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BY:

Spokane Tribe of Indians
OFFICE OF THE SPOKANE TRIBAL ATTORNEY
P.O. BOX 100, Wellpinit, WA 99040
(509) 458-6521 / fax (509) 458-6596

October 5, 2020

By Certified Mail Return Receipt Requested

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

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

**RE: Notice of Intent to Sue Under the Clean Water Act Concerning the
Spokane River PCB TMDL**

Dear Administrators Hladick and Wheeler:

The Office of the Spokane Tribal Attorney represents the Spokane Tribe of Indians ("Tribe"), PO Box 100, Wellpinit, WA 99040. Any response related to this matter should be directed to Ted Knight, Special Legal Counsel at (509) 953-1908 or tedk@spokanetribe.com. This letter is to provide you with sixty days notice of the Tribe's intent to amend/supplement its complaint in W.D. Wash. No. 2:11-cv-01759-BJR, against you and the EPA (*hereinafter* "EPA") under section 505(a)(2) of the Clean Water Act ("CWA"), 33 USC Section 1365(a)(2), for the violations described herein concerning EPA's failure to perform its nondiscretionary duty under CWA Section 303(d)(2) with regard to the total maximum daily load ("TMDL") for PCBs in the Spokane River and its tributaries.

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 that 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 limits 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 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.

Under Section 303(d), states and EPA are required to 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).

Clean Water Act Citizen Suit Provision

CWA Section 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 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 Environmental v. Reilly*, 762 F.Supp. 1422, 1426-1429 (W.D. Wash. 1991).

Spokane River PCB TMDL

Numerous 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 of polychlorinated biphenyls (PCBs) in edible fish tissue. (**Attachment 1**). Many of these listings go back to 1996.

The Washington Department of Ecology conducted water quality studies from 2003-2007 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 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 No. 11-03-013 (April 2011).

In May 2011, Ecology published "Spokane River Toxics Reduction Strategy," Department of Ecology Publication No. 11-10-038. 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 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 measure to reduce all toxics to the Spokane River. Those measure are described in this strategy. Such a straight-to-implementation plan is a recent strategy 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 the 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 obligations to approve or disapprove, and upon disapproval, to promulgate the TMDL for PCBs constructively submitted by Ecology for various segments of the Spokane River. The Spokane Tribe of Indians intervened as a plaintiff in 2013.

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 Administrative Procedures Act "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 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 the Clean Water Act claims and the Spokane Tribe's breach of trust claim 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 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 2015, in accordance with the Court's remand order, EPA submitted its "Plan for Addressing PCBs in the Spokane River" (hereinafter "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 PCB" 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 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.

In a recent document publically released by Ecology, Ecology stated the following:

TMDLs are cleanup plans that identify the reductions needed in a water body in order for a water body to get back into compliance with the water quality standards. A TMDL is not self- implementing and therefore would not meet the objective of issuing the NPDES permits by fall 2021. A TMDL would help to determine the waste load allocations that would be placed in each individual permit and it would identify the nonpoint load reductions needed. While the waste load allocations would be placed in the NPDES permits, the nonpoint load is more difficult to address.

The technology limitations for reducing PCBs to a level that would meet the water quality standards would remain an issue for each discharger once a TMDL was developed. A TMDL might provide more detail and analysis on the percentages of reduction needed between point sources and nonpoint sources, but NPDES permittees would still not be able to implement technology to meet the waste load allocations and a variance would still be necessary. **Accordingly, Ecology will defer development of a PCBs TMDL at this time in order to pursue more immediate reductions of PCBs loading to the Spokane River.**

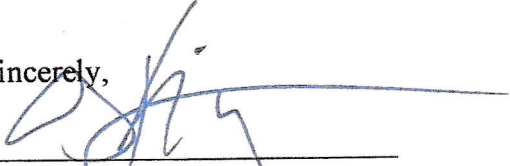
Preliminary Draft Environmental Impact Statement for PCB Variances on the Spokane River, page 9, June 10, 2020, available at <https://ecology.wa.gov/DOE/files/90/90a9f3ee-d7e1-4b6b-90cb-86edf06d7671.pdf> (last visited September 30, 2020)(emphasis added). For some of the Spokane River’s 303-d listed segments for PCBs, the development of a PCB TMDL has been delayed for almost 25 years since the segments were first listed.

Intent to sue

With its actions, delay, and declarations, Washington State, through the Department of Ecology has constructively submitted a TMDL for PCB 303(d)-listed segments of the Spokane River and Little Spokane River identified in Attachment 1. EPA has failed to perform its non-discretionary duty to review and approve or disapprove this constructively submitted PCB TMDL, and, in the event of disapproval, to promulgate its own PCB TMDL. The Spokane Tribe of Indians intends to amend/supplement its

complaint to include violations of the Clean Water Act in the Western District of Washington No. 2:11-cv-01759-BJR against EPA. Relief sought will include declaratory and injunctive relief, as well as the award of litigation expenses.

Sincerely,



Ted Knight
Special Legal Counsel
Spokane Tribe of Indians

Cc: William Barr, United States Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue
Washington, DC 20530-0001

Counsel of record in W.D. Wash. Case No. 2:11-cv-01759-BJR (via email)

Laura Watson, Director
Department of Ecology
State of Washington
PO Box 47600
Olympia, WA 98504-7600

Washington State's Counsel of record in W.D. Wash. Case No. 2:11-cv-01759-BJR (via email)



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ListingID	AU ID	Medium	Parameter	Category	Waterbody Name	WRIA	
View 8201	17010305000011	Tissue	Polychlorinated Biphenyls (PCBs)	5	SPOKANE RIVER	57 - Middle Spokane	8201
View 8202	17010305000009	Tissue	Polychlorinated Biphenyls (PCBs)	5	SPOKANE RIVER	57 - Middle Spokane	8202
View 8207	17010305000010	Tissue	Polychlorinated Biphenyls (PCBs)	5	SPOKANE RIVER	57 - Middle Spokane	8207
View 9015	4711717D4	Tissue	Polychlorinated Biphenyls (PCBs)	5	SPOKANE LAKE	54 - Lower Spokane	9015
View 9019	4711718D3	Water	Polychlorinated Biphenyls (PCBs)	2	SPOKANE LAKE	54 - Lower Spokane	9019
View 9021	47117H5I3	Tissue	Polychlorinated Biphenyls (PCBs)	5	SPOKANE LAKE	54 - Lower Spokane	9021
View 9027	17010307000010	Tissue	Polychlorinated Biphenyls (PCBs)	5	SPOKANE RIVER	54 - Lower Spokane	9027
View 9033	170103070000774	Tissue	Polychlorinated Biphenyls (PCBs)	5	SPOKANE RIVER	54 - Lower Spokane	9033
View 9051	170103080000018	Tissue	Polychlorinated Biphenyls (PCBs)	5	LITTLE SPOKANE RIVER	55 - Little Spokane	9051
View 13119	170103050000010	Water	Polychlorinated Biphenyls (PCBs)	2	SPOKANE RIVER	57 - Middle Spokane	13119
View 14385	17010307009615	Tissue	Polychlorinated Biphenyls (PCBs)	5	SPOKANE RIVER	54 - Lower Spokane	14385
View 14396	170103050000011	Water	Polychlorinated Biphenyls (PCBs)	2	SPOKANE RIVER	57 - Middle Spokane	14396
View 14397	170103050000012	Tissue	Polychlorinated Biphenyls (PCBs)	5	SPOKANE RIVER	57 - Middle Spokane	14397
View 14400	17010307009102	Tissue	Polychlorinated Biphenyls (PCBs)	5	SPOKANE RIVER	54 - Lower Spokane	14400
View 36440	4711718C2	Tissue	Polychlorinated Biphenyls (PCBs)	5	SPOKANE LAKE	54 - Lower Spokane	36440
View 36441	4711716C1	Tissue	Polychlorinated Biphenyls (PCBs)	5	SPOKANE LAKE	54 - Lower Spokane	36441
View 78928	4711717B9	Tissue	Polychlorinated Biphenyls (PCBs)	5	SPOKANE LAKE	54 - Lower Spokane	78928
View 78929	47117H5J8	Tissue	Polychlorinated Biphenyls (PCBs)	5	SPOKANE LAKE	54 - Lower Spokane	78929
View 78930	4711715A4	Tissue	Polychlorinated Biphenyls (PCBs)	5	SPOKANE LAKE	54 - Lower Spokane	78930
View 78931	4711717D3	Tissue	Polychlorinated Biphenyls (PCBs)	5	SPOKANE LAKE	54 - Lower Spokane	78931
View 78932	4711715A5	Tissue	Polychlorinated Biphenyls (PCBs)	5	SPOKANE LAKE	54 - Lower Spokane	78932
View 78933	4711717E2	Tissue	Polychlorinated Biphenyls (PCBs)	5	SPOKANE LAKE	54 - Lower Spokane	78933
View 78968	17010307009085	Tissue	Polychlorinated Biphenyls (PCBs)	5	SPOKANE RIVER	54 - Lower Spokane	78968

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Ted Knight
Office of the Spokane Tribal Attorney
PO Box 100
Wellpinit, WA 99040

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

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