

# How Clean is Clean? Litigation of PCB Testing in Washington

Puget Soundkeeper Alliance v. Department of Ecology

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The Duwamish River has been a listed Superfund site since 2001 and on the Clean Water Act (CWA) 303(d) impaired waters list for over 50 different pollutants, including PCBs.<sup>1</sup> PCBs are known for being “highly toxic to humans and animals... typically taking decades to degrade.”<sup>2</sup> The most contaminated section of the Lower Duwamish is a 5 mile long industrialized estuary called the Duwamish Waterway that flows “northward into Elliott Bay.”<sup>3</sup> Currently, the “fish in the Duwamish are unsafe to eat because of PCB levels in the river.”<sup>4</sup>

In Washington, the state Water Quality Standard (WQS) for PCBs is stricter than the federal standard under the CWA, an outcome permitted by the CWA.<sup>5</sup> The CWA allows issuance of NPDES permits which allow polluters to discharge at levels that will allow a water body to meet and not exceed the state WQS.<sup>6</sup> However, regulations require that “permits must be modified by Ecology when it is determined that the discharge causes or contributes to a violation of water quality standards.”<sup>7</sup> In this way, the CWA is designed to protect downstream uses like fishing.

The WQS for PCB discharge limit for NPDES permit holders should be set at .00017 micrograms per liter.<sup>8</sup> The current testing method approved by the Ecology and EPA known as Method 608 is only able to detect PCBs at 0.5 micrograms per liter.<sup>9</sup> Therefore, if a polluter discharges below 0.5 micrograms per liter, it is possible for that polluter to violate the actual WQS without detection.<sup>10</sup> When making test method determinations, the regulations currently provide that test methods are appropriate if they are

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<sup>1</sup> King County, *King County Partnerships in the Lower Duwamish Clean-up*, <https://www.kingcounty.gov/services/environment/wastewater/duwamish-waterway/superfund-cleanup/partnerships.aspx> (Last updated Oct. 20, 2020).

<sup>2</sup> Puget Soundkeeper Alliance’s Petition for Discretionary Rev. 4, Mar. 24, 2017.

<sup>3</sup> Ecology, *Lower Duwamish Waterway Site history*, [Site history - Washington State Department of Ecology](#)

<sup>4</sup> Puget Soundkeeper, *Puget Soundkeeper statement on Washington Supreme Court decision in Seattle Iron and Metals Case*, <https://pugetsoundkeeper.org/2018/08/31/puget-soundkeeper-statement-on-washington-supreme-court-decision-in-seattle-iron-and-metals-case/> (Aug. 31, 2018).

<sup>5</sup> *Id.* 5.

<sup>6</sup> *Id.* 6.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* 7.

<sup>10</sup> *Id.* 8.

approved by the EPA, are a superseding method, or are approved following consultation with adjacent states and approval of the EPA.<sup>11</sup>

Seattle Iron and Metals (“SIM”), an auto shredder and metal recycler, have obtained a wastewater and stormwater NPDES permit issued by Ecology to discharge into the Duwamish.<sup>12</sup> The suit arose when the Puget Soundkeeper (“Soundkeeper”) challenged the Washington Department of Ecology’s (“Ecology”) issuance of this permit on the basis of the testing methodology used which Soundkeeper argues is insufficient to understand whether a permit holder is violating the WQS and therefore compliant with the law.<sup>13</sup> Soundkeeper noted that “the lack of an appropriate monitoring method is especially concerning because past data on SIM’s discharge of PCBs shows violations of their permit limits and state [WQS].”<sup>14</sup>

Soundkeeper argued to the State Supreme Court that “monitoring must be done using sufficiently sensitive test methods,” which was not being met since the testing methodology used could not detect the limit imposed by the WQS.<sup>15</sup> Further, Soundkeeper argued that a new method, Method 1668C, qualified as a superseding method and could be selected on that ground.<sup>16</sup> To justify this argument, Soundkeeper referred to the Webster Third International Dictionary definition for its plain meaning, “to make inferior by better or more efficiently serving a function.”<sup>17</sup> Soundkeeper reasoned that based on this definition, Method 1668C was superior because it could detect lower concentrations of PCBs at 0.000022 nanograms per liter and therefore superseded Method 608.<sup>18</sup>

However, Ecology argued that Method 608 is the only sufficiently sensitive test method to use for compliance in NPDES permits because Method 608 is the only approved test method under the regulations, and only approved test methods can be used.<sup>19</sup> Further, Ecology argued that there is lack of evidence that Method 608 cannot detect smaller levels of PCBs, pointing to a few instances where Method 608 detected such smaller concentrations.<sup>20</sup>

After the petition for review was granted, the Washington Supreme Court ultimately ruled against Soundkeeper finding that the “the method has not been approved by EPA and [cannot] tell whether the PCBs are in the wastewater, test container, or circulating in the air.”<sup>21</sup> The Court noted concern that if Method 1668C were approved that “any polluter would predictably be able to challenge the validity of the agency’s actions because of the inability to identify the source of pollution.”<sup>22</sup> The Court reasoned that

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<sup>11</sup> Petition for Review Response, 5.

<sup>12</sup> Petition for Discretionary Review, 1.

<sup>13</sup> *Id.*

<sup>14</sup> *Puget Soundkeeper statement.*

<sup>15</sup> Petition for Discretionary Review, 11.

<sup>16</sup> *Id.* 12.

<sup>17</sup> *Id.* 13.

<sup>18</sup> *Id.*

<sup>19</sup> Response to petition for discretionary review, 9.

<sup>20</sup> *Id.* 13.

<sup>21</sup> Don Jenkins, *Washington court upholds state’s way to measure PCBs*, The Capital Press, [https://www.capitalpress.com/state/washington/washington-court-upholds-state-s-way-to-measure-pcb/article\\_d814df33-88ec-5d26-ab65-9a602ab0545d.html](https://www.capitalpress.com/state/washington/washington-court-upholds-state-s-way-to-measure-pcb/article_d814df33-88ec-5d26-ab65-9a602ab0545d.html) (Dec. 13, 2018).

<sup>22</sup> *Id.*

EPA knew there would be “instances . . . where its approved testing methods [were] not sensitive enough” and that “the testing method . . . need only be sufficiently sensitive.”<sup>23</sup> In other words, “the statute’s plain language does not require a perfectly sensitive test.”<sup>24</sup> Ultimately, the Court found that while both methods were available, the use of Method 608 was reasonable and therefore acceptable.<sup>25</sup>

In the dissenting opinion, Justice González reiterated that “in Washington, there is no right to discharge pollutants . . . Accordingly, an entity is not permitted to discharge unless it can prove that there will be no resulting pollution of our waterways.”<sup>26</sup> He further emphasized that NPDES permits are a “concession . . . to the perceived necessities of the time . . . however, in no event shall the discharge of toxicants be allowed that would violate any water quality standard.”<sup>27</sup> While Justice Gonzalez agrees that Method 1688C is not a superseding method, he disagrees that Method 608 is an acceptable method “because requiring use of Method 608 to monitor PCB levels fails to ensure a permit holder’s compliance with statutory water quality standards.”<sup>28</sup> He emphasized that the testing method must have “the capacity to quantify toxicants at the level of 0.00017 nanograms per liter and pointed to a possible solution of having a new method be approved by Ecology and EPA, as permitted under the statute.”<sup>29</sup> As a result, Method 608 continues to be used in the Spokane River.

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<sup>23</sup> *Puget Soundkeeper All. v. Dep’t of Ecology*, 191 Wash. 2d 631, 640 (Aug. 30, 2018).

<sup>24</sup> *Id.* 641.

<sup>25</sup> *Id.* 641, 642.

<sup>26</sup> *Id.* 646.

<sup>27</sup> *Id.* 647.

<sup>28</sup> *Id.* 649.

<sup>29</sup> *Id.* 652.