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Washington Department of Ecology Water Quality Permit Writer's Manual Revision: Supreme Court of Washington Addresses Challenge Based on Alleged Administrative Procedure Act Violation

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The Supreme Court of the State of Washington ("SCT") addressed in a December 8th Opinion a judicial challenge to a revision of the Washington Department of Ecology's ("WDE") *Water Quality Program Permit Writer's Manual* ("Manual"). See *Northwest Pulp & Paper Association, et al. v. State of Washington, Department of Ecology*, No. 100573-3.

The *Manual* revision was challenged on the grounds it constituted rulemaking outside of the Administrative Procedure Act ("APA").

WDE is stated to utilize the *Manual* to provide technical guidance to staff drafting permits pursuant to the state's water permitting programs. WDE revised the *Manual* in 2018 adding Chapter 6, Section 4.5. The new section addressed methods permit writers could use to identify and measure polychlorinated biphenyls ("PCBs") discharged into the State of Washington waters.

WDE administers the Clean Water Act National Pollutant Discharge Elimination System ("NPDES") for the State of Washington's jurisdictional waterbodies. This program includes the requirement that a discharger of pollutants who has the "reasonable potential" to violate state water quality standards must have an NPDES permit with effluent limitations for that pollutant.

Two methods (Method 608.3 and Method 8082A) measure the total amount of PCBs. However, the methods are indicated to only have limited ability to identify individual PCB congeners. Method 1668C is stated to have the ability to measure concentrations of individual congeners. This Method, however, is indicated to be more expensive and difficult to perform.

WDE revised the *Manual* to include test Method 1668C and 8082A.

The Northwest Pulp & Paper Association, along with the Association of Washington Business and Washington Farm Bureau (collectively "Northwest Pulp & Paper") petitioned for judicial review and declaratory judgment under the APA. They requested that the Superior Court invalidate this new section in the *Manual* (4.5). WDE was alleged to have promulgated a rule without complying with APA rulemaking

requirements, therefore exceeding its authority. Further, they argued that the section is arbitrary and capricious.

The Superior Court dismissed the petition and denied declaratory relief concluding that Section 4.5 was not a rule under the APA.

The Washington Court of Appeals affirmed.

Departments and agencies in the federal and state executive branches adopt regulations that impose legally binding requirements. The APA generally requires agencies, in exercising that responsibility, to engage in notice-and-comment rulemaking to provide public notice of proposed regulations and allow interested parties to comment.

Agencies do have the ability to clarify existing obligations through non-binding guidance documents. The APA exempts such documents from notice-and-comment requirements. However, agency guidance documents are sometimes challenged through arguments that because of the implicit threat of enforcement action, if it is not followed, it should have been subject to the rulemaking procedures of the APA.

The SCT in addressing the issue considered two questions:

1. Does Section 4.5 of the *Manual* constitute a rule under the APA definition?
2. Does Section 4.5 fall into one of the enumerated categories that require rulemaking under the relevant Washington statute?

The SCT first determines that Section 4.5 does not constitute an agency directive of general applicability. This is a criteria for determining whether it is a rule. The SCT holds that it does not. It notes that an action is of general applicability if it applies uniformly to all members of a class.

The reasoning for this conclusion included:

- Section 4.5 does not impose a uniform numeric standard or schedule because permit writers have the discretion to choose the type of monitoring necessary based on the circumstances of the facility
- A standard is not applied uniformly where the permit writers have the option of exploring an alternative process altogether (and permit writers are allowed to discuss alternative processes with their supervisors)

The *Manual* revision is held to not impose a uniform standard on all dischargers because:

- Permit writers have the discretion to seek alternative processes
- Any decisions about specific PCB testing requirements are necessarily made on a case-by-case basis depending on the circumstances of each individual facility

Therefore, the SCT holds that the WDE did not invalidly promulgate a rule when it added Section 4.5 to its *Manual*.

A copy of the Opinion can be downloaded [here](#).