

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

2317 EAST JOHN STREET
SEATTLE, WASHINGTON 98112
(206) 860-2883, FAX (206) 860-4187

February 21, 2020

Via Certified Mail - Return Receipt Requested

Chris Hladick, Administrator
Environmental Protection Agency Region 10
1200 Sixth Ave., Suite 900
Seattle, WA 98101

RECEIVED ON:

ORC

FEB 27 2020

NO CMS
EPA Region 10

Office of the Regional Administrator

Via Certified Mail - Return Receipt Requested

Andrew Wheeler, Administrator
Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, DC 20460

**Re: SUPPLEMENTAL NOTICE OF INTENT TO SUE UNDER THE CLEAN
WATER ACT CONCERNING SPOKANE RIVER PCB TMDL**

Dear Administrators Hladick and Wheeler:

We represent Sierra Club, 2101 Webster Street, Suite 1300, Oakland, CA 94612, (415) 977-5500, and Center for Environmental Law and Policy, 25 West Main, Spokane, WA 99201, (509) 209-2899. Any response or correspondence related to this matter should be directed to us at the letterhead address. This letter is to provide you with sixty days notice of Sierra Club and Center for Environmental Law and Policy's intent to file a complaint, or amend its complaint in W.D. Wash. No. 2:11-cv-01759-BJR, against you and EPA (hereinafter, collectively "EPA") under Section 505(a)(2) of the Clean Water Act ("CWA"), 33 USC § 1365(a)(2), for the violations described herein concerning EPA's failure to perform its nondiscretionary duty under CWA Sec. 303(d)(2) with regard to the total maximum daily load ("TMDL") for PCBs in the Spokane River.

Clean Water Act and TMDLs

Congress passed the CWA in 1972 to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To achieve that objective, Congress declared as a "national goal" that "the discharge of pollutants into the navigable waters be eliminated by 1985." Id.

EPA's regulatory program for water protection focuses on two potential sources of pollution: point sources and nonpoint sources. Point source pollution was addressed in the 1972 amendments to the CWA, where Congress prohibited the discharge of any pollutant from any point source into certain waters unless that discharge complies with the CWA's specific requirements. 33 U.S.C. §§ 1311(a) and 1362(12). Under this approach, compliance

focuses on technology-based controls to limit the discharge of pollutants through the National Pollutant Discharge Elimination System (“NPDES”) permit process.

When these requirements are found insufficient to clean up certain waterbodies, the CWA requires use of a water quality-based approach. States are required to identify such waters and designate them as “water quality limited.” The states are then to establish a priority ranking for these waters, and in accordance with that ranking, to establish more stringent pollution limited called “total maximum daily loads,” or “TMDLs.” 33 U.S.C. §§ 1313(d)(1)(A) and (C). TMDLs are the greatest amount of a pollutant the water body can receive daily without violating a state’s water quality standard.

The TMDL calculations help ensure that the cumulative impacts of multiple point source discharges are accounted for and evaluated in conjunction with pollution from nonpoint sources. States are then required to take whatever additional cleanup actions are necessary, which can include further controls on both point and nonpoint pollution sources. As a GAO report concluded, the TMDL process:

Provides a comprehensive approach to identifying and resolving water pollution problems regardless of the sources of pollution. If implemented, the TMDL process can provide EPA and the states with a complete listing of key water pollutants, the source of the pollutants, information on the amount of pollutants that need to be reduced, options between point and/or nonpoint approaches, costs to clean up, and situations where it may not be feasible to meet water quality standards.¹

Under Sec. 303(d), states and EPA are required meet a schedule regarding TMDL lists: TMDL lists were to be submitted to EPA by states no later than 180 days after EPA’s publication of first water pollutants list (June 26, 1979); EPA was to approve or disapprove the submissions within 30 days after that (July 26, 1979); and, upon disapproval, EPA was to promulgate its own TMDLs within 30 days (August 25, 1979). 33 U.S.C. § 1313(d)(2); *see, American Canoe Ass’n v. EPA*, 30 F.Supp.2d 908, 921 (E.D. Va. 1998).

CWA citizen suit provision

CWA Sec. 505(a)(2), 33 U.S.C. § 1365(a)(2), authorizes citizens to bring suit in federal court against EPA for failing to perform an “act or duty” under the CWA that is not discretionary. The courts have jurisdiction to order EPA to perform such act or duty, and to award costs of litigation, including reasonable attorney and expert witness fees. 33 U.S.C. §§ 1365(a) and (d).

EPA’s duties to approve or disapprove TMDL submissions, and to promulgate its own

¹ US Government Accounting Office, “Water Pollution – More EPA Action Needed to Improve the Quality of Heavily Polluted Waters,” January 1989 (GAO/RCED-89-38) at 34 – 35; cited by *Alaska Center for the Environment v. Reilly*, 762 F.Supp. 1422, 1424 (W.D. Wash. 1991).

TMDLs upon disapproval, are non-discretionary, and these duties extend to a state's constructive submission of TMDLs. See *Columbia Riverkeeper v. Wheeler*, 944 F.3d 1204, 1206 (9th Cir. 2019); *Scott v. City of Hammond*, 741 F.2d 992, 996-997 (7th Cir. 1984); *American Canoe Ass'n*, 30 F.Supp.2d at 919 – 921; *Alaska Center for the Environment v. Reilly*, 762 F.Supp. 1422, 1426 - 1429 (W.D. Wash. 1991).

Spokane River PCB TMDL

Fifteen waterbody segments of the Spokane River and Lake Spokane (also known as Long Lake), and one segment of the Little Spokane River are on Washington's final and approved 303(d) list for not meeting Washington State's human health water quality criterion for polychlorinated biphenyls (PCBs) in edible fish tissue:

<u>Waterbody</u>	<u>Reach</u>	<u>Waterbody Number</u>	<u>Watercourse Number</u>	<u>Listing ID</u>
Spokane River	Idaho Border to Latah Creek	WA-57-1010	QZ45UE	14397 14398 8201 8207 8202 14402
Spokane River	Latah Creek to Ninemile Dam	QA-54-1010	QZ45UE	14400 14385 9033
Little Spokane River	Near mouth	QA-55-1010	JZ70CP	9051
Lake Spokane (Long Lake)	Ninemile Dam to Lake Spokane Dam	WA-54-9040	QZ45UE	9021 36441 9015 36440
Spokane River	Lake Spokane Dam to Mouth	WA-54-1020	QZ45UE	9027

The Spokane Tribe human health PCB water quality criterion of 1.3 pg/l (parts per quadrillion) applies to portions of the Lake Spokane (Long Lake) sections and are also not met. Washington State's human health criteria for PCBs is 7 pg/l (for both water & organisms and organisms only).

Listing IDs 8201, 8202, 8207, 9015, 9021, 9027, 9033 and 9051 have been included on the Washington State 303(d) lists since 1996. Listing IDs 14385, 14397, 14398, 14400, 14402, 36440, and 36441 have been included since 2004.

The Washington Department of Ecology conducted water quality studies from 2003 to 2007 to assess PCB sources to the Spokane River. The goal of these efforts was to quantify PCB contamination and identify necessary reductions in sources and the receiving waters to meet applicable PCB water quality criteria in the Spokane River. The studies, which analyzed

PCBs in river water, industrial and municipal effluents, stormwater, suspended particulate matter bottom sediments, sediment cores, and fish tissue, are described in “Spokane River PCB Source Assessment 2003 – 2007,” Department of Ecology Publication No. 11-03-013 (April 2011).²

In May 2011, Ecology published “Spokane River Toxics Reduction Strategy,” Department of Ecology Publication No. 11-10-038.³ At page 19 of this document, Ecology explains that “[a] draft Spokane River PCB TMDL was issued for public comment in June 2006 but was not completed because of the need for more data, including more accurate stormwater data, updated fish tissue sampling results, and the addition of new Spokane Tribe water quality standards for PCBs based on updated fish consumption rates. The draft TMDL was revised with this updated information in 2009 and issued as the Spokane River Source Assessment Report in 2011.”

Also on that page, Ecology declares the following:

Ecology is not currently planning to develop a PCB TMDL with wasteload allocations, but this is still a potential tool for the future. Setting wasteload allocations through a TMDL to accomplish that would set a target well below the ‘background’ PCB concentrations observed in remote bodies of water with no obvious source of contamination other than aerial deposition.

In part because it would establish an impossible near-term target, and based on its experience with the Spokane River Dissolved Oxygen TMDL, which took 12 years to complete, Ecology is opting to proceed directly to implementing measures to reduce all toxics to the Spokane River. Those measures are described in this strategy. Such a *straight-to-implementation* plan is a recent strategy being adopted by EPA and Ecology to address the many bodies of water that are on the list of polluted waters [called the 303(d) list] through tools other than TMDLs. Ecology plans to develop a straight-to-implementation plan for Spokane River toxics in 2012.

Sierra Club and Center for Environmental Law and Policy brought a Clean Water Act citizen suit against EPA in October 2011 seeking, *inter alia*, injunctive relief for EPA’s failure to perform their nondiscretionary duties under 33 U.S.C. § 1313(d)(2) concerning EPA’s obligation to approve or disapprove, and, upon disapproval, to promulgate the TMDL for PCBs constructively submitted by Ecology for various segments of the Spokane River.

On March 16, 2015, the Honorable Judge Barbara Rothstein of the Western District of Washington issued an order on cross motions for summary judgment, finding that the EPA violated section 706(2)(A) of the APA “in finding the [Spokane River Regional Toxics] Task Force . . . a suitable ‘alternative’ to the TMDL.” Dkt. 120, p. 21:04-06. The Court set aside EPA’s prior decision that, *inter alia*, interim

² Available at <http://www.ecy.wa.gov/biblio/1103013.html>.

³ Available at <http://www.ecy.wa.gov/biblio/1110038.html>.

measures to achieve water quality standards are an acceptable alternative to a TMDL and remanded the matter to EPA for additional consideration consistent with the Court's order. Dkt. 120, pp. 21-22. The Court also dismissed Sierra Club and Center for Environmental Law and Policy Clean Water Act claims without prejudice, but found,

There comes a point at which continual delay of a prioritized TMDL and detours to illusory alternatives ripen into a constructive submission that no action will be taken. With the Task Force as presently proposed, Ecology is coming dangerously close to such a point, and with EPA's support.

Dkt. 120 at 21:01-04. In the nearly five years since the Court's determination, Ecology's continual delay and illusory alternatives have crossed the line into a constructive submission of no TMDL for PCBs in the Spokane River, triggering EPA's non-discretionary duties under the Clean Water Act.

On July 14, 2015, in accordance with the Court's remand order, EPA submitted its "Plan for Addressing PCBs in the Spokane River" (hereafter "EPA's Plan"). Dkt. 129-1. EPA's plan included a schedule, which called for the Task Force to complete by December 31, 2016 a "Comprehensive Plan to bring the Spokane River into compliance with applicable water quality standards for PCBs" and indicated that "if in EPA's determination the Comprehensive Plan does not adequately address the items listed [in EPA's plan], then Ecology would immediately initiate development of a PCB TMDL for impaired segments of the Spokane River, and such TMDL would be submitted for EPA's approval by July 15, 2019." Dkt. 129-1, p. 11. EPA's Plan further provided that Ecology "will initiate a TMDL to address the impairments by no later than July 15, 2028, and will finalize that TMDL by no later than July 1, 2030." *Id.* at p. 1, 12. Despite providing these deadlines for Ecology, EPA's Plan "clarifies" that those deadlines are illusory and unenforceable, since EPA "does not interpret its regulations at 40 C.F.R. 130.7(d)(1), which are referenced in the Court's order, to give EPA the authority to establish a legally enforceable schedule for either the Task Force or the State." *Id.* at 11.

Indeed the Task Force, of which Ecology is a member, prepared its "Comprehensive Plan" in a way that explicitly leaves the door open for Ecology to continue its long delays and never issue a TMDL for PCBs in the Spokane River. Page one reads: "Should the Task Force fail to make measurable progress toward [attaining water quality standards for PCBs], then Ecology is 'obligated to proceed with a TMDL in the Spokane River for PCBs **or determine an alternative** to ensure that water quality standards are met.'" (emphasis added, no citation provided for the internal quotation marks). The Comprehensive Plan also states that it "does not constitute an agreement by any agency or member of the Task Force to fund or participate in implementation of the Control Actions or Future Studies," on which it places so much emphasis. EPA's Plan and the Comprehensive Plan do not provide a credible plan for producing the PCB TMDL. Ecology's pattern of conduct makes it unambiguously clear that it has no intention of issuing a PCB TMDL for the Spokane

River and that it will simply continue to pursue alternatives in lieu of a TMDL, a course of action that Ecology does not have the discretion to take and which is proving inadequate to meet water quality standards in any case.

Intent to sue

With its actions, delay, and declarations, Ecology has constructively submitted a TMDL for PCBs in the 303(d)-listed segments of the Spokane River identified above. EPA has failed to perform its non-discretionary duty to review and approve or disapprove this constructively submitted TMDL, and, in the event of disapproval, to promulgate its own TMDL. Sierra Club and Center for Environmental Law and Policy will file a lawsuit under 33 U.S.C. § 1365(a)(2), or amend its complaint in W.D. Wash. No. 2:11-cv-01759-BJR against EPA no less than sixty days from the date of this notice of intent to sue. Relief sought will include declaratory and injunctive relief, as well as the award of litigation expenses.

Very truly yours,

SMITH & LOWNEY, PLLC

By: 

Marc Zemel

c: William Barr, U.S. Attorney General
Counsel of record in W.D. Wash. Case No. 2:11-cv-01759-BJR