

RECEIVED

AUG 24 2022

DEPARTMENT OF ECOLOGY
OFFICE OF DIRECTOR

RECEIVED

AUG 25 2022

DEPARTMENT OF ECOLOGY
EXECUTIVE

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
IN AND FOR THE STATE OF WASHINGTON

CITY OF SPOKANE,

Appellant,

PCHB No.

NOTICE OF APPEAL

v.

WASHINGTON STATE DEPARTMENT OF
ECOLOGY,

Respondent.

TO: THE POLLUTION CONTROL HEARINGS BOARD, STATE OF WASHINGTON
AND TO THE WASHINGTON STATE DEPARTMENT OF ECOLOGY

I. Name and Address of Appellant and Appellant's Representative:

Appellant:

City of Spokane
Attn: Marlene Feist
Public Works Director
Public Works Department
808 West Spokane Falls Blvd.
Spokane, WA 99201
mfeist@spokanecity.org
Telephone: (509) 625-6505

1 **Appellant Representative:**

2 Craig Trueblood
3 Endre M. Szalay
4 K&L Gates LLP
5 925 Fourth Avenue, Suite 2900
6 Seattle, WA 98104-1158
7 Craig.Trueblood@klgates.com
8 Endre.Szalay@klgates.com
9 Telephone: (206) 623-7580
10 Facsimile: (206) 623-7022

11 **II. Order Appealed From:**

12 Appellant City of Spokane (the “City”) appeals National Pollutant Discharge Elimination
13 System (“NPDES”) Waste Discharge Permit (“Permit”) No. WA0024473 issued on July 27, 2022 by
14 the Washington State Department of Ecology (“Ecology”) to the City. A copy of the Permit is
15 attached as Exhibit A. A copy of Ecology’s transmittal letter is attached as Exhibit B. The Permit’s
16 Fact Sheet is attached as Exhibit C. Ecology’s Response to Comments on the Permit and Fact Sheet
17 is attached as Exhibit D.

18 **III. Introduction:**

19 The City is committed to complying with the federal Clean Water Act (the “CWA”), 33
20 U.S.C. 1251 et seq., and Washington’s Water Pollution Control Act (the “Water Pollution Control
21 Act”), Chapter 90.48 RCW. To that end, the City has dedicated substantial resources to protecting
22 water quality in the Spokane River for the benefit of its citizens and the environment, including its
23 long-standing participation on the Spokane River Regional Toxics Task Force to address
24 polychlorinated biphenyls (“PCBs”) issues in the Spokane River, controlling Combined Sewer
25 Overflows (CSOs”) at seventeen outfalls, and constructing the Next Level Treatment (“NLT”) at the
26 City’s Riverside Park Water Reclamation Facility (“RPWRF”) to provide treatment above and
 beyond most all other wastewater utilities across the State and nation.

1 The City brings this appeal because of Ecology’s unlawful and unreasonable approach to the
2 Permit for the City’s RPWRF and CSOs. Among other things, the Permit includes effluent limits and
3 conditions for PCBs and pH that are entirely premature or unreasonable, effluent limits for cadmium
4 that do not reflect existing water quality information for the receiving water, and costly and
5 unnecessary monitoring and studies. The immediate impact of Ecology’s approach to the Permit is
6 that the City will have to devote significant time and resources toward the new and unreasonable
7 requirements, with no appreciable benefit to human health and the environment. Further, if not
8 checked by the Pollution Control Hearings Board (the “Board”), Ecology’s permitting approach may
9 cost the City—and ultimately its rate payers—substantial funds for unnecessary capital
10 improvements to its recently constructed state-of-the-art NLT facility. The Board should stay the
11 effectiveness of the Permit, invalidate the unlawful and unreasonable provisions of the Permit, and
12 remand to Ecology for reissuance of the Permit with new conditions that comport with the CWA, the
13 Water Pollution Control Act, and the Administrative Procedure Act, Chapter 30.45 RCW.

14
15
16 **IV. Statement of Facts**

17 The City owns and operates the RPWRF that discharges treated wastewater to the Spokane
18 River. Additionally, the City has seventeen controlled CSOs that discharge to the Spokane River and
19 Latah Creek. The City is committed to protecting and improving water quality in the Spokane River
20 through its operation of and investment in RPWRF and its CSO system as well as through
21 community engagement. The City is nearing completion of \$450 million in infrastructure projects
22 designed to protect and improve water quality in the Spokane River. These projects include controls
23 within the CSO system, reduction of stormwater runoff, NLT at RPWRF, and other improvements.
24 Additionally, the City has actively participated in the Spokane River Regional Toxics Task Force
25
26

1 (“SRRTTF”), a community-based organization focused on reducing PCBs in the Spokane River.
2 This has included voluntary in-kind contributions of staff time to help administer SRRTTF, and
3 monetary contributions of \$500,000.

4 Ecology began the public notice and comment process for the Permit in December 2021.
5 During the public comment period for the Permit, the City expressed its concerns regarding
6 Ecology’s approach to the Permit, including its approach to PCBs, pH, cadmium, wet weather
7 operation, and a bevy of proposed new monitoring and study requirements. The City was hopeful
8 that it could work with Ecology to resolve its concerns without the need to appeal the Permit.
9 Unfortunately, similar to the other Spokane River dischargers that appealed their recently-issued
10 NPDES permits¹, the final Permit leaves the City no choice but to seek appropriate relief from the
11 Board.
12

13
14 **V. Short and Plain Statement of Grounds for Appeal:**

15 The City appeals the Permit because it contains provisions that are unlawful, unreasonable,
16 and/or arbitrary and capricious as set forth below. The City reserves the right to supplement its
17 grounds for appeal consistent with the Board’s Rules of Practice and Procedure, Chapter 371-08
18 WAC.

19 1) PCB limits for the RPWRF are unreasonable at this time. Ecology should remove all
20 PCB limits from the Permit until the following are resolved:

21 a. On April 1, 2022, EPA published a proposed rule for new human health
22 criteria for PCBs in Washington. EPA, Restoring Protective Human Health Criteria in
23 Washington, 87 Fed. Reg. 19,046 (Apr. 1, 2022). EPA proposed to revise the PCB
24 criterion to 7 ppq (parts per quadrillion); the current PCB water quality criterion is 170
25

26 ¹ See PCHB Nos. P22-045, P22-055, P22-059 and P22-061.

1 ppq. The public comment for the proposed rule closed on May 31, 2022, and EPA
2 estimates that it will require up to nine months to issue a final rule.

3 b. On February 11, 2022, a federal judge approved a consent decree to resolve
4 litigation against the U.S. Environmental Protection Agency (“EPA”) regarding a total
5 maximum daily load (“TMDL”) for PCBs in the Spokane River. *See Sierra Club v.*
6 *McLerran*, No. 2:11-cv-01759 (W.D. Wash. Feb. 11, 2022) (order entering consent
7 decree). Under the consent decree, EPA will develop a PCB TMDL for the Spokane
8 River by September 2024, including PCB waste load allocations for the City and other
9 permitted Spokane River dischargers. Among other things, the PCB TMDL will evaluate
10 the contribution of point and nonpoint sources of PCBs in Idaho as well as Washington,
11 and therefore is a critical step in identifying appropriate PCB limits for Spokane River
12 dischargers in Washington such as the City.

13 c. In February 2019, over three years prior to Ecology’s issuance of the Permit,
14 the City applied for an individual discharger variance from the PCB water quality
15 standard. Ecology has not yet made a decision on that application, nor does the Permit or
16 Fact Sheet even mention the City’s variance application.

17 EPA’s actions of the revised PCB criteria and TMDL and Ecology’s decision on the City’s variance
18 application should be completed prior to imposing numeric PCB effluent limits in the Permit.

19 2) The Permit should not include a numeric PCB effluent limit (Condition S1.A, Table
20 2) because Ecology’s rationale for the effluent limit (i.e., the analysis for demonstrating the RPWRF
21 has a reasonable potential to cause or contribute to violations of the PCB water quality criteria) is
22 flawed due to, among others, the following reasons:

23 a. The reasonable potential analysis uses PCB data collected using EPA Method
24 1668, which is not approved for CWA compliance purposes. Further, Ecology’s use of
25 Method 1668 is currently pending before the Washington Supreme Court. *Nw. Pulp &*
26

1 *Paper Ass'n v. Dep't of Ecology*, 199 Wn.2d 1010, 508 P.3d 671 (May 4, 2022) (order
2 granting petition for review).

3 b. The reasonable potential analysis relies on data from the RPWRF prior to the
4 NLT facility upgrades completed in 2021. Ecology lacked sufficient data from this
5 RPWRF upgrade to complete a valid reasonable potential analysis for PCBs.

6 3) To the extent the Permit contains any PCB requirements, it should be narrative in
7 nature and limited to the best management practices (“BMPs”) (Condition S17.A) and revised to,
8 among other things, (a) include monitoring based only on EPA-approved test methods (i.e.,
9 eliminate any use of Method 1668, which is not approved for CWA compliance purposes) and (2)
10 remove the requirement for year-round operation of the City’s NLT facility upgrade, which is not
11 possible for all flows entering RPWRF.

12 4) In the alternative, to the extent the Permit contains an interim and final numeric PCB
13 effluent limit (Condition S1.A, Table 2), the BMP requirements in Condition S17.A are unnecessary,
14 overly burdensome, and should be eliminated and/or made entirely voluntary and up to the discretion
15 of the City.

16 5) The Permit improperly requires the City to participate in the Spokane River Regional
17 Toxics Task Force or an equivalent community advisory group (Condition S17.B). Condition S17.B
18 should be removed from the Permit. It is not required by the CWA and, in light of the EPA’s
19 development of a PCB TMDL, the Task Force or similar group is no longer a TMDL alternative and
20 therefore and is unnecessary and unreasonable.

21 6) The Permit’s effluent limits for pH are unreasonable (Condition S1.A, Table 2).
22 Ecology lacked accurate and current data needed to perform a reasonable potential analysis for pH.
23 Imposing pH limits without further study is premature and could lead to adverse environmental
24 impacts. The Permit’s pH limits—and associated compliance schedule for meeting the new pH limits
25
26

1 (Condition S18)—should be deleted and replaced with the pH conditions in the City’s current
2 NPDES permit.

3 7) The Permit contains unreasonable and unnecessary effluent limits for cadmium
4 (Condition S1.A, Table 2). The Spokane River meets the cadmium water quality criterion so the
5 performance-based limits specified in the 1992 Metals TMDL are no longer necessary or
6 appropriate. The cadmium limits in the City’s current NPDES permit should be maintained.

7 8) The Permit contains unreasonable conditions for wet weather treatment and design
8 criteria for the City’s NLT (Conditions S4.A and S4.B.) triggering the potential for a costly and
9 unnecessary new facility plan.

10 9) The Permit contains unreasonable conditions by imposing by-pass requirements on
11 flows that exceed the design capacity of NLT (Condition S5.F.). Normal operation of NLT includes
12 treatment of up to 50 MGD through the membrane filtration process and blending with secondary
13 effluent prior to disinfection/dichlorination. This is not “by-pass.”

14 10) The Permit fails to clarify that a CSO “event” is defined by wet weather storms rather
15 than the occurrence of overflows (Condition S2.B.). Any CSO overflow between the start of a storm
16 event until 24 hours after the storm event should be defined as one CSO “event.”

17 11) The Permit contains unreasonable and unnecessary studies, plans, and other
18 submittals that should be removed from the Permit, including CSO pollutant monitoring and
19 planning, CSO post-construction monitoring and planning, exfiltration prevention monitoring and
20 planning, sediment monitoring and planning, and a mixing zone study. The Permit is arbitrary and
21 capricious because Ecology has failed to provide an adequate regulatory basis for many of the
22 studies, plans, and submittals, and justification for the City’s outlay of significant time and cost to
23 complete these requirements within the Permit’s condensed timeframe.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

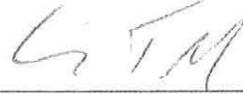
VI. Relief Sought:

1) Pursuant to WAC 371-08-540, the City respectfully requests that the Board invalidate the unlawful, unreasonable, and/or arbitrary and capricious provisions of the Permit and remand the Permit to Ecology for modification and reissuance in accordance with the CWA, the Washington Pollution Control Act, the Administrative Procedure Act, and other applicable laws.

2) Pursuant to RCW 43.21B.320 and WAC 371-08-415, the City respectfully requests a stay of the Permit based upon the grounds and factual basis set forth above, and further requests that the existing permit be continued during the pendency of this appeal. Without such a stay and continuation, irreparable harm will occur to the City. In order to meet the various deadlines imposed in the Permit for NLT operations, plans, studies and monitoring, the City will need to expend significant resources well before this appeal can be resolved.

DATED this 23rd day of August, 2022.

K&L GATES LLP

By 

Craig Trueblood, WSBA # 18357
Endre M. Szalay, WSBA # 53898

Attorneys for Appellant