

HONORABLE BARBARA J. ROTHSTEIN

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SIERRA CLUB; and CENTER FOR)
ENVIRONMENTAL LAW AND)
POLICY,)

No. 11-cv-1759-BJR

Plaintiffs,)

PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT

and)

SPOKANE TRIBE OF INDIANS,)

Plaintiff-Intervenor,)

v.)

MICHELLE PIRZADEH; MICHAEL)
REGAN, and UNITED STATES)
ENVIRONMENTAL PROTECTION)
AGENCY,)

Defendants)

and)

SPOKANE COUNTY; KAISER)
ALUMINUM WASHINGTON LLC; and)
STATE OF WASHINTGON)
DEPARTMENT OF ECOLOGY,)

Defendant-Intervenors.)
_____)

TABLE OF CONTENTS

1

2

3

4

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6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

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24

25

26

27

28

I. INTRODUCTION.....1

II. APPLICABLE LAW.....2

 A. Standard of Review.....2

 B. Clean Water Act Section 303, Total Maximum Daily Loads
 and the Constructive Submission Doctrine.....2

 C. Clean Water Act Citizen Suits3

III. PROCEDURAL BACKGROUND3

IV. ARGUMENT5

 A. Ecology Has No Credible Plan for a PCB TMDL and Has
 Reached the Point of a Constructive Submission.....6

 1. The EPA Plan and Task Force Comprehensive Plan are not
 credible plans for producing a PCB TMDL7

 2. Ecology’s “TMDL Alternative” scheme repudiates
 CWA Sec. 303(d).....10

 3. Ecology and the Task Force have lost credibility.....14

 a. Ecology and the Task Force oppose funding for a
 PCB TMDL.....14

 b. Ecology has abandoned the 2006 Draft Spokane River
 PCB TMDL.....15

 c. A TMDL is against the prevailing interests of the Task Force16

 B. The EPA Plan is Arbitrary and Capricious19

 1. The EPA Plan lacks a reasonable endpoint for a PCB TMDL20

 2. The EPA Plan arbitrarily excludes sediment and fish tissue
 PCB-sampling as bases for measuring progress toward
 attainment of water quality standards23

 3. Even if water-column benchmarks were appropriate, the
 benchmark concentrations are arbitrary.....25

C. Plaintiffs Have Standing27

V. CONCLUSION27

ATTACHMENT 1: Excerpts of Administrative Record.

EXHIBITS A – H: Documents for which judicial notice is requested.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
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22
23
24
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26
27
28
29

TABLE OF AUTHORITIES

CASES

1
2
3 *Adkins v. VIM Recycling, Inc.*,
4 644 F.3d 483, 499 (7th Cir. 2011)16
5 *Columbia Riverkeeper v. Wheeler*,
6 944 F.3d 1204, 1211 (9th Cir. 2019) *passim*
7 *Friends of the Earth v. Gaston Copper Recycling Corp.*,
8 204 F.3d 149, 156 (4th Cir. 2000)24
9 *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*,
10 528 U.S. 167, 180 (2000)27
11 *PUD No. 1 of Jefferson County v. Wash. Dep't of Ecology*,
12 511 U.S. 700, 714-15 (1994)2, 24
13 *Puget Soundkeeper Alliance v. Dept. of Ecology*,
14 191 Wn.2d 631 (2018).....18
15 *Sierra Club v. Chevron U.S.A., Inc.*,
16 834 F.2d 1517, 1525 (9th Cir. 1987)3
17 *Upper Blackstone Water Pollution Abatement Dist. v. EPA*,
18 690 F.3d 9, 22 (1st Cir. 2012).....10

STATUTES

19 5 U.S.C. § 706..... 5, 19-20
20 33 U.S.C. § 1251.....2
21 33 U.S.C. § 1313..... *passim*
22 33 U.S.C. § 1365.....3, 5
23 40 C.F.R. § 122.4.....2
24 40 C.F.R. § 122.44..... 2, 17-18
25 40 C.F.R. § 130.77, 18
26 40 C.F.R. § 131.3.....2
27
28

1 40 C.F.R. § 131.6.....2

2 WAC 173-204-130.....27

3 WAC 173-201A-602.....24

4 **OTHER**

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6 When to Use EPA Method 1668 for PCB Congener Analysis (July 22, 2015),
7 available at <https://apps.ecology.wa.gov/publications/documents/1509052.pdf>.....18

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11 Institutional Design, 89 Tex. L. Rev. 15, 21 (2010).....16

I. INTRODUCTION

1
2 As this Court found more than six years ago, “the Spokane River has been on the 303(d)
3 list since 1996 and after nearly 20 years [now 25 years] still contains the worst PCB pollution in
4 the state.” Dkt. 120 at 20:13-14. The extraordinarily degraded state of the river obligates the
5 Department of Ecology (Ecology) to implement a Total Maximum Daily Load (TMDL) program
6 for PCBs to the Spokane River and the Clean Water Act imposes a non-discretionary duty on
7 EPA to prepare its own TMDL where Ecology has no credible plan for finalizing one. *Columbia*
8 *Riverkeeper v. Wheeler*, 944 F.3d 1204, 1211 (9th Cir. 2019).
9

10
11 In 2015, this Court ordered EPA to consult with Ecology and file a reasonable plan for
12 finalizing a Spokane River PCB TMDL, but what EPA filed was an arbitrary plan not designed
13 to close remaining information gaps or finalize a TMDL. Since then, additional evidence shows
14 that Ecology will never prepare the TMDL. The result has been agonizing delay of a legally
15 mandated process that Ecology and EPA continue to avoid without any improvement to PCB
16 contamination in the river.
17

18 At the time of the Court’s remand order, the Court already found that Ecology was
19 “coming dangerously close” to a constructive submission, “and with EPA’s support.” Dkt. 120
20 at 21:01-04. Ecology has since crossed that line. The time has come for the Court to put an end
21 to Ecology’s perpetual delays and illusory processes, find that Ecology has abandoned its duty to
22 prepare a PCB TMDL under the well-developed constructive submission doctrine, and order
23 EPA to prepare the TMDL without further delay.
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II. APPLICABLE LAW

A. Standard of Review.

Summary judgment should be granted when there is no issue of material fact. FED. R. Civ. P. 56.

B. Clean Water Act Section 303, Total Maximum Daily Loads and the Constructive Submission Doctrine.

With the enactment of the Clean Water Act in 1972 (hereafter “CWA”), Congress set important goals for restoration of the chemical integrity of the nation’s waters to ensure “water quality which provides for the protection and propagation of fish, shellfish and wildlife and provides for recreation in and on the water.” 33 U.S.C. § 1251(a)(2).¹ CWA section 303, entitled “Water Quality Standards and Implementation Plans,” is the primary CWA provision addressing receiving water quality. 33 U.S.C. § 1313. Under Section 303, states must establish water quality standards, subject to EPA approval, that protect the desired conditions and uses of water bodies, including harvesting fish that are safe to eat. 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. §§ 130.0(b), 130.2(d) and 130.3.

Water quality standards comprise designated uses, numeric and narrative water quality criteria and antidegradation requirements, all of which are independent and separately enforceable requirements of federal law. 33 U.S.C. § 1313(c)(2)(A) and (d)(4)(B); 40 C.F.R. §§ 131.3(i) and 131.6; *PUD No. 1 of Jefferson County v. Wash. Dep’t of Ecology*, 511 U.S. 700, 714-15 (1994). Where effluent limitations cannot ensure that a point source discharge complies with water quality standards, federal law prohibits the issuance of an NPDES permit. 40 C.F.R. § 122.4(d); *see also* 40 C.F.R. § 122.44(d)(1).

¹ *See also* 33 U.S.C. §§ 1251(a)(1) and 1251(a)(3).
Plaintiffs’ Motion for Summary Judgment - 2

1 Section 303 requires states to identify waterbodies that fail to meet state water quality
 2 standards. 33 U.S.C. § 1313(d) and (e). “Once a state has submitted a § 303(d) list, it must then
 3 submit a TMDL to EPA for approval for each pollutant in each impaired water segment. This
 4 TMDL sets the maximum amount of a pollutant that each segment can receive without exceeding
 5 the applicable water quality standard.” *Columbia Riverkeeper*, 944 F.3d at 1206 (citations
 6 omitted). “The EPA ‘shall either approve or disapprove’ a TMDL within thirty days of its
 7 submission.” *Id.* (quoting 33 U.S.C. § 1313(d)(2)). “Where a state has failed to develop and
 8 issue a particular TMDL for a prolonged period of time, and has failed to develop a schedule and
 9 credible plan for producing that TMDL[,] . . . there has been a constructive submission of no
 10 TMDL, which triggers the EPA’s mandatory duty to act.” *Id.* at 1211.

13 C. Clean Water Act Citizen Suits.

14 The Clean Water Act citizen suit provision authorizes lawsuits against the Administrator
 15 of EPA when EPA is alleged to have failed to perform any act or duty under the CWA that is not
 16 discretionary. 33 U.S.C. § 1365(a)(2).² The Ninth Circuit treats citizen enforcement actions
 17 “liberally, because they perform an important public function . . . [C]itizens should be
 18 unconstrained to bring these actions and the courts should not hesitate to consider them.” *Sierra*
 19 *Club v. Chevron U.S.A., Inc.*, 834 F.2d 1517, 1525 (9th Cir. 1987).

22 III. PROCEDURAL BACKGROUND

23 The background of this decade-long case has been summarized several times. The
 24 Court’s Memorandum Order Remanding Matter for Further Consideration (dated March 16,
 25 2015) recounts much of the relevant legal background under the Clean Water Act as well as a
 26

28 ² Citizens must provide sixty days’ notice of their intent to sue before commencing an action. 33 U.S.C. § 1365(b);
 29 *see also* 40 C.F.R. § 135.3(b).

1 general history of PCBs in the Spokane River up to that point. Dkt. 120 at 2:10-8:09. In
2 response to the Court's remand order, EPA filed what it titled "EPA's Plan for Addressing PCBs
3 in the Spokane River" (hereafter "EPA Plan"). Dkt. 129-1. Plaintiffs subsequently filed a
4 Second Supplemental Complaint in June 2016 to challenge the EPA Plan³ and the parties agreed
5 to hold the case in abeyance, which began in September 2016. Dkts. 162 and 182.
6

7 In Plaintiffs' motion for the stay, Plaintiffs explained that they would consider voluntarily
8 dismissing this case depending on two factors: (1) whether Ecology issues NPDES permits with
9 total PCB numeric effluent limitations set at the total PCB state water quality criterion, and (2)
10 the adequacy of the then-pending Task Force "Comprehensive Plan to bring the Spokane River
11 into compliance with applicable water quality standards for PCBs." (hereafter "Task Force
12 Comprehensive Plan"). See Dkt. 180 at 2:27-3:14. Unfortunately, Plaintiffs' hope that these
13 items would provide meaningful water quality protections in accordance with the CWA went
14 unfulfilled, prompting Plaintiffs to notify EPA of their intention to lift the stay during
15 discussions leading up to a October 16, 2019 Joint Status Report. See Dkt. 205, ¶ 3. During the
16 case abeyance, the Ninth Circuit also issued a ruling in *Columbia Riverkeeper v. Andrew*
17 *Wheeler*, 944 F.3d 1204 (9th Cir. Dec. 20, 2019), affirming the TMDL constructive submission
18 doctrine and setting forth relevant legal standards for the instant motion.
19
20
21

22 The Court lifted the stay of this case in June 2020 (Dkt. 199) and since that time, EPA
23 has filed two separate dispositive motions (see Dkts. 200 and 223), the briefing for which
24 provide additional overview of the history of this litigation and the relevant legal framework.
25 See Dkt. 204 at 2:24-13:12.
26
27

28 ³ Plaintiff-Intervenor Spokane Tribe of Indians filed a Third Amended and Supplemental Complaint on June 24,
29 2016. Dkt. 168.

1 The Court denied EPA's first post-stay dispositive motion, recounted some relevant
 2 background in its order (Dkt. 210 at 2:16-8:15) and held that "the EPA Plan is a final agency
 3 action subject to judicial review." Dkt. 210 at 13:03-04. Plaintiffs then filed a Third
 4 Supplemental Complaint, adding a renewed TMDL constructive submission claim under the
 5 CWA, 33 U.S.C. §§ 1313(d)(2) and 1365,⁴ and additional claims under the Administrative
 6 Procedure Act (hereafter "APA"), 5 U.S.C. § 706. Dkt. 217.⁵ EPA's Motion to Dismiss certain
 7 APA claims in the Third Supplemental Complaint remains pending. *See* Dkts. 223, 231, 236.

9 It has now been 15 years since the Washington Department of Ecology (hereafter
 10 "Ecology") circulated a draft Spokane River PCB TMDL for comment, abandoned the PCB
 11 TMDL, and commenced illusory alternatives to a TMDL via the Spokane River Regional Toxics
 12 Task Force (hereafter "Task Force"). *See* Dkt. 120 at 5:02-7:09. The Spokane River remains
 13 impaired for PCBs, there is still no PCB TMDL for the Spokane River and no credible plan for
 14 one. *See* Dkt. 120 at 20:13-14.

17 IV. ARGUMENT

18 A. Ecology Has No Credible Plan for a PCB TMDL and Has Reached the Point of a 19 Constructive Submission.

20 On the undisputed record, the Washington Department of Ecology (hereafter "Ecology")
 21 has no credible plan for producing a PCB TMDL for the Spokane River, constructively
 22 repudiating its legal obligation do so, and triggering the EPA's duty to produce the TMDL. As
 23 the Ninth Circuit set forth in *Columbia Riverkeeper*:

26 _____
 27 ⁴ Plaintiffs served a supplemental notice of intent to sue by letter dated February 21, 2020, which satisfied the
 28 jurisdictional requirement for a citizen suit under the CWA. Dkt. 217 at 30-35; 33 U.S.C. § 1365(b); 40 C.F.R. §
 135.3(b).

29 ⁵ Plaintiff-Intervenor Spokane Tribe of Indians also filed a Fourth Amended and Supplemental Complaint. Dkt.
 226.

1 Where a state has failed to develop and issue a particular TMDL for a prolonged period
 2 of time, and has failed to develop a schedule and credible plan for producing that TMDL,
 3 it has no longer simply failed to prioritize this obligation. Instead, there has been a
 4 constructive submission of no TMDL, which triggers the EPA's mandatory duty to act.

Columbia Riverkeeper v. Wheeler, 944 F.3d at 1211.

5 There should be no dispute that Ecology has failed to develop a PCB TMDL for a
 6 “prolonged period of time.” The Spokane River has been impaired for PCBs, with fish
 7 advisories in effect, since at least 1996.⁶ The River's PCB impairment has been a priority since
 8 at least 2000.⁷ And it has been fifteen years since Ecology prepared a draft PCB TMDL for the
 9 Spokane River (2006), complete with Waste Load Allocations (“WLAs”) and Load Allocations
 10 (“LAs”), before withdrawing it, renaming it, and pursuing TMDL “alternatives” instead. Dkt.
 11 120 at 5-6; AR 90.

12 Against this backdrop, in 2015, this Court found that Ecology was already coming
 13 “dangerously close” to a constructive submission:

14 *There comes a point at which continual delay of a prioritized TMDL and detours to*
 15 *illusory alternatives ripen into a constructive submission that no action will be taken.*
 16 *With the Task Force as presently proposed, Ecology is coming dangerously close to such*
 17 *a point, and with EPA's support.* Accordingly, the Court finds that the EPA acted
 18 contrary to law in finding the Task Force, as it is currently comprised and described, a
 19

20
 21 ⁶ AR Supp. 8 at 2996; AR 15 at 94 and 97; AR 34 at 465 (Ecology/EPA MOA identifying risks to public health as a
 22 factor to be given the “greatest weight in determining priorities”); AR Supp. 7 at 2950 – 2951; AR Supp. 5 at 2779.

23 Administrative Record documents (filed by EPA on April 22, 2013 (Dkt. 60)), cited herein with the prefix “AR,” are
 24 filed as attachments to Dkt. 81. Supplements to the Administrative Record (filed by EPA on September 17, 2013
 25 (Dkt. 79)), are cited herein with the prefix “AR Supp.” Administrative Record documents for Plaintiffs' Third
 Supplemental Complaint (filed by EPA on April 29, 2021 (Dkt. 237)), are cited herein by bates number with the
 prefixes “ADD_CLAIMS” and “EPA_PLAN,” and excerpts are attached to this motion for reference.

26 ⁷ AR 105 at 2422; AR 106 at 2431 and 2434; AR 107; AR 108 at 2448; AR 109 at 2462–2463; AR 110 at 2475–
 27 2476; AR 111 at 2479; AR 112; AR 113 at 2493; AR 116; AR 117 at 2524; AR 124 at 2590. In the development of
 28 TMDLs, the Environmental Assessment Program (“EAP”) performs the technical analysis, including monitoring,
 data- gathering, modeling, and other analysis necessary to produce a TMDL. AR 24 at 302.

1 suitable ‘alternative’ to the TMDL. For the reasons set forth below, the Court remands
2 the matter to the EPA for further consideration and consultation with Ecology.

3 Dkt. 120 at 21:01-04 (citation omitted) (emphasis added). Now, Ecology has reached that point
4 and the Court should order EPA to produce the Spokane River PCB TMDL, as required by law.

5 **1. The EPA Plan and Task Force Comprehensive Plan are not credible plans for**
6 **producing a PCB TMDL.**

7 Following the Court-ordered remand, EPA prepared and filed the EPA Plan. In filing this
8 “plan,” EPA proclaimed that it is unenforceable in any way, undermining its force. *See* Dkt.
9 129-1 at 11. Under the relevant standards, EPA’s position that its plan is non-binding (among
10 other reasons discussed *infra* at sec. IV.B) disqualifies the EPA Plan as a “credible plan for
11 producing the TMDL.” *Columbia Riverkeeper*, 944 F.3d at 1211. Although the EPA Plan
12 purports to provide a schedule that *could* result in the PCB TMDL, it states:

14 In submitting this schedule, EPA clarifies that it does not interpret its regulations at 40
15 C.F.R. 130.7(d)(1), which are referenced in the Court’s order, to give EPA the authority
16 to establish a legally enforceable schedule for either the Task Force or the State. . . . The
17 regulation speaks to the collaborative nature of the development of such schedules.
18 However, it does not authorize EPA to establish a legally enforceable schedule for State
19 submissions of TMDLs or for work by an independent task force. . . .

20 Dkt. 129-1 at 11 (emphasis added). More recently, EPA again argued that no legal consequences
21 would flow from the EPA Plan. Dkt. 200 at 15-18 (“EPA’s Plan encourages the continued,
22 ongoing work by the Task Force, the State, and others . . . This Plan, however, is not legally
23 binding . . .”). Accordingly, EPA has made it perfectly clear, both to Ecology and this Court,
24 that it will not attempt to enforce the purported TMDL schedule.⁸

25 The Task Force itself also published a “Comprehensive Plan to Reduce Polychlorinated
26 Biphenyls (PCBs) in the Spokane River” (“Task Force Comprehensive Plan”).

27
28 ⁸ In addition, even if it is implemented, the schedule in the EPA Plan is flawed, with arbitrary benchmarks that do
29 not ensure PCB reductions or the development of a TMDL. Plaintiffs expand on this below at Section IV.B.
Plaintiffs’ Motion for Summary Judgment - 7

1 ADD_CLAIMS_0002108 (Nov. 16, 2016). The Task Force Comprehensive Plan makes no
 2 reference to this Court’s remand order or this CWA citizen suit, nor incorporates the “schedule”
 3 in the EPA Plan. *Id.* Notably, the Comprehensive Plan does not commit to a PCB TMDL, even
 4 if the Task Force fails to make “measurable progress” toward attaining water quality standards.
 5 *Id.* at 1. Indeed, under its plan, in the event the Task Force fails (even under its own, flawed
 6 standards),⁹ Ecology may elect to “determine an alternative” to a TMDL:
 7

8 Should the Task Force fail to make measurable progress towards this goal, then Ecology
 9 is “obligated to proceed with a TMDL in the Spokane River for PCBs **or determine an**
 10 **alternative** to ensure that water quality standards are met.”

11 *Id.* (emphasis added).¹⁰ This appears to be the only place in the Comprehensive Plan that even
 12 mentions a Spokane River PCB TMDL, or its possibility. *Id.*¹¹ Under the CWA, there is no
 13 legal “alternative” to a TMDL for waterbodies on the 303(d) list, as the Spokane River is for
 14 PCBs. Ecology’s duty under the CWA to develop a PCB TMDL is nondiscretionary. *Columbia*
 15 *Riverkeeper*, 944 F.3d at 1211. This is hardly a “credible plan” for a TMDL. *Id.*
 16

17 Indeed, pursuing an “alternative” to a TMDL is precisely what caught the Court’s ire
 18 eighteen months before the Task Force issued the Comprehensive Plan. The Court’s order was
 19 unequivocal: “the EPA may not approve a task force as an alternative to a TMDL, *i.e. a task*
 20 *force not designed to complete or assist in completing a TMDL.*” Dkt. 120 at 19:16-18
 21 (emphasis added); *accord id.* at 21:04-06 (“the EPA acted contrary to law in finding the Task
 22 Force, as it is currently comprised and described, a suitable ‘alternative’ to the TMDL”).
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26 ⁹ See *infra*, Sec. IV.B.

27 ¹⁰ The Comprehensive Plan provides no citation for its use of quotation marks.

28 ¹¹ In another place, the Comprehensive Plan provides existing loading rates, and asserts those loading rates “would
 29 not be appropriate for consideration in developing . . . waste load allocations for the facilities under a TMDL.”
 Those loading rates were calculated as 126 to 165 mg/day for industrial discharges and 51 to 125 mg/day for the
 municipal discharges and were “derived for the purposes of a semi-quantitative loading analysis to support the
 Comprehensive Plan.” ADD_CLAIMS_0002150.

1 Now, six years later, the Task Force remains a “TMDL alternative” (*see*
 2 ADD_CLAIMS_0003669), suffering from the same defect, made worse by lost time: the Task
 3 Force is not designed to assist in completing a TMDL. At this point, Ecology’s continued
 4 delegation to the Task Force is no longer merely contrary to the APA, rather it has ripened into a
 5 constructive submission of no TMDL. *See* Dkt. 120 at 21.

7 In fact, the Task Force’s own words, as expressed to EPA following this Court’s remand
 8 order, confirm that assisting with a TMDL is “outside the scope of the Task Force.”

9 **Many scientific challenges complicate the development of a TMDL.** The efforts of
 10 the Task Force have significantly increased the body of knowledge with regard to PCBs
 11 in the Spokane River, but substantial data gaps still prevent the development of a
 12 scientifically credible TMDL.

13 Initial studies have led to both an improved understanding of the Spokane River and to
 14 the realization that **much uncertainty remains to be resolved.** The following examples
 15 illustrate some of the data that would be required, **which is outside the scope of the**
 16 **Task Force.**

17 EPA_PLAN_0002763. The Task Force’s statement is part of a document titled “Coordinated
 18 Response to EPA Regarding the Remand from Judge Rothstein,” and was “formally approved by
 19 the Task Force on June 15, 2015.” *Id.* Ecology and EPA are both members of the Task Force.¹²
 20 Since then, the inadequate scope of the Task Force has remained unchanged and endorsed by
 21 EPA. *See* Dkt. 129-1 at 9 (“Although the Task Force’s work will be used if development of a
 22 TMDL is necessary, the Task Force was not convened for that purpose.”); Dkt. 200 at 17:02
 23 (“EPA’s Plan encourages the continued, ongoing work by the Task Force . . .”).

24 Plaintiffs fundamentally disagree that any remaining uncertainties surrounding PCBs in
 25 the Spokane River make a TMDL development infeasible. *See* AR Supp. 8 at 2998 (EPA’s PCB
 26
 27

28 ¹² *See* Webpage, Spokane River Regional Toxics Task Force, https://srrttf.org/?page_id=5191 (Task Force Member
 29 Roster), last visited July 2, 2021.

1 TMDL Handbook, encouraging use of the “most recent and best available data,” not perfect
 2 data).¹³ Indeed, other states have developed PCB TMDLs facing similar uncertainties, which are
 3 to be expected. *See* Exhibits A - F.¹⁴ However, by arguing it cannot complete a TMDL because
 4 of data gaps (*see* Dkt. 94 at ¶ 3),¹⁵ while simultaneously approving a “TMDL Alternative” that is
 5 not designed to assist in completing the TMDL (*see* EPA_PLAN_0002763), Ecology has
 6 ignored this Court’s order (Dkt. 120 at 19:16-18)¹⁶ and reached the point of a constructive
 7 submission—now 15 years after it abandoned its draft PCB TMDL.

9 As the record shows, the time has come for the Court to put an end to Ecology’s delays
 10 with illusory TMDL “alternatives” and find that Ecology constructively submitted no PCB
 11 TMDL for the Spokane River.

13 **2. Ecology’s “TMDL Alternative” scheme repudiates CWA Sec. 303(d).**

14 Ecology’s use of the Task Force is part of a larger scheme within Ecology to utilize
 15 “TMDL Alternatives” in lieu of difficult TMDLs. The Task Force is one of these “TMDL
 16 Alternatives,” but there are other examples too. *See* ADD_CLAIMS_0003669 (“This document
 17 provides guidance on TMDL Alternatives available to TMDL leads . . .”). While the Court need
 18 not determine in the context of this case whether this overall scheme is contrary to law,
 19 Ecology’s programmatic development and endorsement of “TMDL Alternatives” demonstrates
 20 that Ecology will not necessarily proceed to a PCB TMDL if and when it acknowledges that the
 21
 22

24 ¹³ This comports with the absence in the CWA and EPA’s regulation of permission to delay a legally mandated
 25 pollution control mechanism “until better science can be developed, even where there is some uncertainty in the
 existing data.” *Upper Blackstone Water Pollution Abatement Dist. v. EPA*, 690 F.3d 9, 22 (1st Cir. 2012).

26 ¹⁴ Plaintiffs request judicial notice of these EPA-approved PCB TMDLs. *See* 33 U.S.C. § 1313(d)(2).

27 ¹⁵ Ecology declarant: “Ecology concluded that the 2006 draft PCB TMDL had data gaps that needed to be addressed
 before Ecology could finalize the draft PCB TMDL...”

28 ¹⁶ *See also* Dkt. 210 at 6:14-19 (“This Court further noted ‘the worrying lack of progress made with respect to
 scientific data [regarding PCBs in the Spokane River] in recent years.’ The Court found this particularly
 troublesome because this alleged lack of data is one of the reasons Ecology and the EPA claim that Ecology has
 been unable to develop a PCB TMDL up to this point.” (internal citation omitted)).

1 Task Force is ineffectual. This “TMDL Alternatives” scheme provides many other detours for
2 Ecology to pursue, consuming many more years and decades without a TMDL, as the Spokane
3 River remains impaired for PCBs and its fish dangerous to eat.

4 This Court previously explained that adopting an “alternative may, under some
5 circumstances, represent a reasonable interim measure rather than an abandonment of any future
6 plans to prepare a TMDL.” Dkt. 120 at 15:07-10. However, the Court clarified that “EPA may
7 not approve a task force as an alternative to a TMDL, i.e. a task force not designed to complete
8 or assist in completing a TMDL. The Task Force as presently proposed provides no way of
9 determining if the Task Force has been effective in furthering the preparation of a TMDL.” *Id.*
10 at 19:16-21 (internal citation omitted) (emphasis added). We now know that the Task Force is
11 still not designed to complete or assist in completing the PCB TMDL. EPA_PLAN_0002763
12 (“outside the scope of the Task Force”); Dkt. 129-1 at 9 (“not convened for that purpose”); Dkt.
13 200 at 17:02 (“EPA’s Plan encourages the continued, ongoing work by the Task Force...”).
14 Rather, the Task Force is a flawed, experimental “TMDL Alternative.” *See*
15 ADD_CLAIMS_008097 (identifying Task Force as “alternative”).

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19 In addition to leaving the door open through the Comprehensive Plan for yet another
20 “alternative” if/when Ecology finds the Task Force to be ineffectual (ADD_CLAIMS_0002108
21 at 1), Ecology has also indicated this intention in other contexts. For example, Ecology’s
22 “TMDL Lead” for the Task Force,¹⁷ Karl Rains, prepared a presentation in October 2019
23 echoing the Comprehensive Plan language that yet another “alternative” remains available:
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29 ¹⁷ See ADD_CLAIMS_0008097.
Plaintiffs’ Motion for Summary Judgment - 11

Potential Outcomes

- **The Spokane River meets WQS?** – Task done, celebrate!!
- **SRRTF is working well together and moving towards the goal?** – Measurable Progress is evident
- **SRRTF is working well together and environmental outcomes not evident?** – Review with the SRRTF and permittees, identify adaptive management measures
- **SRRTF is not working, not meeting nor creating meaningful work products?** – Ecology is obligated to proceed with a TMDL **or alternative**



ADD_CLAIMS_0005398 (highlight added). *See also* AR 1 at 2 (May 2012 letter from Ecology to EPA: “if Ecology determines the Task Force is failing . . . Ecology would be obligated to proceed with development of a TMDL in the Spokane River for PCBs **or determine an alternative** . . .” (emphasis added)); ADD_CLAIMS_0001139¹⁸ (“Ecology maintains its authority to pursue [a] A traditional TMDL[, or] [b] **other approach**” (emphasis added)).

There are two problems with this scheme. First, the standards Ecology is using to determine “meaningful work product” or “meaningful progress” are meaningless and not reasonably designed to close data gaps, to attain water quality standards, or to reduce PCB loading, as a TMDL with WLAs and LAs would dictate. This is addressed further at section IV.B, below.

Second, it is contrary to law for Ecology to preserve the option of pursuing TMDL alternatives in perpetuity. Of course, Ecology and the Task Force know to say the right things too, and often state that a TMDL remains an option or will be pursued. But any such statements

¹⁸ EPA describes this document as an attachment to a 2016 email from Ecology to EPA. *See* Dkt. 237-1 at 21. Plaintiffs’ Motion for Summary Judgment - 12

1 are not credible considering other representations to the contrary and Ecology's and the Task
2 Force's history on this issue. *Columbia Riverkeeper v. Wheeler*, 944 F.3d at 1211.

3 Perhaps Ecology thinks its "alternatives" are superior to a TMDL. But even if Ecology
4 believes it knows better than Congress about how to clean up the Spokane River, no amount of
5 justification changes the law. A PCB TMDL for the Spokane River is a legal obligation. 33
6 U.S.C. § 1313(d); *Columbia Riverkeeper*, 944 F.3d 1204.

7
8 The record demonstrates that Ecology repudiates this statutory duty. Indeed, in the rare
9 instances when Ecology or the Task Force address the possibility of a TMDL, there is no plan for
10 one. Instead, they take the opportunity to lambast the TMDL program as inferior and supplant
11 their own judgment for that of Congress. *See* ADD_CLAIMS_0003669 (TMDLs are "ever more
12 complex, controversial and resources intensive. . ."); ADD_CLAIMS_0002245-46 ("Of the
13 limited number of PCB [TMDLs] prepared to date, not one water body in the country has
14 successfully met applicable water quality standards for PCBs through the TMDL process");¹⁹
15 ADD_CLAIMS_0001139 ("Toxics reductions require a new strategy. A traditional TMDL
16 establishes limits before action. The new approach starts with action.");
17 ADD_CLAIMS_0008347 ("we are confident the Task Force approach and actions identified in
18 our funding request will yield more tangible results in reducing PCBs than the traditional TMDL
19 process."). This is not how the Clean Water Act is designed to function. The Act imposes clear,
20 mandatory processes for impaired waterbodies. *Columbia Riverkeeper v. Wheeler*, 944 F.3d
21 1204. These processes are not discretionary and must be enforced. *Id.* Under this Court's
22 standards for a constructive submission, the Task force is an illusory alternative that has ripened
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28 ¹⁹ This kind of defeatist thinking is another explanation for why Ecology has failed to produce a credible plan for the
29 PCB TMDL in the Spokane watershed.

1 into a constructive submission that no action on a PCB TMDL will be taken. Dkt. 120 at 21:01-
 2 02. The Court should order EPA to step in and prepare the PCB TMDL without further delay,
 3 consistent with the law.

4 **3. Ecology and the Task Force have lost credibility.**

5 Under *Columbia Riverkeeper v. Wheeler*, Ecology's credibility is a component of the
 6 Court's analysis. 944 F.3d at 1211 (requiring a "credible" plan). Thus, the Court should view
 7 any Ecology statement of intent to produce the TMDL against the backdrop of the last fifteen
 8 years, since at least 2006, when Ecology had a draft TMDL in hand, and then abandoned it. *See*
 9 AR 90 (Draft Spokane PCB TMDL); Dkt. 120 at 5:01-7:03. The weight of the record shows that
 10 when Ecology says it will produce a PCB TMDL for the Spokane River, it is an empty promise.
 11 To Ecology and the Task Force, a PCB TMDL is a nuisance that need not be pursued so long as
 12 they have alternatives to consume years and decades of time without WLAs or LAs for toxic
 13 PCBs that would be difficult to meet.

14 **a. Ecology and the Task Force oppose funding for a PCB TMDL.**

15 First, the Task Force has gone out of its way to oppose funding for a Spokane River PCB
 16 TMDL, undermining any claim that it intends to prepare one. ADD_CLAIMS_0008347. In
 17 March 2021, Spokane Riverkeeper, a local environmental non-profit and former Task Force
 18 member (which resigned from the Task Force in protest over its inadequacy and refusal to
 19 support a TMDL²⁰), wrote to the Governor requesting \$800,000 for PCB TMDL development.
 20 ADD_CLAIMS_0008288-89. Apparently concerned that the Governor might grant the funding
 21 request,²¹ the Task Force responded to Riverkeeper with a letter to the Governor of its own.
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28 ²⁰ ADD_CLAIMS_0004866

29 ²¹ *See* ADD_CLAIMS_0008342 ("Hi Task Force members, [e]arlier this month Riverkeeper sent a letter to Governor Inslee requesting Monsanto Settlement Funds be used towards establishing a Spokane River TMDL
 Plaintiffs' Motion for Summary Judgment - 14

1 Instead of embracing the opportunity to develop a TMDL, as legally required, the Task Force
2 objected:

3 You recently received a request from Spokane Riverkeeper, an organization that
4 withdrew from the Task Force in 2019, promoting the traditional TMDL process instead
5 of our more innovative approach. While we share many of the same goals and actions
6 outlined in the Riverkeeper proposal and hope to work with them on achieving these, we
7 are confident the Task Force approach and actions identified in our funding request will
8 yield more tangible results in reducing PCBs than the traditional TMDL process.

9 ADD_CLAIMS_0008347.

10 This letter not only reveals the prevailing, disdainful attitude among Task Force members
11 toward the TMDL process, but it also contradicts any argument that the lack of a PCB TMDL is
12 due to a lack of resources. By objecting to TMDL funding, the Task Force, with Ecology,²² have
13 demonstrated that its 15-year delay since withdrawing the draft TMDL is not a matter of
14 resource prioritization. Ecology and the Task Force simply do not want the resources for a
15 TMDL because they do not want or intend to produce a TMDL. In a literal sense, the Task
16 Force and Ecology would not put money where their mouths are, and this undermines their
17 credibility vis-à-vis TMDL development.

18 **b. Ecology has abandoned the 2006 Draft Spokane River PCB TMDL.**

19 Second, Ecology appears to have designated the 2006 draft PCB TMDL as “obsolete,”
20 and archived it in a way that makes it less accessible. Department of Ecology E-mail
21 Correspondence, RE: AO 19-01 Ecology Publication # 0603-024 (July 29-31, 2019), attached
22 hereto as Exhibit H.²³ It is plain that Ecology does not intend to pick the draft TMDL back up to
23
24

25
26 process, among other things. We felt it appropriate to respond to this as a Task Force.”). Ecology is a Task Force
27 member and recipient of this email.

28 ²² *Supra* n. 20.

29 ²³ To satisfy the Court’s Standing Order (Dkt. 213 at ¶ II.C), the parties have commenced conferral about
supplementing the administrative record, including adding this Ecology e-mail correspondence, which Plaintiffs
received from Ecology pursuant to a request under the Public Records Act, Chapter 42.56 RCW. The parties’
Plaintiffs’ Motion for Summary Judgment - 15

1 complete it— i.e. Ecology has “abandoned” it, constituting a constructive submission. Dkt. 120
 2 at 15:07-10. When Ecology’s Surface Water Quality Standards Specialist wanted a copy of the
 3 2006 draft, she could not even find it. Exhibit H. For fifteen years, the draft has been collecting
 4 dust, with no progress being made to update and finalize it.

5
 6 **c. A TMDL is against the prevailing interests of the Task Force.**

7 Finally, since this Court’s ruling in 2015, the Task Force has continued to demonstrate an
 8 aversion to preparing a PCB TMDL, in part because a TMDL would impose requirements
 9 adverse to Task Force members’ short-term economic interests. With PCB-dischargers
 10 dominating the Task Force, substantial obstacles to addressing PCB impairment in the Spokane
 11 River have gone far beyond “agency capture”²⁴—Ecology has overtly handed over the reins to
 12 industry to pursue industry-palatable alternatives to a TMDL, contrary to law. A key
 13 environmental group on the Task Force resigned in protest in June 2019.

14
 15 ADD_CLAIMS_0004866. In these circumstances, Ecology and the Task Force have lost
 16 credibility vis-à-vis a PCB TMDL, and an order under the CWA citizen suit provision is
 17 necessary. *See Adkins v. VIM Recycling, Inc.*, 644 F.3d 483, 499 (7th Cir. 2011) (citing “agency
 18 capture” as a reason behind citizen suit provisions in environmental laws). Dischargers should
 19 have a role in regulation, but their interests must not override a clean-up process mandated by
 20 law.
 21

22
 23 Kaiser Aluminum, Inland Empire Paper Company, and the City of Spokane—all Task
 24 Force members— each discharge exorbitant amounts of PCBs directly to the Spokane River.
 25

26
 27 _____
 28 conferral is ongoing and Plaintiffs are hopeful this record will be formally added to the administrative record by
 29 stipulation. If EPA does not stipulate, however, Plaintiffs reserve the right to move the Court to add this record.

²⁴ See Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 Tex. L. Rev. 15,
 21 (2010) (defining “agency capture” as “undue industry influence” and discussing the policy biases that flow from
 the phenomenon)

1 See ADD_CLAIMS_002150 (providing calculated loading rates in mg/L). And so long as there
2 is no PCB TMDL for the Spokane River, there will be (1) no WLAs that limit their discharges,
3 and (2) no PCB numeric effluent limitations in their NPDES permits that are calculated through
4 the holistic TMDL process. See Dkt. 120 at 20:17-21 (citing 40 C.F.R. § 122.44(d)(1)(vii)(B)).
5 Without any such enforceable PCB limits, those dischargers may avoid taking the difficult and
6 costly steps needed to comply with their allocation. See *id.* It is no wonder that the Task Force
7 prefers to focus its energy on problems outside its control and unlikely to change the paradigm—
8 a TMDL deferred is an economic break for its members, to the detriment of the Spokane River
9 and those who depend on it for sustenance. See *e.g.* ADD_CLAIMS_0003469 (“One of the
10 challenges that EPA faces in approaching these issues is that TSCA requires the Agency to
11 consider costs when developing a regulatory standard, and the CWA does not.”). These perverse
12 incentives get in the way of meaningful progress toward producing a TMDL and attaining water
13 quality standards. The time has come for the Court to order EPA to step in.
14
15

16
17 For example, instead of working toward a TMDL, the Task Force has spent considerable
18 effort lobbying EPA to revise Toxic Substance Control Act (TSCA) regulations that set PCB
19 limits in consumer products, despite its miniscule chance of success²⁵ and comparatively distant
20 connection to the ongoing PCB-loading to the Spokane River. See ADD_CLAIMS_0002245;
21 ADD_CLAIMS_0008350 (budgeting \$500,000 for related actions in 2021-2031). In the process,
22 the Task Force belittled the viability of a TMDL, and has shown a preference to blame the river’s
23 impairment on anything other than Task Force members’ own substantial PCB discharges.
24

25 ADD_CLAIMS_0002245. The Task Force attempts to justify its illusory approach by arguing
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27

28
29 ²⁵ See ADD_CLAIMS_0003469.

1 that “not one water body in the country has successfully met applicable water quality standards
2 for PCBs through the TMDL process.” *Id.* This conclusion is unsupported by the record, but
3 even if it were true, surely no illusory alternative, lacking any WLAs or LAs or processes for
4 establishing them, have achieved water quality standards for PCBs, either. Nor does the CWA
5 make them discretionary. *Columbia Riverkeeper*, 944 F.3d 1204.
6

7 Although the Task Force has no problem lobbying the EPA on TSCA, it opposed efforts
8 to have EPA approve PCB analytical Method 1668 for PCB enforcement monitoring. Method
9 1668 can detect and quantify PCBs at far lower concentrations than other methods. *See*
10 ADD_CLAIMS_0001634, Table 26 (comparing methods). It is approved for water quality
11 monitoring,²⁶ but not to enforce numeric effluent limits in NPDES permits. *See*
12 ADD_CLAIMS_0001634; *Puget Soundkeeper Alliance v. Dept. of Ecology*, 191 Wn.2d 631
13 (2018). Approval of Method 1668 for compliance monitoring is crucial for improving regulatory
14 oversight of PCB discharges and reducing PCB loads to the Spokane River. Pursuing approval
15 for Method 1668 would also meet this Court’s test to “assist in completing a TMDL” (Dkt. 120
16 at 19:16-18), as the method would provide precision to the WLAs that form a cornerstone of a
17 TMDL. 40 C.F.R. § 122.44(d)(1)(vii)(B); 40 C.F.R. § 130.7. Yet, the Task Force objected to
18 funding to pursue approval of Method 1668, just as it opposed funding for the TMDL itself.
19 *Compare* ADD_CLAIMS_0008291 (Riverkeeper proposing \$20,000 to petition EPA to approve
20 method 1668) *with* ADD_CLAIMS_0008349 (Task Force response).
21
22

23
24 Approving Method 1668 is not a priority for the Task Force, despite (or perhaps,
25 because) without it, any numeric PCB effluent limits would be largely undetectable and thus
26
27

28 ²⁶ *See* Department of Ecology, Implementation Memorandum #12, When to Use EPA Method 1668 for PCB
29 Congener Analysis (July 22, 2015), available at <https://apps.ecology.wa.gov/publications/documents/1509052.pdf>
Plaintiffs’ Motion for Summary Judgment - 18

1 difficult to enforce. The record shows that draft PCB effluent limits for the Spokane River
2 would be much lower than the detection limit of the currently-approved analytical method, 608,
3 so no violation would be reported, even if PCBs were discharged at orders of magnitude above
4 the human-health based limit (but below Method 608's detection limit). *Compare*
5 ADD_CLAIMS_0001212 (draft maximum daily effluent limit of 0.00017 µg/L Total PCBs) *with*
6 ADD_CLAIMS_0001634, Table 26 (Method 608 detection limit is between 0.008 and 0.25
7 µg/L); *see* Dkt. 129-1 at 25. In other words, the status quo is also a free pass for Task Force
8 members, which discharge PCBs under NPDES permits.²⁷

9
10 The Task Force alternative is not a credible plan, nor is it a “reasonable interim measure”
11 toward a TMDL. Dkt. 120 at 15:09-10. Ecology’s illusory TMDL alternative, which has wasted
12 fifteen years, must end.

13
14 **B. The EPA Plan is Arbitrary and Capricious.**

15 Plaintiffs respectfully contend that under the relevant legal standards, the Court should
16 hold that Ecology has constructively submitted no PCB TMDL for the Spokane River under 33
17 U.S.C. § 1313(d)(2) and order EPA to produce the TMDL. In the alternative, and at a minimum,
18 the Court should vacate and remand the EPA Plan as arbitrary, capricious and contrary to law,
19 with instructions to develop a schedule that guarantees prompt issuance of the TMDL. 5 U.S.C.
20 § 706(2)(A).
21

22
23 After the Court found that EPA “acted contrary to law in finding the Task Force, as it is
24 currently comprised and described, a suitable ‘alternative’ to the TMDL,” this Court ordered
25
26

27
28 ²⁷ It is also important to note that the NPDES permits for dischargers of PCBs to the Spokane River were issued in
29 See Dkt. 204 at 6-8 (describing how the prospect for NPDES permits with numeric PCB effluent limits precipitated
the stay of this case in September 2016).

1 EPA to work with Ecology to develop and file with the Court:

2 a complete and duly adopted reasonable schedule for measuring and completion of the
3 work of the Task Force, including quantifiable benchmarks, plans for acquiring missing
4 scientific information, deadlines for completed scientific studies, concrete permitting
5 recommendations for the interim, specific standards upon which to judge the Task
6 Force’s effectiveness, and a definite endpoint at which time Ecology must pursue and
7 finalize its TMDL.

8 Dkt. 120 at 24:23-25:04 (emphasis added); *see also* Dkt. 210 at 6-7. EPA went through the
9 motions to comply with the Court’s order, but what EPA filed did not include a reasonable
10 schedule to meet these ends. Rather, it is an arbitrary plan with meaningless benchmarks that
11 does not ensure progress on a TMDL, protect water quality or human health.

12 Under the APA, the Court shall hold unlawful and set aside agency actions found to be
13 “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C.
14 § 706(2)(A). The Court already held that the EPA Plan is a final agency action subject to APA
15 judicial review. Dkt. 210. Now, under the relevant legal standards, the Court must vacate the
16 EPA Plan because of its failure to (1) set a schedule with a reasonable endpoint for a TMDL, (2)
17 its failure to use sediment and fish tissue PCB data when determining benchmarks for measuring
18 progress toward attainment of water quality standards, and (3) even if water column
19 concentrations could be reasonably relied upon, the benchmarks adopted are far too lax and
20 could not reasonably measure progress. The Court should vacate and remand the EPA Plan with
21 specific instructions for its reformulation and reissuance in a way that guarantees prompt
22 issuance of a PCB TMDL.
23

24 **1. The EPA Plan lacks a reasonable endpoint for a PCB TMDL.**

25 EPA has made abundantly clear that it will not enforce the schedule within the EPA Plan.
26 Dkt. 129-1 at 11; Dkt. 200 at 15-18. On its face, however, the schedule does not even provide a
27 “definite endpoint” to Ecology’s delays until July 2030—15 years after the EPA Plan was
28

1 prepared. Dkt. 129-1 at 11. This is patently unreasonable, arbitrarily derived and frustrates the
 2 purpose of the Court's remand order.

3 When Ecology withdrew its draft Spokane River PCB TMDL in 2006,²⁸ it cited certain
 4 data gaps as its purported reason for doing so. *See* Dkt. 120 at 6. Closing these data gaps is
 5 precisely what the Court's remand order sought to ensure on a timely basis so that a TMDL
 6 would be issued without delay:
 7

8 Specifically, the EPA shall work with Ecology to create a definite schedule with concrete
 9 goals, including: clear statements on how the Task Force will assist in creating a PCB
 10 TMDL in the Spokane River by reducing scientific uncertainty; quantifiable metrics to
 11 measure progress toward that goal; regular checkpoints at which Ecology and the EPA
 12 will evaluate progress; a reasonable end date, at which time Ecology will finalize and
 submit the TMDL for the EPA's approval or disapproval; and firm commitments to
 reducing PCB production from known sources in the interim.

13 *Id.* at 22:04-12; *see also id.* at 20:11-10.²⁹

14 Yet, the focus of the EPA Plan is not closing these data gaps or enabling the preparation
 15 of a final TMDL. Of the 13-page EPA Plan,³⁰ 10 pages are devoted to a summary and "context,"
 16 without regard to the goal of closing data gaps or moving the TMDL forward. Dkt. 129-1 at 1-
 17 10. A scant one paragraph describes "Further Work of the Task Force," which says by
 18 December 2016, the Task Force would be able to close "one of the data gaps previously
 19 identified as the highest priority – source identification." *Id.* at 10. This appears to be the only
 20 specific effort described in the EPA Plan to address data gaps.
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25 ²⁸ EPA disputes that the TMDL had sufficient information from which a final PCB TMDL could have been
 26 produced, but evidence indicates that the final TMDL would have been issued no later than 2009, had Ecology
 stayed the course. *See* Dkt. 120 at 5:20-23.

27 ²⁹ "The EPA found that scientific uncertainty prevents the submission of a TMDL, yet it is unclear how or whether
 28 the Task Force will resolve that problem." *See also id.* at n. 20 ("During oral argument, counsel for EPA was unable
 to articulate precisely how the Task Force would resolve the scientific uncertainty".)

29 ³⁰ The EPA Plan also includes two appendices: A) a map of the Spokane River watershed, and B) EPA's NPDES
 permitting recommendations to Ecology. Dkt. 129-1 at 17-31.

1 The only other part of the EPA Plan that purportedly satisfies the Court's remand order is
2 the "schedule," which spans 1 ½ pages, a significant portion of which is EPA's disclaimer that it
3 will not enforce the schedule. *Id.* at 11-12. The rest of the EPA Plan seeks to justify why the
4 EPA Plan "does not contemplate immediate initiation of a TMDL" despite the specifics of the
5 Court's remand order. *Id.* at 12-13.

7 The "schedule" uses Spokane River "instream concentration of PCBs" as benchmarks for
8 extending the continual delay of a PCB TMDL, but it lacks any provision to measure progress
9 toward the goal of reducing the TMDL's scientific uncertainty, as the remand order instructed.
10 *Compare* Dkt. 129-1 at 11-12 *with* Dkt. 120 at 22:04-12. The EPA Plan provides that the Task
11 Force should make "recommendations for future studies to address remaining data gaps," but
12 there is nothing about "regular checkpoints at which Ecology and the EPA will evaluate
13 progress" toward closing those data gaps. Dkt. 129-1 at 11-12; Dkt. 120 at 22:04-12.

15 The reality is that 15 years ago, when Ecology was focused on preparing the TMDL, it
16 projected that, at most, it would have sufficiently complete data by June 2009. Dkt. 120 at 5:24.
17 When issuing the EPA Plan and considering a TMDL schedule, EPA indicated the highest
18 priority data gap would be closed in December 2016. Dkt. 129-1 at 10. How, then, could EPA
19 have reasonably concluded that it could take until 2030 for Ecology to collect sufficient data for
20 a TMDL?
21

23 Plaintiffs vehemently dispute that there was insufficient data to complete the PCB TMDL
24 when Ecology abandoned it in 2006, in 2015 when EPA prepared the EPA Plan, and certainly
25 now. There is already ample information about PCB contamination in the Spokane River from
26 more than thirty years of focused study and enough to develop the PCB TMDL. Indeed, the
27 body of scientific information about Spokane River PCB contamination and sources exceeds that
28

1 supporting other PCB TMDLs cited as exemplary by EPA’s *PCB TMDL Handbook*. Supp. 8 at
 2 2998.

3 But even where Ecology reasonably delayed for better data, the EPA Plan in no way
 4 assures measurable progress toward resolving the very scientific uncertainties upon which
 5 Ecology relies for continuous delays. If Ecology has not closed the gaps over the course of the
 6 last 15 years, Ecology is unreasonably pursuing near-perfect data—which is unattainable—and
 7 not needed for a CWA-compliant TMDL.³¹ The EPA Plan is arbitrary on this basis and should
 8 be vacated and reissued.
 9

10
 11 **2. The EPA Plan arbitrarily excludes sediment and fish tissue PCB-sampling as
 12 bases for measuring progress toward attainment of water quality standards.**

13 Under the EPA Plan, Ecology’s submission of the PCB TMDL for the Spokane River
 14 may be postponed to 2030 if specified benchmarks are met.³² These benchmarks are described as
 15 instream concentration of PCBs meeting 200 and then 170 pg/L “based on the annual central
 16 tendency of the preceding year.”³³ These benchmarks are arbitrarily derived as EPA did not
 17 consider (1) the narrative water quality criteria that the Spokane River be safe for fish harvesting,
 18 and (2) the more important and relevant environmental metrics: total PCB concentrations in
 19 sediment and fish tissue.
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23 ³¹ “TMDLs established under the phases approach [should] include a schedule for installation and evaluation of
 24 nonpoint source control measures, data collection, and assessment of water quality standard attainment . . . the
 25 schedule [should] include a time frame within which water quality standards are expected to be met and within
 26 which controls will be re-evaluated if water quality standards have not been attained. **The information would be
 27 used to determine whether the TMDL needs to be revised.**” United States Environmental Protection Agency,
 28 Memorandum, Clarification Regarding “Phased” Total Maximum Daily Loads (August 2, 2006) at 2 (emphasis
 29 added), attached hereto as Exhibit G for judicial notice. The EPA Plan focus on implementation of an initial set of
 BMPs coupled with continued progress and status monitoring to gauge progress is like the adaptive implementation
 approach for phased TMDLs—but without the legal mandates for PCB discharge reductions that would accompany
 a TMDL.

³² Dkt. 129-1 at 11 – 12.

³³ *Id.*

1 Indeed, PCB § 303(d) listings in the Spokane River are based on fish tissue exceedances,
2 not water column exceedances. Dkt. 129-1 at 4; ADD_CLAIMS_0002119.³⁴ Washington has
3 established narrative water quality criteria for the Spokane River to include “wildlife habitat and
4 fish harvesting.” WAC 173-201A-602, Table 602.³⁵ This fish harvesting designated use is part
5 of the water quality standards for the Spokane River that must be protected. *See PUD No. 1 v.*
6 *Wash. Dep’t of Ecology*, 511 U.S. 700 (1994). The Spokane River remains impaired for this use
7 because PCBs are toxic, hydrophobic and bioaccumulating substances, which move from water
8 to sediments to fish tissue in dangerous concentrations. *See* ADD_CLAIMS_0000968; Dkt. 129-
9 1 at 2-3. As a result, Washington Department of Health public health advisories, warning against
10 eating fish, have been in effect for many years on the Spokane River. *See* AR Supp. 5; *Friends*
11 *of the Earth v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 156 (4th Cir. 2000) (well-
12 recognized CWA aim is to ensure waters are “fishable and swimmable”). Therefore, attaining
13 water quality standards is not merely about measuring certain concentrations of PCBs in the
14 water column. Water quality standards will not be attained until fish in the Spokane are safe to
15 harvest. The water column benchmarks in the EPA Plan were not reasonably adopted to measure
16 progress toward attaining these standards and must be vacated.

17 Ecology continues to sample sediment and fish tissue in the river, but the EPA Plan does
18 not adopt benchmarks for PCBs in those mediums. *See* ADD_CLAIMS_0003200;
19 ADD_CLAIMS_0004811. This is despite the clear propensity of PCBs to accumulate in
20 sediments and fish tissue, not to remain suspended in the water column. *See* Supp. 7 at 2984;

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27 ³⁴ The Department of Ecology’s public database cites several studies with tissue exceedances for PCB 303(d) listing.
Washington State Water Quality Assessment, Listing ID: 8202 (“Basis Statement”).

28 https://apps.ecology.wa.gov/ApprovedWQA/ApprovedPages/ViewApprovedListing.aspx?LISTING_ID=8202
29 ³⁵ Table 602 indicates “all” miscellaneous uses are designated for the Spokane River. WAC 173-201A-600, Table
600 defines “miscellaneous uses” to include “Wildlife habitat” and “Fish harvesting.”

1 Supp. 8 at 2996, 3012. EPA’s schedule is arbitrary under the relevant legal standards. *See* 5
2 U.S.C. § 706(2)(A).

3 On the administrative record, EPA did not adequately consider the ability of the public to
4 safely harvest fish from the river and the use of sediment and/or fish tissue PCB concentrations
5 as benchmarks. To the extent EPA did consider these standards and benchmarks, its decision to
6 exclude them is not supported by the facts.
7

8 **3. Even if water-column benchmarks were appropriate, the benchmark**
9 **concentrations are arbitrary.**

10 In addition to overlooking the significance of the more direct relationship between
11 sediment and tissue contamination and non-attainment of narrative PCB criteria, the
12 concentrations used in the EPA Plan (200 pg/L by 2020 and 170 pg/L by 2024) set irrationally
13 low bars that never left any doubt they would be met. In fact, a consultant for the Task Force
14 summed it up well, back in 2017 during a Task Force e-mail discussion about PCB data and
15 “central tendency”:
16

17 If the primary goal is only to show compliance with 200 pg/L, it won’t take that many
18 samples purely because the mean at each station is so much less than the target (>50 pg/L
19 difference).

20 ADD_CLAIMS_0002837. The consultant then contrasted meeting the 200 pg/L benchmark with
21 showing progress on water quality improvement:

22 The required number of samples will go way up if the goal is to examine much smaller
23 differences, such as ‘is the river improving over time?’ As my table indicates, collection
24 of 100 samples will still have an error band around the mean of 18.9 pg/l. This means
25 that hundreds of samples may be needed to discern small changes in concentrations.

26 *Id.* *See also* ADD_CLAIMS_0001019 (suggesting “Ambient water quality data shows PCB
27 concentrations are generally below the 170 ppq water quality standard, with some
28

1 exceptions.”³⁶); ADD_CLAIMS_0002119 (water quality data collected at eight river locations
2 between 2014 and 2016 “show that the central tendencies of the water column data range from
3 17 pg/L to 154 pg/L total PCB as compared to the current Washington Water Quality Standard of
4 170 pg/L”).

5 Further, the wording of the thresholds in EPA’s plan—that determining attainment of the
6 numeric threshold is “based on the annual central tendency of the preceding year”—is vague. It
7 does not clarify what data is to be averaged or how many data points are needed, does not
8 characterize statistical distribution, or whether any weighing of data will be done. *See* Dkt. 129-1
9 at 11. And critically, it does not identify the specific locations for this determination. Under the
10 formulation presented by EPA’s plan, there is too much discretion left to the agencies to
11 determine whether thresholds or benchmarks are met.

12 On the administrative record, the water-column benchmarks are arbitrary and the Court
13 should not allow EPA to use them as an unlawful justification to continue this decades-long
14 delay of a PCB TMDL.

15 If the threshold/trigger approach to further deferring the TMDL is to be used it should be
16 more specific about how and at what representative locations attainment of in-stream PCB
17 concentration targets is to be determined. Any benchmarks must also include (1) fish tissue
18 benchmarks with samples of a variety of ages and species to representatively sample the
19 populations, and (2) sediment benchmarks to reflect the propensity of PCBs to adhere to
20 sediments due to their hydrophobic nature. *See* AR 90 at 1362. Washington regulations provide
21 freshwater sediment cleanup objectives and screening levels for PCBs, which should be
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28 ³⁶ Also noting no “statistically significant” decrease in PCB concentrations in *fish* since 2005.
29 ADD_CLAIMS_0001019.

1 considered as bases for benchmarks. *See* Washington Administrative Code 173-204-130, Table
2 VI. These are needed to provide an appropriately rigorous and scientific evaluation of progress
3 towards compliance with PCB tissue criteria.

4 **C. Plaintiffs Have Standing.**

5 Under the relevant standards, Plaintiffs have standing to sue on behalf of their members
6 who would have standing in their own right, the interests at stake are germane to Plaintiffs'
7 organizational purposes of environmental protection, and neither the claims asserted nor the
8 relief requested require the participation of Plaintiffs' individual members. *Friends of the Earth,*
9 *Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000); Declaration of Kathleen
10 Dixon; Declaration of Gunnar Holmquist; Declaration of John Osborn; Declaration of W.
11 Thomas Soeldner.

14 **V. CONCLUSION**

15 For the foregoing reasons, plaintiffs Center for Environmental Law and Policy and the
16 Sierra Club respectfully request the Court find a constructive submission of no PCB TMDL for
17 the Spokane River and order EPA to fulfill its statutory duty to prepare the PCB TMDL without
18 delay. Alternatively, the Court should find the EPA Plan arbitrary, capricious and contrary to
19 law, vacate the plan and order EPA to reissue it in a manner that assures prompt issuance of the
20 PCB TMDL.
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RESPECTFULLY SUBMITTED this 2nd day of July, 2021.

SMITH & LOWNEY, PLLC

By: s/Marc Zemel

Marc Zemel, WSBA #44325

By: s/Richard Smith

Richard Smith, WSBA # 21788

Attorneys for Plaintiff

2317 E. John St.,

Seattle, WA 98112

Tel: (206) 860-2124; Fax: (206) 860-4187

E-mail: marc@smithandlowney.com; richard@smithandlowney.com,