

Sierra Club's Case Against the County's Wastewater NPDES Permit

Sierra Club and Center for Environmental Law & Policy v. State of Washington, Department of Ecology, and Spokane County

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On July 19, 2013, Sierra Club and the Center for Environmental Law & Policy (referred to collectively as “Plaintiffs”) appealed the issuance of an NPDES permit by the Department of Ecology (“Ecology”) to Spokane County (“the County”) for the Spokane Regional Water Reclamation Facility (“Facility”) to Washington’s Pollution Control Hearings Board (“the Board”), the administrative body that hears appeals of permits issued by Ecology.¹ Plaintiffs appeal challenged “whether the NPDES Permit unlawfully authorize[s] PCB discharges that will cause or contribute to a violation of water quality standards.”²

The effluent water from the Facility is released into the Spokane River, which is currently on the Clean Water Act (“CWA”) impaired waters list under 303(d) for PCBs in a stretch of the river between X and Y, which is downstream of the facility although the facility does not directly release effluent into the impaired sections.³ PCBs cause “toxic effects to the immune, reproductive, nervous, and endocrine systems” and “are likely to cause cancer in people.”⁴ Despite clean-up efforts over the last couple of years, the fish advisory has been active since 2009 and no PCB cleanup plan (“TMDL”) has been completed for PCBs.⁵

Tertiary treatment technology, a “step-fed nitrification/denitrification treatment system with membrane filtration and chlorination,” is used at the facility to treat PCBs in the water.⁶

During the hearing before the Board, Richard Koch testified that despite “high quality removal of PCBs,” that the effluent would still contain PCBs.⁷ When drafting an NPDES permit, if “an effluent limit is necessary,” the permit drafter must indicate “whether the discharge has a reasonable potential to cause or contribute to a violation of water quality standards.”⁸ If a reasonable potential is proven, “then the permit writer evaluates whether there is sufficient information to develop a numeric effluent limit for the pollutants of concern.”⁹

¹ Findings of Fact, Conclusions of Law, and Order of the Pollution Control Hearings Board at1 (July 19, 2013).

² *Id.* at1.

³ *Id.* at2.

⁴ Ecology, *Polychlorinated biphenyls (PCBs)*, [Polychlorinated biphenyls](#).

⁵ Findings of Fact at 4-5

⁶ *Id.* at9.

⁷ *Id.*

⁸ *Id.* at10-11.

⁹ *Id.* at 11.

Although “the Permit Fact Sheet states in places that a reasonable potential analysis was performed,” the analysis did not measure PCBs¹⁰ In addition, Koch also “testified that he did not conduct a reasonable potential analysis for PCBs because he did not have sufficient data to do so.” In place of the numeric limit, Koch drafted “a narrative effluent limit composed of best management practices (BMPs)” described in Condition S12 and Condition S13.¹¹ Condition S12 featured a required “Annual Toxics Management Report for Ecology’s review and approval”, while Condition S13 required “Spokane County to participate in the creation of a Regional Toxics Task Force” (“the Task Force”).¹² The Task Force would “develop a comprehensive plan to bring the Spokane River into compliance with applicable water quality standards for PCBs,” describing various methods to reduce PCBs but lacking “specific deadlines or criteria” providing a vague “measurable progress” standard instead.¹³

The primary issue examined by the Pollution Control Hearings Board (“the Board”) was whether “the NPDES Permit No. WA-0003317 unlawfully authorize[s] PCB discharges that will cause or contribute to a violation of water quality standards.”¹⁴ In July 2013, the Board concluded based on the findings of fact above that “Ecology should have used [the] data to conduct a reasonable potential analysis for PCBs.”¹⁵ Further, the Board held “that the evidence presented supports the conclusion that there is a reasonable potential for the discharge from the Facility to cause or contribute to a violation of water quality standards.”¹⁶

Regarding Koch’s testimony, the Board agreed that there was not enough data to prepare “a numeric effluent limit for PCBs”, therefore triggering Ecology’s “require[ment] to include BMPs” as a narrative effluent limit¹⁷ On this point, the Board concluded that Condition S12 “fails as a narrative effluent limitation.”¹⁸ Specifically, it “lacks deadlines by which Spokane County is to undertake and/or complete actions to reduce PCBs” and “standards against which Spokane County will be measured for accomplishment of [its] goals.”¹⁹ The Board remanded to Ecology to “modify the provisions of Condition S12 to identify the expected reductions in toxicant loadings, the schedule for initiating such reductions, and at a minimum, offer greater definition and timelines for/of this expected outcome.”²⁰

The Board found Condition S13 inadequate for similar reasons. The Board critiqued the Task Force and Condition S13, noting that it did not satisfy the narrative effluent limit requirement.²¹ Further, the Board indicated that “the creation of the Task Force is a positive step”, but “it is uncertain that the Task Force

¹⁰ *Id.*.

¹¹ *Id.* at 12.

¹² *Id.* at 13-14.

¹³ *Id.* at 14-15.

¹⁴ *Id.* at 17.

¹⁵ *Id.* at 21.

¹⁶ *Id.* at 21-22.

¹⁷ *Id.* at 22.

¹⁸ *Id.* at 23.

¹⁹ *Id.*.

²⁰ *Id.* at 25.

²¹ *Id.* at 26.

will achieve any of its stated goals.”²² Finally, the Board noted that the Task Force is not a defense to violating the Permit terms.²³

On August 16, 2016, the Washington Court of Appeals affirmed the Board’s decision stating that “Ecology should have conducted a reasonable potential analysis,” reversed in part because the Board should not have “perform[ed] its own reasonable potential analysis,” and remanded to Ecology to perform the analysis.²⁴ The Court noted that while the requirement to conduct a reasonable potential analysis was mandatory, Ecology could use its “discretion in how to perform the analysis.”²⁵ As a result, “the Permit was invalid.”²⁶ Regarding the Board’s reasonable potential analysis, the Court concluded that the Board could not “conduct its own initial analysis” and therefore “acted outside its statutory authority.”²⁷ Ecology now has the responsibility to correct the deficiencies in the NPDES Permit to make it valid.

The issuance of new NPDES permits for all dischargers has been on perpetual delay while the Department of Ecology considers whether or not to issue a water quality variance for pollution discharge sources.

²² *Id.* at 26.

²³ *Id.* at 27.

²⁴ *Spokane County v. Sierra Club*, No. 47158-2-11, 2016 WL 4366951, 2 (Wash. App. Aug. 16, 2016).

²⁵ *Id.* at 9.

²⁶ *Id.* at 10.

²⁷ *Id.* at 11.