U.S.C. § 1311(a) 4, 34
33 U.S.C. § 1311(b) 6, 32, 33, 35
33 U.S.C. § 1313(c) 5, 6
33 U.S.C. § 1313(d)..... 6, 15
33 U.S.C. § 1318 (a) 8
33 U.S.C. § 1342..... 4, 34
 33 U.S.C. § 1342(b)..... 4, 9, 48
 33 U.S.C. § 1342(p)..... 40
33 U.S.C. § 1362(7) 4
33 U.S.C. § 1362 (11) 5
33 U.S.C. § 1362 (14) 5
33 U.S.C. § 1365..... 17
33 U.S.C. § 1370.....8-9, 34

State Statutes

RCW 34.05 30
RCW 34.05.570(1)..... 31
RCW 34.05.570(3)..... 31, 47
RCW 43.21 36
RCW 90.48 1, 48
RCW 90.48.0109, 48-49

RCW 90.48.080	12
RCW 90.48.160	12
RCW 90.48.162	12
RCW 90.48.170	12
RCW 90.48.190	12
RCW 90.48.260	4
RCW 90.48.520	1, 10, 12, 34, 35, 43, 44, 47, 48, 49

Federal Regulations

40 C.F.R. § 122.44	5
§ 122.44(d)	6, 7, 11, 33
§ 122.44(i)	8
§ 122.44(k)	7
40 C.F.R. § 130.0(b)	5
40 C.F.R. §130.2(d)	5
40 C.F.R. § 130.3	5
40 C.F.R. §131.3(i)	6
40 C.F.R. § 131.6	6
40 C.F.R. § 131.36	15
40 C.F.R. § 136	3, 21, 23, 24, 29, 30, 43, 45, 46
40 C.F.R. § 136.1	8
40 C.F.R. § 136.4	8
40 C.F.R. § 136.5	46, 49

State Regulations

WAC 173-201A.....	10
WAC 173-201A-010.....	48
WAC 173-201A-010(1).....	6
WAC 173-201A-010(4).....	10
WAC 173-201A-240(1).....	10, 35, 48, 49
WAC 173-201A-240(3).....	35
WAC 173-201A-240(5).....	15
WAC 173-201A-260(2).....	10
WAC 173-201A-260(3).....	12, 12, 30, 40, 42, 44, 45, 46
WAC 173-201A-400.....	19
WAC 173-201A-400(3).....	25
WAC 173-201A-400(4).....	25
WAC 173-201A-510(1).....	11, 12, 34, 47, 48, 49
WAC 173-201A-510(4).....	38, 39
WAC 173-201A-610.....	16, 35
WAC 173-201A-612.....	16, 35
WAC 173-204.....	10
WAC 173-204-400(7).....	7
WAC 173-220.....	10, 11
WAC 173-220-010.....	9
WAC 173-220-060.....	37
WAC 173-220-110.....	12, 49
WAC 173-220-130.....	11, 47

WAC 173-220-130(1).....	11, 34, 43, 49, 50
WAC 173-220-130(2).....	11, 34, 50
WAC 173-220-130(3).....	7
WAC 173-220-140.....	38
WAC 173-220-140(1).....	38, 39
WAC 173-220-140(2).....	39
WAC 173-220-140(3).....	39
WAC 173-220-150(1).....	47
WAC 173-220-210(1).....	11, 42, 45
WAC 173-230-130(2).....	34

Other

63 Fed.Reg. 36742	5, 6, 15
-------------------------	----------

I. INTRODUCTION

Petitioner Puget Soundkeeper Alliance contends that Washington State water pollution control law means what it says: “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.”¹ The National Pollutant Discharge Elimination System (“NPDES”) permit issued under the federal Clean Water Act (“CWA”), 33 U.S.C. § 1251 *et seq.*, and the Washington water pollution control statute, Ch. 90.48 RCW, by the Department of Ecology (“Ecology”) to discharger Seattle Iron & Metals, Corp. (“SIM”) and upheld by the Washington Pollution Control Hearings Board is invalid and contrary to law because it explicitly authorizes discharges known to contribute to violations of water quality standards for toxic pollutants without mandatory, effective water quality-based effluent limitations. In issuing and upholding the permit, Ecology and the Board relied on a selective and untenable interpretation of these statutes’ implementing regulations that defies the State’s role in federal/state water pollution control permitting and the bedrock principle of these statutes prohibiting pollutant discharges known to violate water quality standards in the receiving waters. These errors are all the more

¹ RCW 90.48.520; *see Puget Soundkeeper Alliance v. Pollution Control Hearings Board*, 189 Wn.App. 127, 138 (2015) (“... our legislature has in no uncertain terms prohibited the Department [of Ecology] from issuing permits that allow toxic discharges in violation of applicable standards”).

egregious here because the receiving water is the Duwamish River, which is already so contaminated with PCBs and other toxicants it is a Superfund site and its fish are not safe to eat.

Soundkeeper challenges the Board's conclusions (1) that no water quality-based effluent limitations ("WQBELs") are necessary despite the reasonable potential for untreated stormwater discharges to cause or contribute to violations of Duwamish River water quality standards for toxic copper, zinc, and mercury, and (2) that despite the availability of a modern, reliable, and reasonable EPA-developed laboratory analysis method capable of quantifying PCB discharge concentrations at or near the low level of appropriate numeric WQBELs (Method 1668C), the NPDES permit must require monitoring by an outdated and manifestly inadequate laboratory method capable of detecting violations only at levels orders of magnitude higher than the appropriate limit (Method 608).

II. ASSIGNMENTS OF ERROR

Soundkeeper assigns error to Conclusions of Law 4 – 12 and the resulting remand order from the Board's July 23, 2015, Findings of Fact, Conclusions of Law, and Order in *Puget Soundkeeper Alliance v. State of Washington, Department of Ecology; and Seattle Iron & Metals, Corp.*, Pollution Control Hearings Board No. 13-137c ("Board Decision").

III. ISSUES PRESENTED

1. Did the Board err in concluding that SIM's NPDES permit must be issued with the requirement to use Method 608, the only method approved for PCB effluent limit compliance monitoring under 40 C.F.R. § 136, when such requirement effectively increases the level of PCB discharges authorized to orders of magnitude above the numeric limits needed to prevent violations of water quality standards, and a superior EPA-developed lab analysis method is available (Method 1668), providing quantitation and compliance monitoring in the range of such PCB limits?

2. Did the Board err in concluding that technology-based effluent limitations for copper, zinc, and mercury for SIM's untreated stormwater (outfall 002) discharge are acceptable "interim limitations" despite Ecology's finding of reasonable potential for these discharges to contribute to violations of water quality standards in the Duwamish River?

3. Does substantial evidence support the Board's deference to Ecology's "technical determination that it lacked sufficient monitoring data for SIM's untreated stormwater discharge to develop site-specific [WQBELs]" for copper, zinc, and mercury?

4. Did the Board err in remanding the SIM NPDES permit to Ecology without directions to (1) include numeric WQBELs for copper,

zinc, and mercury for outfall 002, and (2) condition permit issuance on EPA approval for use of Method 1668 for PCB compliance monitoring?

IV. STATEMENT OF THE CASE

A. Statutory and Regulatory Background.

1. The Clean Water Act

With the CWA's 1972 enactment, Congress set important goals for restoration of the chemical integrity of the nation's waters to ensure "water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water."²

To this end, section 301(a) of the CWA prohibits the discharge of any pollutant to the nation's waters except in compliance with specified sections of the CWA.³ Section 402 establishes the NPDES program, under which the EPA or state agencies that have been delegated NPDES permitting authority, such as Ecology, issue permits authorizing and regulating discharges of pollutants.⁴

² 33 U.S.C. § 1251(a)(2); *see also*, 33 U.S.C. §§ 1251(a)(1) ("It is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985") and 1251(a)(3) ("It is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited"); *and see*, *Monongahela Power Co. v. Marsh*, 809 F.2d 41, 45 – 46 (D.C. Cir. 1987) (With its passage, the CWA "marked the ascendancy of water-quality control to the status of a major national priority.")

³ 33 U.S.C. §§ 1311(a) and 1362(7).

⁴ *See* 33 U.S.C. § 1342(b); *Ass'n to Protect Hammersley, Eld, and Totten Inlets v. Taylor Res., Inc.*, 299 F.3d 1007, 1009-10 (9th Cir. 2002); RCW 90.48.260.

Under the CWA, pollutant sources are either (1) point sources, which are prohibited unless authorized by NPDES permit or (2) nonpoint sources, which are not directly regulated by the CWA but addressed through state laws and planning incentives. 33 U.S.C. §§ 1251(a)(7), 1288, 1311(a), and 1342; *Or. Natural Desert Ass'n*, 172 F.3d at

NPDES permit terms are limited to five years and, in addition to a variety of supporting conditions mandating sound operational practices, monitoring, reporting, and recordkeeping, generally include one or both of two types of limits, called “effluent limitations,” on the quantities of pollutants that may be discharged to waterbodies: (1) technology-based limits and (2) water quality-based limits.^{5, 6}

While the CWA refocused water pollution control on the direct piping of pollutants into waterbodies, it retained the broader goal of attaining acceptable water quality within receiving waters.⁷ Under Section 303, states must establish water quality standards, subject to EPA approval, that protect the desired conditions and uses of every river and stream, including fishing for fish that are safe to eat.⁸ Water quality standards comprise three parts: designated uses, numeric and narrative water quality

1096 – 1097. “The term ‘point source’ means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. ...” 33 U.S.C. § 1362(14).

⁵ See *Am. Mining Cong. v. U.S. EPA*, 965 F.2d 759, 762 n.3 (9th Cir. 1992); 40 C.F.R. § 122.44.

⁶ The CWA defines “effluent limitation” as “any restriction ... on quantities, rates and concentrations of chemical physical, biological, and other constituents” discharged from point sources. 33 U.S.C. § 1362(11); see *U. S. EPA v. California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 204 – 205 (1976).

⁷ *Pronsolino v. Nastri*, 291 F.3d 1123, 1126 (9th Cir. 2002); 63 Fed. Reg. 36742, 36745 – 6747 (AR 2436 – 2437).

⁸ 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. §§ 130.0(b), 130.2(d) and 130.3.

criteria, and an antidegradation policy.⁹ Every applicable component of each of the three parts is independently effective and their protection is cumulative.¹⁰ Water quality standards form the bedrock of the CWA because they ensure that water quality and designated uses of waters are protected *regardless* of technological or economic limitations.¹¹

NPDES permits must include effluent limits adequate to ensure compliance with water quality standards in the receiving water, and this mandate is virtually absolute.¹² As the Ninth Circuit put it, “[e]ffluent limitations are a means of *achieving* water quality standards.”¹³ Issuing a permit that allows violations of water quality standards is prohibited.¹⁴

⁹ 33 U.S.C. § 1313(c)(2)(A) and (d)(4)(B); 40 C.F.R. §§ 131.3(i) and 131.6; 63 Fed. Reg. at 36748 – 6787 (AR 2439 – 2478) (describing these components). Citations to “AR #” herein refer to the six digit numbers printed on the pages of the administrative record comprising clerk’s papers sub# 21.

¹⁰ *PUD No. 1 of Jefferson County v. Washington Dep’t of Ecology*, 511 U.S. 700, 714 – 719 (1994); WAC 173-201A-010(1)(c) (most stringent criteria apply).

¹¹ *See PUD No. 1 of Jefferson County v. Wash. Dep’t of Ecology*, 511 U.S. at 700, 704 (1994) (“state water quality standards provide a supplementary basis . . . so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels”) (internal quotations omitted); *see also Ackels v. U.S. Env’tl. Prot. Agency*, 7 F.3d 862, 865-66 (9th Cir. 1993) (“economic and technological restraints are not a valid consideration” in establishing permit conditions necessary to comply with water quality standards).

¹² *Upper Blackstone Water Pollution Abatement Dist. v. U.S. Env’tl. Prot. Agency*, 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).

¹³ *Trustees for Alaska v. U.S. EPA*, 749 F.2d 549, 557 (9th Cir. 1984) (italics in original).

¹⁴ 40 C.F.R. § 122.4(d); *Puget Soundkeeper Alliance*, 189 Wn.App. at 137 – 138.

Determining whether an NPDES permit requires a WQBEL for a pollutant entails performance of “reasonable potential analysis.”¹⁵ Reasonable potential analysis results in a binary determination of the probability that the discharge “causes, has the reasonable potential to cause, or contributes to an in-stream excursion above a narrative or numeric criteria within a State water quality standard.”¹⁶ Reasonable potential analysis considers all relevant data about the discharge, and may be done by either statistical analysis or a broad, qualitative consideration of relevant factors.¹⁷ Affirmative reasonable potential means that the NPDES permit must include WQBELs to ensure that “[t]he level of water quality to be achieved by limits . . . is derived from, and complies with all applicable water quality standards.”¹⁸ WQBELs must generally be numeric limits on particular discharge pollutant concentrations or masses.¹⁹

¹⁵ 40 C.F.R. § 122.44(d).

¹⁶ 40 C.F.R. § 122.44(d)(1)(ii).

¹⁷ *Divers’ Env’tl. Conservation Org. v. State Water Resources Control Bd.*, 145 Cal.App.4th 246, 254, 257 – 258 (2006); *Sierra Club, et al., v. Ecology, et al.*, PCHB No. 11-184, Findings of Fact, Conclusions of Law, and Order (July 19, 2013) at 10 – 12 and 21 – 22; AR 2419 – 2420 (EPA guidance discussing reasonable potential analysis “without effluent monitoring data”).

¹⁸ 40 C.F.R. § 122.44(d)(1)(vii)(A).

¹⁹ 40 C.F.R. § 122.44(k)(3); *In re. the Matter of the Petition of Boeing Co.*, Order No. WQ 2006-0012, 2006 Cal. ENV LEXIS 121, 34 – 37 (Cal. Water Res. Control Bd. 2006) (§122.44(k)(3) authorizes use of non-numeric WQBELs only where numeric limitations are infeasible; “feasibility” refers to ability or propriety of establishing numeric limitations, not ability of discharger to comply); *see also* WAC 173-220-130(3)(a) and WAC 173-204-400(7).

Whenever required to carry out the 33 U.S.C. § 1251(a) objectives, including to determine compliance with NPDES permit-imposed effluent limitations, the permit-issuing authority “shall require” a discharger to sample and analyze effluents in a prescribed manner.²⁰ Accordingly, to ensure use of lab analysis methods adequate to the CWA’s water quality objectives, EPA promulgated a list of approved methods for use by NPDES permittees.²¹ Accompanying this list are provisions for “any person” to request EPA’s approval of alternative lab analysis methods on either a nationwide- or limited use-basis.²²

Finally, as relevant here, as part of its cooperative federalism scheme,²³ the CWA makes clear that its mandates and standards are a floor, not a ceiling, for state implementation:

Except as expressly provided in this chapter, nothing in this chapter shall ... preclude or deny the right of any State ... to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, ... or standard of performance is in effect under this chapter, such State ... may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, ... or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard,

²⁰ 33 U.S.C. § 1318(a); 40 C.F.R. § 122.44(i).

²¹ 40 C.F.R. § 136.1.

²² 40 C.F.R. §§ 136.4 and 136.5.

²³ *E.g., Nw. Envtl. Advocates v. U.S. EPA*, No. C03-05760-SI, 2006 U.S. Dist. LEXIS 69476, *6 – 8 (N.D. Cal. 2006); *Save the Valley, Inc. v. U.S. EPA*, 223 F.Supp.2d 997, 1005-1006 (S.D. Ind. 2002).

prohibition, ... or standard of performance under this chapter

....²⁴

2. Washington State water pollution control law

Ecology implements the CWA in Washington by issuing NPDES permits that must comply with federal standards as well as any more stringent state requirements.²⁵ The policy enunciation at the top of Washington's water pollution control statute emphasizes the state's intent to exceed the stringency of federal requirements where appropriate:

It is declared to be the public policy of the state of Washington to maintain the highest possible standards to insure the purity of all waters of the state consistent with public health and public enjoyment thereof, the propagation and protection of wildlife, birds, game, fish and other aquatic life, and the industrial development of the state, and to that end require the use of all known available and reasonable methods by industries and others to prevent and control the pollution of the waters of the state of Washington. Consistent with this policy, *the state of Washington will exercise its powers, as fully and as effectively as possible, to retain and secure high quality for all waters of the state.* The state of Washington in recognition of the federal government's interest in the quality of the navigable waters of the United States, of which certain portions thereof are within the jurisdictional limits of this state, proclaims a *public policy of working cooperatively with the federal government in a joint effort to extinguish the sources of water quality degradation, while at the same time preserving and vigorously exercising state powers to insure that present and future standards of*

²⁴ 33 U.S.C. § 1370; *see also*, 33 U.S.C. § 1251(b) ("It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution"); *Chevron U.S.A. v. Hammond*, 726 F.2d 483, 489-490 (9th Cir. 1984).

²⁵ 33 U.S.C. § 1342(b); *Nw. Envtl. Advocates*, 2006 U.S. Dist. LEXIS at *8; WAC 173-220-010.

*water quality within the state shall be determined by the citizenry, through and by the efforts of state government, of the state of Washington.*²⁶

Supplementing the CWA’s aspirational prohibition on toxic discharges,²⁷ Washington statute includes an “even more categorical” prohibition, stating that “[i]n 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.”²⁸

Dropping to regulation, two chapters of the Washington Administrative Code are most relevant here: Ch. 173-201A (surface water quality standards) and Ch. 173-220 (NPDES permit program).

Ch. 173-201A WAC establishes the criteria, antidegradation policy, and designated uses constituting Washington’s water quality standards, as well as instructions and tools for their implementation. For toxic pollutants, in addition to numeric criteria for particular pollutants (and incorporation of numeric and other criteria for toxics in the Ch. 173-204 WAC sediment management standards²⁹), the narrative criterion fleshes out the RCW 90.48.520 “in no event” toxic discharge prohibition:

Toxic substances shall not be introduced above natural background levels in waters of the state which have the potential either singularly or cumulatively to adversely affect

²⁶ RCW 90.48.010 (italics added).

²⁷ 33 U.S.C. § 1251(a)(3).

²⁸ RCW 90.48.520; *Puget Soundkeeper Alliance*, 189 Wn.App. at 149.

²⁹ WAC 173-201A-010(4).

characteristic water uses, cause acute or chronic toxicity to the most sensitive biota dependent upon those waters, or adversely affect public health, as determined by [Ecology].³⁰

The regulations clarify that when multiple criteria apply, the most stringent is to be used.³¹ And they supplement the federal regulatory prohibition on discharges not ensuring compliance with 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.”³²

Ch. 173-220 WAC addresses Ecology-issued NPDES permits. WAC 173-220-130 mirrors the federal requirement for both technology-based effluent limitations, which must (in Washington) ensure implementation of “all known, available, and reasonable methods of treatment” (“AKART”), and water quality-based limits.³³ To issue an NPDES permit containing only technology-based limits and omitting WQBELs, Ecology must “make a finding that any discharge authorized by the permit will not violate applicable water quality standards.”³⁴ This requirement dovetails with the 40 C.F.R. § 122.44(d) provisions for “reasonable potential analysis” and requires the Ecology finding – a negative reasonable potential determination – before issuing a permit omitting WQBELs.

³⁰ WAC 173-201A-240(1), *see also*, WAC 173-201A-260(2)(a).

³¹ WAC 173-201A-260(3)(c).

³² WAC 173-201A-510(1).

³³ WAC 173-220-130(1)(a) and (1)(b).

³⁴ WAC 173-220-130(2); *Puget Soundkeeper Alliance*, 189 Wn.App. at 138.

Regarding monitoring, WAC 173-220-210(1)(a) provides Ecology the authority to impose in NPDES permits any conditions for monitoring that “may be reasonably required” Central to one of the issues in this appeal, WAC 173-201A-260(3) provides more specific direction:

(g) When applying the numeric criteria established in this chapter, [Ecology] will give consideration to the precision and accuracy of the sampling and analytical methods used, as well as the existing conditions at the time.

(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 CFR Part 136) or superseding methods published. [Ecology] may also approve other methods following consultation with adjacent states and with the approval of the USEPA.³⁵

It is important to note that Washington law (like the CWA) does **not** presume any right of a polluter to a discharge permit.³⁶ Evident in Washington’s law and regulations is the concept that an NPDES permit may not be issued unless mandates for pollution control and water quality protection can be achieved through compliance with specified controls.³⁷

B. The Duwamish River

³⁵ WAC 173-201A-260(3) (italics in original).

³⁶ *Puget Soundkeeper Alliance*, 189 Wn.App. at 138 and 149; *Oklahoma v. U.S. EPA*, 908 F.2d 595, 632 (10th Cir. 1990), *rev'd on other grounds sub nom. Arkansas v. Oklahoma*, 503 U.S. 91, 117 L. Ed. 2d 239, 112 S. Ct. 1046 (1992); *Natural Resources Defense Council, Inc. v. Costle*, 568 F.2d 1369, 1374-751375 (D.C. Cir. 1977).

³⁷ *Puget Soundkeeper Alliance*, 189 Wn.App. at 138 and 149 Id; RCW 90.48.080, .160, .162, .170, .190 (providing for permit termination), .520 (allowing discharges causing violation of toxicity standards “[i]n no event”); WAC 173-201A-510(1); WAC 173-220-110 (requiring determination by Ecology to determine whether or not to issue or deny a permit).

The lowest 5.5 mile stretch of the Duwamish River and surrounding uplands, including the location of SIM and its discharges, constitutes the Lower Duwamish Waterway Superfund site (“LDW Site”).³⁸ Due largely to historic sources of pollution, the LDW Site – its sediments and the tissue of resident fish and shellfish – is dangerously contaminated with hazardous chemicals.³⁹ The ongoing Superfund cleanup comprises an EPA-led effort to identify and cleanup particularly contaminated areas of LDW Site sediment, and a multi-agency, Ecology-led effort to control present sources of contamination to avoid recontamination of cleanup areas.⁴⁰ The intent of the cleanup plan “is to reduce contaminant concentrations in sediments, surface water, and fish and shellfish tissue to the extent practicable, and to minimize reliance on fish and shellfish consumption advisories to reduce human exposure from ingestion of contaminated resident fish and shellfish.”⁴¹ EPA estimates that the costs of the cleanup, to be borne by actors in both the private and public spheres, will reach well into the hundreds of millions of dollars.⁴²

³⁸ AR 3589, et seq. (LDW Superfund Site Record of Decision, EPA, Nov. 2014).

³⁹ AR 2029 – 2031, 2069 – 2070, 2136, 3605 – 3613, 3632 – 3637.

⁴⁰ AR 3615 – 3618, 1492 – 1536 (joint Ecology-EPA technical memorandum on LDW source control).

⁴¹ Board Decision at 5.

⁴² AR 3738.

PCBs are the primary focus of the LDW Superfund cleanup.⁴³ PCBs are polychlorinated biphenyls, a group of 209 manmade chlorinated organic chemicals (“congeners”) that are highly toxic to humans and animals.⁴⁴ Up to the 1970s, mixtures of various congeners were marketed for industrial uses and are known as “aroclor.” PCBs belong to a class of chemicals regulated as “PBTs,” or persistent bioaccumulative toxics, also called “BCCs,” bioaccumulative chemicals of concern.⁴⁵ Besides their high toxicity, PCBs persist in the environment, typically taking decades to degrade.⁴⁶ Due to their strong preference to bond to organic matter, PCBs bioaccumulate in animal tissue, and biomagnify as they are passed from prey to predator up the food chain.⁴⁷

Ample monitoring data collected over several years documents the grossly elevated concentrations of PCBs in LDW sediments and fish tissue.⁴⁸ Surface sediment concentrations exceeding PCB sediment cleanup objectives and cleanup screening levels are abundantly located throughout the LDW, including the vicinity of the SIM outfall.⁴⁹ The calculated mean and spatially weighted average concentrations of surface sediment PCBs in

⁴³ AR 3677 – 3683.

⁴⁴ AR 2007 – 2008, 3224.

⁴⁵ AR 2687 – 2708.

⁴⁶ RP 241:6 – 15.

⁴⁷ RP 240:6 – 15.

⁴⁸ AR 3626 – 3635; RP 261:22 – 271:4.

⁴⁹ RP 268:9 – 271:4.

the LDW are 1,136 and 346 µg/kg dry weight (“dw”), respectively, compared to a target human health-based concentration of 2 µg/kg/dw.⁵⁰ LDW tissue samples from various species range in mean PCB concentrations from 130 to 1,300 µg/kg, far exceeding the 5.3 µg/kg fish tissue criteria applicable in Washington.⁵¹

In addition to highly contaminated sediments and resident fish tissue, recent water column monitoring data indicates that PCB levels in Duwamish River water exceed applicable human health criteria (170 pg/L).⁵² Thus, available information shows that the Duwamish River lacks assimilative capacity for additional PCBs with in the water column, sediments, and fish tissue.⁵³

The Duwamish River has numerous segments included on the state’s list of waters not meeting water quality standards, notably for a variety of toxic pollutants, including PCBs, copper, zinc, and mercury.⁵⁴

Due to elevated levels of PCBs and other toxic chemicals of concern found in tissue, the Washington Department of Health has imposed a “*do not eat*” advisory for resident fish and shellfish in the Duwamish River.⁵⁵ Its

⁵⁰ AR 3627, 3678.

⁵¹ AR 3633; RP 253:14 – 21; WAC 173-201A-240(5); 40 C.F.R. 131.36.

⁵² Board Decision at 18; RP 262:11 – 17, 697:17 – 22.

⁵³ RP 262:11 – 17, 697:17 – 698:2. “The assimilative capacity is the difference between the background level of a pollutant and the highest level that would comply with the water quality criterion.” Board Decision at 17 (quoting 63 Fed. Reg. 36742, 36787.).

⁵⁴ AR 1891 – 1914. This is called the “303(d) list” in reference to 33 U.S.C. § 1313(d). *See, Pronsolino*, 291 F.3d at 1127 – 1128.

⁵⁵ AR 2001.

2005 health consultation concluded that “[e]ating even minimal amounts of resident seafood from the LDW would result in exposure to PCBs at levels of public health concern. For this reason, consumption of LDW resident seafood (fish and shellfish that live in the LDW) is a *public health hazard*.”⁵⁶ Degraded water and sediment quality conditions thus render the river unable to support its designated uses related to fish and shellfish harvest.⁵⁷

C. Seattle Iron & Metals Corp.’s discharges and Soundkeeper’s litigation

Since 1999, SIM has operated an auto-shredding and metal recycling operation on the east bank of the Duwamish River at approximately River Mile 2.5.⁵⁸ As part of its operations, SIM discharges treated process wastewater (identified as the outfall 001 discharge) and untreated industrial stormwater (the outfall 002 discharge) to the river via a City of Seattle storm drain outfall which protrudes from the riverbank some distance above the river water surface in most tidal conditions.⁵⁹ The outfall 002 discharge comprises stormwater collected from certain roofs and a parking lot, and receives no treatment before dumping into the LDW.⁶⁰

⁵⁶ AR 2001 (emphasis in original).

⁵⁷ WAC 173-201A-610 and -612.

⁵⁸ Board Decision at 2; AR 3312 – 3317 (Fact Sheet description of facility).

⁵⁹ AR 375, 1406, 1410, 3315 – 3317, 3805.

⁶⁰ RP 387:6 – 10; AR 3316

The potential for elevated levels of toxic pollutants in both of SIM's discharge streams, including among other things PCBs, copper, zinc, and mercury, is evidenced by SIM's own discharge monitoring reports, and the generation and presence of these pollutants at and around the SIM site, including dirt and storm sewer system sediments.⁶¹ Indeed, because PCBs are found in the types of materials SIM processes, it is recognized as a potential source of contaminants and recontamination of sediments at or near its facility.⁶²

Petitioner Soundkeeper has been litigating since summer 2012 to force SIM's compliance with water pollution control law to stem its contribution to toxic conditions in the Duwamish River, starting with a CWA citizen suit to hold SIM liable for NPDES permit violations under 33 U.S.C. § 1365.⁶³ In Soundkeeper's view, SIM's record of violation of both numeric effluent limitations and operational requirements contained in its NPDES permit is rather egregious and longstanding.⁶⁴

⁶¹ Board Decision at 6 – 7; AR 353 – 355 (Seattle Public Utilities' notice of violation), 389 – 393 (City of Seattle notification of violation), 945 – 947 (EPA warning letter), 1034 – 1039 (City of Seattle monitoring information), 1296 – 1309 (EPA comment letter), 1578 - 1586 (Ecology's source control action plan), 1945 – 1953 (Ecology data gaps report), 3318 – 3321 (Fact Sheet); RP 342:11 – 344:10, 347:9 – 350:7.

⁶² Board Decision at 6.

⁶³ *Puget Soundkeeper Alliance v. Seattle Iron & Metals Corp.*, W.D. Wash. No. 12-1201, Complaint filed July 12, 2012 (Dkt. 1) (Attachment 3). Stormwater discharges from an adjacent parcel that SIM also uses are separately authorized under the Industrial Stormwater General Permit and are addressed in Soundkeeper's federal suit but are not at issue in this case.)

⁶⁴ *Id.*; AR 353 – 363 (Seattle Public Utilities notice of violation), 378 (Ecology inspection report stating, “[t]he site appeared to have been pushed to its limits. The stormwater on site

When Ecology reissued SIM's individual NPDES Permit No. WA0031968 on September 16, 2013, Soundkeeper appealed the permit to the Board in proceedings (PCHB No. 13-137c) resulting in the Board Decision now under appeal. At the same time, Soundkeeper and SIM stipulated to a stay of the CWA citizen suit in federal district court.⁶⁵ The federal district court stay remains in place and is likely to remain so pending this Court's determination of appropriate permit requirements.

During the pendency of PCHB No. 13-137c, Ecology twice modified the permit. First, in August 2014, it extended the compliance schedule in Condition S9.⁶⁶ Soundkeeper's challenge to this modification was consolidated into PCHB No. 13-137c and addressed in the Board Decision issued July 23, 2015.⁶⁷ Second, Ecology again modified the permit the week before the March 16 – 19, 2015, hearing for PCHB No. 13-137c to modify the specified PCB monitoring method for the treated wastewater (outfall 001) discharge from an intermediate method to the least sensitive method, which Soundkeeper also appealed but in a separate action before

appeared to be extremely contaminated and viscous. The implementation of pollution source control measures on the site was very limited.”), 389 – 393 (City of Seattle violation notification), 945 – 947 (EPA warning letter), 1327 – 1329 (notice of violation), 3319 – 3321 (Fact Sheet summary of violations).

⁶⁵ W.D. Wash. No. 12-1201RSM, Joint Motion for Stay of Proceedings and Order (Oct. 28, 2013) (Dkt. 16), (Attachment 3).

⁶⁶ AR 3254, 3257, 3273.

⁶⁷ Board Decision at 8, n. 1.

the Board.⁶⁸ The Board dismissed this second appeal on summary judgment.⁶⁹ Although that second decision offers explanation relevant to the PCB monitoring method issue raised here, it presented a distinct legal issue and thus there is presently no challenge to this second Board decision before this Court.

D. The NPDES permit

In the iteration judged by the Board Decision, SIM's NPDES permit (issued September 16, 2013, modified August 26, 2014), includes a variety of terms and conditions.⁷⁰ Conditions S1.A and S1.B, specifying numeric effluent limitations and PCB laboratory analysis methods for treated wastewater (outfall 001) and untreated stormwater (outfall 002) respectively, are key provisions here.

1. Condition S1.A for treated wastewater (outfall 001)

Ecology granted a "mixing zone" under WAC 173-201A-400 for the outfall 001 discharge of treated wastewater.⁷¹ As Ecology explains,

A mixing zone is the defined area in the receiving water surrounding the discharge point(s), where wastewater mixes with receiving water. Within mixing zones the pollutant concentrations may exceed water quality numeric standards, so long as the discharge doesn't interfere with designated uses of the receiving water body (for example, recreation,

⁶⁸ *Id.* at 8, n. 1, and 27, n. 2.

⁶⁹ *Puget Soundkeeper Alliance v. Ecology*, PCHB No. 15-050, Order Granting Respondents' Motion for Summary Judgment (Jan. 6, 2016) (Attachment 4).

⁷⁰ AR 3254 – 3306.

⁷¹ AR 3261, 3324 - 3328.

water supply, and aquatic life and wildlife habitat, etc.). The pollutant concentrations outside of the mixing zones must meet water quality numeric standards.⁷²

Following the mixing zone authorization, Ecology used “dilution factors,” derived by SIM’s consultants using specialized computer modeling software, to account for the dilution purportedly achieved within the mixing zone in the Duwamish River under and surrounding SIM’s discharge pipe sticking out of the bank, to derive numeric WQBELs at concentrations higher than the applicable water quality criteria for toxic pollutants copper, lead, mercury, silver, zinc, and total PCBs.⁷³ To derive these numeric limitations, Ecology used receiving water-specific information (ambient pollutant concentrations and metal criteria translators, as appropriate) to determine the applicable criteria for these pollutants, and then multiplied these criteria by the dilution factors derived – 30.2 for chronic criteria and 5.3 for acute criteria.⁷⁴

⁷² AR 3324; *see also*, *Puget Soundkeeper Alliance, et al. v. Ecology*, PCHB No. 02-162, Order Granting Partial Summary Judgment (June 6, 2003) at XXIII – XXXIII (discussing mixing zone rule and cautions against overuse); *and* AR 2422 – 2427 (EPA guidance on mixing zones).

⁷³ AR 3261, 3325. Ecology explains, “[t]he mixing zone analysis produces a numerical value called a dilution factor (DF). A dilution factor represents the amount of mixing of effluent and receiving water that occurs at the boundary of the mixing zone. For example, a dilution factor of 10 means the effluent is 10% and the receiving water is 90% of the total volume of water at the boundary of the mixing zone. Ecology uses dilution factors with the water quality criteria to calculate reasonable potentials and effluent limits. Water quality standards include both aquatic life-based criteria and human health-based criteria. The former are applied at both the acute and chronic mixing zone boundaries; the latter are applied only at the chronic boundary. The concentration of pollutants at the boundaries of any of these mixing zones may not exceed the numerical criteria for that zone.” AR 3325.

⁷⁴ AR 3325, 3347; RP 379:2 - 25.

2. PCB laboratory analysis methods for outfall 001

Condition S2.A requires SIM to collect grab samples of the outfall 001 discharge on a monthly basis.⁷⁵ Condition S2.B prescribes that sampling and analytical methods used for monitoring compliance with the S1.A effluent limitations “must conform to the latest revision of the *Guidelines Establishing Test Procedures for the Analysis of Pollutants* contained in 40 CFR Part 136.”⁷⁶ To determine compliance with the outfall 001 PCB effluent limits however, Ecology specified that Method 8082A be used.⁷⁷

Ecology specified Method 8082A rather than Method 608, the only method approved for PCB effluent limit compliance monitoring in 40 C.F.R. § 136, because Method 8082A allows the analyzing laboratory to quantify PCB concentrations at a lower level than does Method 608 and, also, because much of the Duwamish River PCB data has already been generated by this method.⁷⁸

Lab analysis methods each have a method detection level (“MDL”), representing the lowest level at which the concentration of a substance in a sample can reliably be detected by the given method.⁷⁹ An MDL answers

⁷⁵ AR 3262.

⁷⁶ AR 3263.

⁷⁷ AR 3259, 3263.

⁷⁸ RP 646:8 – 647:6.

⁷⁹ Board Decision at 26; AR3305 – 3306.

the question “what is the least concentration of the substance that can be detected but not quantified.” A practical quantitation limit (“PQL”) is statistically derived from a method’s MDL to indicate the lowest level at which a pollutant concentration can be reliably quantified. A PQL answers the question “what is the lowest pollutant concentration that we can reliably measure.”⁸⁰

When a numeric effluent limitation is lower than the required lab analysis method’s PQL, the PQL becomes the measure of compliance with the limitation, i.e., the effective numeric limitation equals the higher PQL.⁸¹ Effluent limit violations at levels between a nominal numeric effluent limitation and the higher effective limitation at the PQL level cannot be discerned and do not count as violations.⁸²

Footnote c to Condition S1.A of SIM’s permit explains the application of this practice:

For PCB, the Practical Quantitation Limits (PQL) recommended analytical Protocol 8082 (sic) is 0.1 µg/L and method detection limits is (sic) 0.017 µg/L. Ecology will use PQL to determine compliance with the effluent limit. If the measured effluent concentration is less than the PQL, the Permittee must report less (sic) 0.1 µg/L on discharge monitoring report (DMR) form.⁸³

⁸⁰ See, AR 3440 – 3443 (Ecology permit writers manual’s discussion of analytical levels and usage in NPDES permits); RP 57:16 – 59:16.

⁸¹ AR 3443; RP 61:14 – 62:16.

⁸² Board Decision at 26; see also, *Puget Soundkeeper Alliance v. Ecology*, PCHB No. 15-050, Order Granting Respondents’ Motion for Summary Judgment (Jan. 6, 2016) at 4. (Att. 4).

⁸³ AR 3259.

Thus, while the numeric WQBELs for PCBs are stated in the S1.A table as average monthly and daily maximum of 5.1 and 8.9 ng/L (equal to 0.0051 and 0.0089 µg/L), the actually effective effluent limits, due to the relative insensitivity of Method 8082A, were both fixed at 0.1 µg/L.⁸⁴

Method 608, developed in the 1970s, and required by 40 C.F.R. § 136 for NPDES compliance monitoring lab analysis for PCBs, measures the concentrations of various PCB aroclors, rather than of the 209 PCB congeners that together constitute “total PCBs,” in which the applicable human health-based PCB water quality criterion is expressed.⁸⁵ As specified by Ecology, Method 608 has MDLs of 0.25 or 0.13 µg/L, depending on the aroclor detected, and a PQL of 0.5 µg/L.⁸⁶ Thus, by requiring the use of the unapproved Method 8082A rather than the approved Method 608, the permit imposed effective numeric PCB limits at the lower PQL (0.1 µg/L) rather than Method 608’s higher PQL (0.5 µg/L). This still left the effective limit (0.1 µg/L) many times higher than the permit’s nominal PCB limits (0.0051 and 0.0089 µg/L).

3. Condition S1.B for untreated stormwater discharge (outfall 002)

The permit provides no mixing zone or dilution factors for the

⁸⁴ RP 61:7 – 62:16.

⁸⁵ AR 3226 – 3227.

⁸⁶ AR 3305.

untreated stormwater discharge.⁸⁷ Condition S1.B imposes “final maximum daily limits” for several pollutants, including copper, zinc, and total PCBs.⁸⁸ Ecology considered these effluent limitations to be technology-based rather than water quality-based limits.⁸⁹ The S1.B effluent limitations were all values taken from the list of indicator benchmarks contained in another NPDES permit, the Industrial Stormwater General Permit (“ISGP”), except for the PCB limit.⁹⁰ For SIM’s permit, Ecology determined that the ISGP values for turbidity, copper, lead, zinc, total petroleum hydrocarbons, and oil sheen represent AKART for the untreated stormwater.⁹¹

The S1.B PCB limit was a daily maximum of 0.25 µg/L.⁹² This was neither a technology- nor a water quality-based limit, but instead a “method detection limit limitation” set at the MDL for Method 608, the 40 C.F.R. § 136-approved PCB compliance monitoring method prescribed by footnote c to the Condition S1.B table.⁹³

E. The Board Decision

Following a four-day hearing, the Board issued the Board Decision on July 23, 2015, resolving all the issues raised by Soundkeeper’s appeal of

⁸⁷ AR 3358.

⁸⁸ AR 3260.

⁸⁹ AR 3358.

⁹⁰ RP 336:3 – 340:11.

⁹¹ RP 336:22 – 337:14; AR 3358.

⁹² AR 3260.

⁹³ AR 3260, 3305; RP 340:1 – 11.

the SIM permit, including several issues not relevant here.

With regard to the Condition S1.A effluent limitations for the treated wastewater, the Board faulted the mixing zone on two counts. First, the Board rejected the modeling conclusions used to derive the dilution factors due to disregard of the most stringent discharge scenarios in violation of WAC 173-201A-400(3).⁹⁴ The Board remanded the permit to Ecology for reconsideration of the mixing zone analysis and the dilution factor derivation.⁹⁵

Second, and more relevant here, the Board found that the mixing zone authorization was altogether unallowable for PCBs under WAC 173-201A-400(4) because “Ecology failed to present evidence clearly indicating that a mixing zone for SIM’s discharge of PCBs into the LDW ‘would not have a reasonable potential to cause a loss of sensitive or important habitat, substantially interfere with the existing or characteristic uses of the water body, result in damage to the ecosystem, or adversely affect public health as determined by the department.’”⁹⁶ In reaching this conclusion, the Board considered the grossly elevated PCBs in Duwamish River sediments and fish tissue, the fish consumption advisory, the LDW Superfund cleanup effort, abundant PCBs found in dirt around SIM’s facility, and that SIM is a

⁹⁴ Board Decision 41 – 45.

⁹⁵ *Id* at 45, 49.

⁹⁶ Board Decision at 47 (quoting WAC 173-201A-400(4)).

potential source of LDW recontamination because “PCBs are found in the types of materials processed by SIM.”⁹⁷ “The contaminated status of the LDW is undisputed. Ecology itself is engaged in significant source control efforts intended to stop the introduction of contaminants, including PCBs, into the LDW. The granting of a mixing zone to SIM for PCBs is counterproductive to that effort.”⁹⁸

Ecology had disregarded each of these factors in its sediments impacts analysis, which the Board rejected as inadequate.⁹⁹ Consistent with EPA guidance, the Board also cited evidence that the Duwamish River lacks assimilative capacity for additional PCBs, which presents a situation particularly inappropriate for a mixing zone, given PCBs’ “persistence and ability to bioaccumulate and biomagnify.”¹⁰⁰

The Board’s remand instructions were very precise with regard to this conclusion of law: “The effluent limit for discharges of PCBs from Outfall 001, absent application of the dilution factor from the mixing zone, is 0.00017 µg/L,” the applicable human health criterion.¹⁰¹

On the S1.B effluent limitations for the untreated stormwater discharge, the Board rejected Soundkeeper’s contention that Ecology had

⁹⁷ Board Decision at 45 – 46.

⁹⁸ *Id.* at 47.

⁹⁹ *Id.* at 13 – 17, 46.

¹⁰⁰ *Id.* at 17 – 18, 46; AR 2427, 2482.

¹⁰¹ Board Decision at 47.

failed to perform reasonable potential analysis on this discharge, instead finding that the permit writer had effectively conducted a qualitative reasonable potential analysis when he examined the available information and pronounced the untreated stormwater to be “not clean,” i.e., to present reasonable potential to cause or contribute to violation of water quality standards.¹⁰² However, despite the positive reasonable potential determination, and the undisputed fact that the S1.B effluent limitations are technology- rather than water quality-based limits, the Board upheld the limitations imported from the ISGP as “interim limits” to be modified in the future and 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.”¹⁰³

The Board rejected, however, the Condition S1.B PCB effluent limitation as neither a technology- nor water quality-based effluent limitation since it was impermissibly based on the MDL of Method 608, i.e., a means of effluent limit derivation authorized nowhere in the law.¹⁰⁴ The Board’s order to modify Condition S1.B was aimed only at recalculation of the PCB effluent limitation, certain to result in a WQBEL

¹⁰² Id at 24 and 37. Soundkeeper’s expert testified to the reasonable potential of the untreated stormwater discharge to cause or contribute to violations of water quality standards for PCBs, copper, zinc, and mercury. RP 342:11 – 350:7.

¹⁰³ Id at 37 – 38.

¹⁰⁴ Id at 23 – 24, 47 – 48.

of 0.000017, the same as the S1.A PCB limit.¹⁰⁵

Soundkeeper had argued to the Board that the NPDES permit could not be issued to SIM under state law unless a third lab analysis method for PCBs, Method 1668C, was required for compliance monitoring.¹⁰⁶ 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, for which the concentration of each quantified PCB congener is summed to provide a total PCB value.¹⁰⁷ EPA had changed the national PCB criteria in 1999 "because PCBs degrade, partition, transform and selectively bioaccumulate in living organisms ... [and] it is unlikely that an environmental sample characterized in terms of Aroclors would resemble an original Aroclor mixture in any way," resulting in mischaracterization (overestimating or underestimating) of PCB concentrations.¹⁰⁸ On the other hand, "[c]ongener analysis [such as that provided by Method 1668C] are not impacted by variations between formulations or subsequent changes in aroclor composition due to degradation, partitioning, transformation, or selective bioaccumulation."¹⁰⁹ Soundkeeper argued that besides being a more

¹⁰⁵ Id at 47 – 49 ("Ecology provided no evidence supporting different effluent limits for PCBs based on their presence in one discharge stream as opposed to another.").

¹⁰⁶ AR 93 – 97, 151 – 153.

¹⁰⁷ AR 2751, 3227.

¹⁰⁸ AR 3227.

¹⁰⁹ Id; RP 64:19 – 67:10.

versatile method in this regard and actually capable of measuring total PCBs in which the applicable criteria is expressed, the use of Method 1668C is essential to water quality protection because it has per congener PQLs as low as 0.022 ng/L (0.000022 µg/L), which allows compliance determinations when effluent PCB concentrations are in the vicinity of the appropriate PCB limit for SIM (0.000017 µg/L).¹¹⁰ For this reason, Soundkeeper argued that monitoring with the inferior Methods 608 or 8082, having PQLs of 0.5 and 0.1 µg/L, respectively, could not be used in compliance with state law mandates for water quality protection and that the NPDES permit could not be issued without a condition requiring use of Method 1668C to effectuate compliance with the necessarily stringent PCB WQBELs.¹¹¹

EPA proposed the inclusion of Method 1668C in 40 C.F.R. § 136 in 2010, but deferred action on the proposal in 2012.¹¹² EPA reported that some states are already using Method 1668C in NPDES permits and for other purposes.¹¹³ Its decision to defer “does not negate the merits of this method for the determination of PCB congeners in regulatory programs or

¹¹⁰ RP 69:19 – 71:20, 85:15 -86:7.

¹¹¹ AR 93 – 97, 151 – 153.

¹¹² AR 3587.

¹¹³ Id.

for other purposes when analyses are performed by an experienced laboratory.”¹¹⁴

Despite finding compelling Soundkeeper’s case for more stringent PCB limits for both of SIM’s discharge streams, the Board held that WAC 173-201A-260(3)(h) requires Ecology to use Method 608, the 40 C.F.R. § 136-listed method, and prohibits the use of Method 1668 or other methods not so-listed.¹¹⁵ The Board essentially authorized issuance of an NPDES permit for SIM in which the PCB limits must be set at 0.000017 µg/L to ensure protection of water quality standards, but in which compliance with these limits must be measured by use of Method 608, which can only quantify PCB concentrations of 0.5 µg/L or greater – effectively increasing the PCB limit to more than *TWENTY-NINE THOUSAND TIMES* the maximum safe discharge level.

V. ARGUMENT

A. Standard of review

The Washington Administrative Procedure Act (“APA”), RCW Chapter 34.05, governs review of the Board’s order.¹¹⁶ This Court may

¹¹⁴ Id; RP 77:6 – 21; 82:13 – 83:9.

¹¹⁵ Board Decision at 34; *Puget Soundkeeper Alliance*, PCHB No. 05-150 (Jan. 6, 2016) (App. 4) at 2 - 6. In its PCHB No. 05-150 (Jan. 6, 2016) decision, the Board mistakenly states the Method 608 PQL (or “QL”) as 0.25 µg/L. It is 0.5 µg/L. AR 3305; RP 68:7– 5.

¹¹⁶ *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 587, 90 P.3d 659 (2004).

overturn the Board's order based on any of the nine grounds enumerated in the APA.¹¹⁷ Relevant here, this Court may grant relief from the Board Decision if it determines: 1) the order is outside statutory authority or jurisdiction conferred by law upon the agency; 2) the agency has erroneously interpreted or applied the law; 3) the order is not supported by substantial evidence; 4) the order is inconsistent with a rule of the agency; or 5) the order is arbitrary or capricious.¹¹⁸ The party challenging an administrative order bears the burden of demonstrating its invalidity.¹¹⁹

When interpreting a statute, the Court's fundamental objective is discerning and implementing the legislature's intent.¹²⁰ This Court should not afford deference to an agency's interpretation of a statutory provision that is unambiguous.¹²¹ Only where a statutory provision is ambiguous and within an agency's area of expertise may the Court defer to an agency's interpretation of the statutory provision.¹²² A statute is ambiguous if it is "susceptible to two or more reasonable interpretations."¹²³

"[D]eference to an agency's interpretation of its own regulations is

¹¹⁷ RCW 34.05.570(3).

¹¹⁸ *Id.* at (b), (d), (e), (h), and (i).

¹¹⁹ RCW 34.05.570(1)(a).

¹²⁰ *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). Regulations are interpreted under the same rules. *Roller v. Dep't of Labor & Indus.*, 128 Wn.App. 922, 926 – 927 (2005).

¹²¹ *Dot Foods, Inc. v. Dep't of Revenue*, 166 Wn.2d 912, 921, 215 P.3d 185 (2009).

¹²² *Id.*

¹²³ *Burton v. Lehman*, 153 Wn.2d 416, 423, 103 P.3d 1230 (2005).

also appropriate.”¹²⁴ However, the Court should not give deference to an agency’s interpretation that “conflicts with legislative intent or is in excess of the agency’s authority.”¹²⁵ The “error of law” standard applies, allowing the Court to substitute its view of the law for the agency’s.¹²⁶

The Washington Supreme Court has “defined arbitrary or capricious agency action as action that is willful and unreasoning and taken without regard to the attending facts or circumstances.”¹²⁷

B. State and federal law require the imposition of numeric WQBELs on copper, zinc, and mercury in Condition S1.B for the untreated stormwater (outfall 002) discharge.

The Board’s determination upholding the technology-based numeric effluent limitations in Condition S1.B in lieu of numeric WQBELs egregiously contravenes a bedrock mandate of applicable water pollution control law. Upon finding reasonable potential of this untreated stormwater discharge to contribute to violations of water quality standards, the law requires – without exception – the imposition of WQBELs.

The CWA’s mandate is clear in statute, regulation, and case law. 33 U.S.C. § 1311(b)(1)(C) requires achievement by a date now passed of “any more stringent limitation, including those necessary to meet water quality

¹²⁴ *Port of Seattle*, 151 Wn.2d at 593.

¹²⁵ *Silverstreak, Inc. v. Dep’t of Labor & Indus.*, 159 Wn.2d 868, 884 (2007).

¹²⁶ *Puget Soundkeeper Alliance*, 189 Wn.App. at 136.

¹²⁷ *Port of Seattle*, 151 Wn.2d at 589 (internal quotations omitted).

standards”¹²⁸ The Ninth Circuit has held that regardless of technical feasibility, the CWA requires effluent limitations “necessary to comply with state water quality standards, and [the CWA] requires the permits to meet the state water quality standards. ... Accordingly, the economic and technical restraints are not a consideration.”¹²⁹

Correspondingly, 40 C.F.R. § 122.44(d)(1) explicitly requires that NPDES permits include any requirements necessary to “achieve water quality standards established under section 303 of the CWA, including State narrative criteria for water quality.” When the NPDES permitting authority determines, as the Board affirmed Ecology did here, “that a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above the allowable ambient concentration of a State numeric criteria within a State water quality standard for an individual pollutant, the permit must contain effluent limits for that pollutant.”¹³⁰ Such WQBELs must ensure that “[t]he level of water quality to be achieved by limits on point sources established under this paragraph is derived from, and complies with all applicable water quality standards.”¹³¹

¹²⁸ See, *Defenders of Wildlife*, 191 F.3d at 1163 – 651165; *Oklahoma v. U.S. EPA*, 908 F.2d at 595, 613 (10th Cir. 1990), *rev'd on other grounds sub nom. Arkansas v. Oklahoma*, 503 U.S. 91, 117 L. Ed. 2d 239, 112 S. Ct. 1046 (1992) (Per § 1311(b)(1)(C), “EPA is under a specific obligation to require that level of effluent control which is needed to implement existing water quality standards without regard to the limits of practicability.”) (quotation marks and internal citations omitted)).

¹²⁹ *Ackels*, 7 F.3d at 865 – 866.

¹³⁰ 40 C.F.R. § 122.44(d)(1)(iii); Board Decision at 24 and 36.

¹³¹ 40 C.F.R. § 122.44(d)(1)(vii)(A).

Washington state's rules are more stringent in mandating the inclusion of WQBELs for toxics in NPDES permits, as they must be to implement both the CWA, 33 U.S.C. §§ 1311(a)(1)(B), 1342(b)(1)(A) and 1370, and the state statute; "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."¹³² WAC 173-201A-510(1) expresses this clearly: "Waste discharge permits, whether issued pursuant to the National Pollutant Discharge Elimination System or otherwise, must be conditioned so the discharges authorized will meet the water quality standards." WAC 173-220-130(1)(b)(i) is a second unambiguous expression: "Any permit issued by [Ecology] shall apply and insure compliance with all of the following, whenever applicable: . . . (b) Any more stringent limitation, including those necessary to: (i) Meet water quality standards . . ."

Accompanying the absolute WAC 173-220-130(1)(b)(i) mandate is a requirement that Ecology "make a finding that any discharge authorized by the permit will not violate applicable water quality standards" if Ecology omits WQBELs and only imposes technology-based effluent limits under - 130(1)(a).¹³³ No such finding exists in the record – Ecology's positive

¹³² RCW 90.48.520.

¹³³ WAC 173-230-130(2).

reasonable potential determination for the outfall 002 discharge constitutes a finding of the opposite.

These rules, individually and, certainly, taken together impose an unambiguous mandate and there is no room for contrary interpretation.¹³⁴ This is particularly so given their role in a regulatory scheme designed to implement equally unambiguous statutory directions and goals.¹³⁵

SIM's untreated stormwater (outfall 002) discharge undisputedly presents a reasonable potential to contribute to violations of water quality standards, not only of numeric criteria for metals, but also of the harvest uses of the Duwamish River and the narrative toxics criteria prohibiting discharge of toxic substances that have the mere "potential either singularly or cumulatively to adversely affect characteristic water uses"¹³⁶ The Board's ruling that Condition S1.B may include only technology-based effluent limitations in lieu of water quality-based limits has no support in the law and is exactly wrong.

In *Puget Soundkeeper Alliance v. Pollution Control Hearings Board*, 189 Wn.App. 127 (2015), the Court found exactly as Soundkeeper again argues: "Agencies issuing NPDES permits must impose limits on

¹³⁴ *Puget Soundkeeper Alliance*, 189 Wn.App. at 136, 143 – 149.

¹³⁵ 33 U.S.C. §§ 1251(a)(3) and 1311(b)(1)(C); RCW 90.48.520; *Puget Soundkeeper Alliance*, 189 Wn.App. at 137 – 138, 142, 149.

¹³⁶ WAC 173-201A-240(1) and (3) and 173-201A-610 and -612; AR 3638 (explaining why marine designated uses apply).

discharges as necessary to implement water quality standards set by state or federal statutes and regulations, regardless of technical practicability.”¹³⁷ In rejecting an NPDES permit provision authorizing discharges that fail whole effluent toxicity compliance tests (demonstrating discharge toxicity), this Court properly held to a strict interpretation of the unambiguous regulations cited above as necessary to implement the “definitive” prohibitions on toxic discharges in state and federal statute, as well as the policy directives to Ecology found in the State Environmental Policy Act, Ch. 43.21C RCW (“SEPA”).¹³⁸

Here, as in that earlier case, “[a]llowing violations of water quality standards, especially for the convenience of permittees and regulators, does not provide a rational basis for disregarding the plain language of [Ecology’s] rules and is an abdication of its responsibility to implement those rules.”¹³⁹ As discussed below, the Board’s reasoning for its contrary ruling, based on unsupported assertions that the faulty Condition S1.B technology-based effluent limitations are “interim limits,” reasonably imposed in lieu of WQBELs, and deference to a purported but non-existent Ecology “technical determination that it lacked sufficient monitoring data

¹³⁷ *Puget Soundkeeper Alliance*, 189 Wn.App. at 137 – 138 (citations omitted) and 142 (“The governing statutory and federal regulatory provisions make clear that NPDES permits may not authorize discharges that violate a water quality standard.”).

¹³⁸ *Id* at 148 -149.

¹³⁹ *Id* at 148.

for SIM’s untreated stormwater discharge to develop site-specific numeric effluent limits,” would directly contradict this holding of *Puget Soundkeeper*.¹⁴⁰

- C. The technology-based S1.B effluent limitations cannot be affirmed as “interim limits.”

The Board Decision’s affirmation of the technology-based Condition S1.B effluent limitations for toxic metals as “interim in nature” and hence reasonable is disallowed by the law. While interim effluent limits may be used only in certain circumstances as part of a compliance schedule to meet final WQBELs, there is no such compliance schedule here and no regulatory support for the Board’s assertion in this case. Outside the compliance schedule context, there is no provision for “interim” effluent limitations in the applicable law; as set forth above, the mandate for properly derived and protective WQBELs when a discharge has reasonable potential to cause a water quality standards violation is virtually absolute.¹⁴¹

First, although Condition S9 provides a compliance schedule for the implementation of AKART to the outfall 002 discharge, there is absolutely no indication in the SIM permit or the permit’s accompanying fact sheet that the Condition S1.B effluent limitations are interim limits or any part of any compliance schedule.¹⁴² To comply with WAC 173-220-060, the fact

¹⁴⁰ Board Decision at 12, 24, 37 – 38.

¹⁴¹ *Puget Soundkeeper Alliance*, 189 Wn.App. at 148 – 149.

¹⁴² AR 3260, 3273, 3321 – 3333, 3337 (describing compliance schedule).

sheet would have had to disclose such a fact. Indeed, the text of the tables containing the numeric S1.B limits provided in both the permit and fact sheet identify these limitations as “Final Maximum Daily Limits.”¹⁴³ No other final limits are identified or alluded to.

Second, the S1.B effluent limitations cannot qualify as “interim limits” in a manner consistent with the regulatory requirements for compliance schedules. WAC 173-201A-510(4) addresses compliance schedules in NPDES permits “for achieving compliance with water quality criteria” contained in WAC Ch. 173-201A. Crucially, “[s]uch schedules of compliance shall be developed to ensure final compliance with all water quality-based effluent limits in the shortest practicable time.”¹⁴⁴ “Schedules of compliance may in no case exceed ten years, and shall generally not exceed the term of any permit.”¹⁴⁵ WAC 173-220-140 also addresses compliance schedules, allowing them for time needed to “achieve compliance with applicable effluent standards and limitations, water quality standards, and other legally applicable requirements.”¹⁴⁶ “Schedules of compliance shall set forth the shortest, reasonable period of time to achieve the specified requirements”¹⁴⁷

¹⁴³ AR 3260 and 3333.

¹⁴⁴ WAC 173-201A-510(4)(a).

¹⁴⁵ WAC 173-201A-510(4)(c).

¹⁴⁶ WAC 173-220-140(1).

¹⁴⁷ WAC 173-220-140(1)(b).

The Board upheld the Condition S9 compliance schedule as “a compliance schedule for AKART implementation that achieves compliance [with AKART requirements] at the earliest possible date.”¹⁴⁸ But the Condition S1.B effluent limitations are totally disassociated from this compliance schedule. There is no date given by which compliance with “final” S1.B limitations is required, nor any specification of or provision for compliance with “final” S1.B WQBELs. Thus, to the extent that the S1.B limits could be viewed in the context of a compliance schedule, such schedule would fail the requirements of WAC 173-201A-510(4)(a) to “ensure final compliance in the shortest practicable time,” of -510(4)(c) to not exceed ten years, and of WAC 173-220-140(1)(b) to “set forth [a] period of time to achieve the specified requirements” The endpoint of the Condition S9 compliance schedule is the January 1, 2016, operation and maintenance manual for a treatment system, not anything about complying with WQBELs. There are no “specified requirements” to achieve or any specified timeframe to achieve them with regard to any WQBELs for the outfall 002 untreated stormwater discharge. Nor is there any compliance with the interim date and reporting requirements under WAC 173-220-140(2) and (3).

Third, SIM’s outfall 002 discharge is entirely industrial stormwater,

¹⁴⁸ Board Decision at 40.

and thus subject to the provisions of 33 U.S.C. § 1342(p). Not only does this section mandate strict compliance with water quality standards for industrial stormwater, it also mandates that NPDES permits for such discharges “shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.”¹⁴⁹ Since the SIM permit does not require compliance with final Condition S1.B WQBELs within three years (or by *any* specified date), it would violate this statutory limitation on compliance schedules if it indeed had one.

In summary, SIM’s permit fails to impose any WQBELs on the outfall 002 discharge, and there is no indication that the S1.B technology-based numeric effluent limits are “interim” limits as contemplated by law or part of a compliance schedule.

- D. Ecology’s imaginary “technical determination” of inability to properly calculate numeric S2.B WQBELs warrants no deference.

In upholding the omission of WQBELs in Condition S1.B, the Board Decision purports to defer “to Ecology’s technical determination that it lacked sufficient monitoring data for SIM’s untreated stormwater discharge to develop site-specific numeric effluent limits.”¹⁵⁰ Ecology made

¹⁴⁹ 33 U.S.C. § 1342(p)(4)(A); *Defenders of Wildlife*, 191 F.3d at 1163 - 1165; *Puget Soundkeeper Alliance, et al.*, PCHB No. 02-162 (June 6, 2003) at XX – XXII.

¹⁵⁰ Board Decision at 37.

no such determination and the Board's assertion in this regard is its own invention, lacking support of any evidence, and, in fact, directly refuted by the testimony of Ecology's permit writer.

Where, as for the outfall 002 discharge, there are no mixing zone or dilution factors to consider, numeric WQBELs are properly set at the pollutants of concern's numeric criteria applicable to the receiving waters. Ecology's permit writer testified unambiguously to this, and to what the appropriately derived numeric WQBELs for S1.B would be – 90 and 81 µg/L daily maximum and monthly average zinc limitations, 4.8 and 3.1 µg/L daily maximum and monthly average copper limitations, and 0.15 µg/L for the mercury limitation.¹⁵¹ These numbers are the Duwamish River-specific water quality criteria calculated in the fact sheet using the receiving water characteristics.¹⁵²

The Board may have conflated this witness's testimony about the impediment posed by the lack of outfall 002 effluent data to his performance of a quantitative reasonable potential analysis with the separate step of numeric WQBEL derivation.¹⁵³

¹⁵¹ RP 578:22 – 581:5, 586:13 – 587:3.

¹⁵² AR 3345 (for the human health mercury criterion) and 3347 (aquatic life criteria for copper and zinc).

¹⁵³ RP 534:19 – 539:8, 582:6 – 12.

Soundkeeper's expert, Allan Chartrand, testified to the propriety of the same numeric WQBELs given by the permit writer.¹⁵⁴ He supported this uncontroverted opinion with citation to the formulas provided by Ecology's permitting guidance document, which do *not* require effluent monitoring data as an input.¹⁵⁵

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

To comply with the more stringent mandates of Washington State water pollution control law in the circumstances presented – where PCB discharges in excess of low numeric WQBELs likely contribute to serious violations of water quality and sediment quality standards and threaten both LDW Superfund site cleanup objectives and the designated uses of fish and shellfish harvest – Ecology must do more than simply default to the EPA-approved lab analysis method (Method 608), which provides a PQL and effective measure of compliance at PCB effluent concentrations far in excess (i.e., more than 29,000 times higher) of critical WQBELs.¹⁵⁶ No matter that EPA's interpretation of the federal CWA and its own regulations allow this mockery and perversion of the CWA's goals, state law is more stringent: "*In no event* shall the discharge of toxicants be allowed that

¹⁵⁴ RP 350:8 – 352:1.

¹⁵⁵ RP 352:12 – 353:3; AR 3416 and 3422.

¹⁵⁶ WAC 173-220-210(1)(a), WAC 173-201A(3)(g).

would violate any water quality standard, including toxicant standards, sediment criteria, and dilution zone criteria.”¹⁵⁷

To review, the basic facts here are that SIM’s PCB discharges (in both discharge streams) present a reasonable potential to contribute to violations of PCB water and sediment quality criteria.¹⁵⁸ Focusing on the persistent, bioaccumulative and toxic nature of PCBs, the dangerously contaminated state of the Duwamish River, the resulting impairment of the river’s harvest designated uses, and the needs of the LDW Superfund source control effort, the Board rejected a mixing zone and dilution factors for PCBs in SIM’s discharge.¹⁵⁹ The Board specified that the appropriate PCB WQBEL “to meet water quality standards” under WAC 173-220-130(1)(b)(i) is 0.000017 µg/L.¹⁶⁰ Astoundingly, and incorrectly, the Board then held that WAC 173-201A-260(3)(h) requires Ecology to specify Method 608 (the 40 C.F.R. § 136-approved method) for PCB compliance monitoring, even though Method 608 discerns effluent limitation violations only at levels of 0.5 µg/L or higher.¹⁶¹ This determination effectively authorizes the discharge of PCBs in concentrations between the crucial 0.000017 µg/L WQBELs and the 29,000-plus times higher 0.5 µg/L. Given

¹⁵⁷ RCW 90.48.520 (italics added); *Puget Soundkeeper Alliance*, 189 Wn.App. at 149 (RCW 90.48.520’s prohibition is “even more categorical” than that in the CWA).

¹⁵⁸ Board Decision at 6, 9 – 11, 15 – 18, 24, 36 – 37, 45 – 47.

¹⁵⁹ Board Decision at 45 – 46.

¹⁶⁰ Id at 47 - 48.

¹⁶¹ AR 3305.

the unambiguous RCW 90.48.520 prohibition and the availability of a superior, EPA-developed method, Method 1668C, the Board's interpretation of WAC 173-201A-260(3)(h) cannot be upheld.

Indeed, without a hint of cynicism or acknowledgment of irony, the Board explicitly rejected as inadequately protective of water quality a nominal Condition S1.B PCB effluent limit set at Method 608's MDL of 0.25 µg/L in favor of the 0.000017 µg/L figure, but that compliance with it may only be determined at or above the 0.5 µg/L Method 608 PQL.¹⁶²

Compliance monitoring by Method 1668C is superior to that by Method 608 not only because of its ability to quantify PCB concentrations in the vicinity of a 0.000017 µg/L WQBEL.¹⁶³ It is superior also because, unlike Method 608, it allows calculation of "total PCBs," in which the human health PCB criteria are expressed and in which the PCB WQBELs should be expressed.¹⁶⁴ Analysis by Method 1668C is available at multiple laboratories and shipping samples to out of state labs is a standard practice.¹⁶⁵ While it is true that Method 1668C is more expensive than Method 608, the increased costs imposed on PCB dischargers to ensure that

¹⁶² Board Decision at 48; *Puget Soundkeeper Alliance*, PCHB No. 15-050 (Jan. 6, 2016) at 3 – 6. In its PCHB No. 05-150 (Jan. 6, 2016) decision, the Board misstates the Method 608 PQL (or "QL") as 0.25 µg/L. It is 0.5 µg/L. AR 3305; RP 68:7– 5.

¹⁶³ RP 69:19 – 70:6.

¹⁶⁴ RP 70:8 – 71:20, 74:20 - 24; AR 3226 – 3227.

¹⁶⁵ RP 72:3 – 10, 75:7 – 20.

they comply with limits needed to prevent recontamination of the LDW Superfund site would certainly be reasonable and appropriate under WAC 173-201A-260(3)(g) and 173-220-210(1)(a) considering the hundreds of millions of dollars to be spent cleaning up LDW PCB contamination.¹⁶⁶

When taken in the context of the state's statutory and regulatory scheme for water quality protection, the Board's narrow interpretation of WAC 173-201A-260(3)(h) cannot stand. First, -260(3)(h) must be read in conjunction with -260(3)(g), which directs Ecology to consider "the precision and accuracy of the sampling and analytical methods used, as well as the existing conditions at the time" in applying the water quality criteria. And it must also be read in conjunction with WAC 173-220-210(1)(a), allowing the imposition of monitoring requirements that "may be reasonably required." Blind deference and default to the 40 C.F.R. § 136 list of EPA-approved methods does not fulfill these directions.

Second, the explicit language of WAC 173-201A-260(3)(h) provides Ecology with three options in selecting analytical methods for use in NPDES permits: (1) "in accordance with the "*Guidelines Establishing Test Procedures for the Analysis of Pollutants*" (40 C.F.R. Part 136)" (italics in original), (2) in accordance with "superseding methods published," or (3) other methods approved by Ecology "following

¹⁶⁶ RP 72:13 – 73:3; AR 3738.

consultation with adjacent states and approval of the USEPA.” Ecology and the Board would read the second two options out of the regulation. To the contrary, Method 1668C’s use can be authorized under either of these.

Method 1668C is a “superseding method published” by EPA.¹⁶⁷ Even though EPA has deferred its approval for inclusion on the 40 C.F.R. § 136 list, the method has been published and is intended to supplant Method 608 where appropriate in CWA programs.¹⁶⁸ According to EPA, some states are already using Method 1668C in regulatory programs, including in permits.¹⁶⁹ It is thus a “superseding” method.

Certainly also Method 1668C could be required by Ecology under the third WAC 173-201A-260(3)(h) option as it may be proposed for limited use (i.e., for the SIM permit, or for all permits authorizing discharges to the LDW) by “any person,” including not only Ecology but also SIM itself.¹⁷⁰

Soundkeeper 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, by SIM or otherwise. In the circumstances, WAC 173-201A-260(3)(h) and the state’s water pollution

¹⁶⁷ AR 2749, *et seq.*; RP 82:6 – 83:9.

¹⁶⁸ AR 2751 and 3226 – 3227.

¹⁶⁹ AR 3587.

¹⁷⁰ 40 C.F.R. § 136.5.

control scheme, specifically including RCW 90.48.520, WAC 173-201A-510(1), and WAC 173-220-130, demand this order.

As stated, “our legislature has in no uncertain terms prohibited [Ecology] from issuing permits that allow toxic discharges in violation of applicable standards.”¹⁷¹ The RCW 90.48.520 “in no event” prohibition on toxic discharges “that would violate any water quality standard, including toxicant standards [and] sediment criteria” is “categorical” and more stringent than federal CWA requirements.¹⁷² EPA’s 2012 deferral of Method 1668C’s approval does not amount to an “event” justifying authorization of toxic discharges at levels expected to violate water quality and sediment standards and to contribute to an existing “*public health hazard*” – no “event” does.¹⁷³ Furthermore, in requiring the use of Method 608, the Board affirmed a permit that fails to require that “[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.”¹⁷⁴ Under the APA, the Board Decision merits reversal since there is no explanation of its inconsistency with legal

¹⁷¹ *Puget Soundkeeper Alliance*, 189 Wn.App. at 138.

¹⁷² *Puget Soundkeeper Alliance*, 189 Wn.App. at 149.

¹⁷³ RCW 90.48.520; AR 2001 (italics in original).

¹⁷⁴ WAC 173-220-150(1)(c).

requirements that states facts and reasons demonstrating a rational basis for inconsistency.¹⁷⁵

Washington regulations are unambiguous in implementing the RCW 90.48.520 prohibition on issuance of an NPDES permit that effectively authorizes PCB discharges at more than 29,000 times the calculated safe level.¹⁷⁶ WAC 173-201A-240(1) prohibits the discharge of toxic substances “which have the potential either singularly or cumulatively to adversely affect characteristic water uses, cause acute or chronic toxicity to the most sensitive biota dependent upon those waters, or adversely affect public health” WAC 173-201A-510(1) states that “[w]aste discharge permits, whether issued pursuant to the [NPDES] or otherwise, must be conditioned so the discharges authorized will meet the 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.”

These state rules must be interpreted to give effect to the RCW 90.48.520 “in no event” prohibition and in a manner consistent with the statutory scheme and authority that gives them purpose.¹⁷⁷ The policy statement of RCW 90.48.010 establishes the state policy to “maintain the

¹⁷⁵ *Puget Soundkeeper Alliance*, 189 Wn.App. at 147 (citing RCW 34.05.570(3)(h)).

¹⁷⁶ *Puget Soundkeeper Alliance*, 189 Wn.App. at 149.

¹⁷⁷ *Puget Soundkeeper Alliance*, 189 Wn.App. at 136 – 138, 142, 148; WAC 173-201A-010 (relying in part on Ch. 90.48 RCW for authority); WAC 173-220-010 (Ecology-issued NPDES permits “are designed to satisfy the requirements for discharge permits under both [33 U.S.C. § 1342(b)] and chapter 90.48 RCW).

highest possible standards” through “exercise of [the state’s] powers, as fully and as effectively as possible,” while recognizing the federal government’s interest in water quality and working cooperatively with it, “while at the same time preserving and vigorously exercising state powers to insure that present and future standards of water quality within the state shall be determined by the citizenry, through and by the efforts of state government, of the state of Washington.”

The Board Decision’s unquestioning deferral to the manifestly inadequate albeit EPA-approved method for PCB analysis instead of the available, superior, and effective Method 1668C in no sense comports with this policy. This deferral must be rejected because it represents the exact opposite of “preserving and vigorously exercising state powers” toward attainment of the state citizenry’s water quality goals.¹⁷⁸ Such deferral impermissibly conflicts with the language and intent of RCW 90.48.010 and .520, as well as those of SEPA.¹⁷⁹

In response, this Court should direct Ecology to determine to deny the permit to SIM under WAC 173-201A-510(1) and WAC 173-220-110 unless EPA approval under 40 C.F.R. § 136.5 is obtained for PCB WQBEL compliance monitoring adequate to ensure compliance with RCW

¹⁷⁸ RCW 90.48.010.

¹⁷⁹ *Puget Soundkeeper Alliance*, 189 Wn.App. at 136 and 148.

90.48.520 and the regulations implementing its toxic discharge prohibition.¹⁸⁰ Otherwise, the SIM permit effectively excludes effluent limitations stringent enough to meet water quality standards, while leaving Ecology unable to honestly make the thus mandatory finding “that any discharge authorized by the permit will not violate applicable water quality standards.”¹⁸¹

VI. CONCLUSION

For the foregoing reasons, 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 20th day of April, 2016

SMITH & LOWNEY, P.L.L.C.

By: 
Richard A. Smith, WSBA # 21788
Claire E. Tonry, WSBA #44497
*Attorneys for Petitioner Puget
Soundkeeper Alliance*

¹⁸⁰ WAC 173-201A-240(1) and -510(1); WAC 173-220-130(1)(b).

¹⁸¹ WAC 173-220-130(1)(b) and (2); *Puget Soundkeeper Alliance*, 189 Wn.App at 137 - 138.

DECLARATION OF SERVICE

I, Jessie Sherwood, declare under penalty of perjury under the laws of the State of Washington that on this date I caused the foregoing Opening Brief to be served via electronic service on the following persons on April 20, 2016:

Phyllis Barney
Assistant Attorney General; Attorney of Record for the Department of Ecology
Office of the Attorney General, Ecology Division
P.O. Box 40117
Olympia, WA 98504-0117
PhyllisB@atg.wa.gov, ecvolef@atg.wa.gov

Dionne Maren Padilla-Huddleston
Office of the Attorney General
800 Fifth Ave. Ste. 2000
Seattle, WA 98104-3188
DionneP@atg.wa.gov

Dated at Seattle, Washington on 20 of April, 2016


Jessie Sherwood

SMITH & LOWNEY PLLC

April 20, 2016 - 12:12 PM

Transmittal Letter

Document Uploaded: 6-482673-Appellant's Brief.pdf

Case Name: Puget Soundkeeper Alliance v. State of Washington, Department of Ecology and State of Washington Pollution Control Hearings Board

Court of Appeals Case Number: 48267-3

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

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

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Jessie Sherwood - Email: jessie.c.sherwood@gmail.com

A copy of this document has been emailed to the following addresses:

phyllisb@atg.wa.gov

ecyolef@atg.wa.gov

dionnep@atg.wa.gov

rasmithwa@igc.org