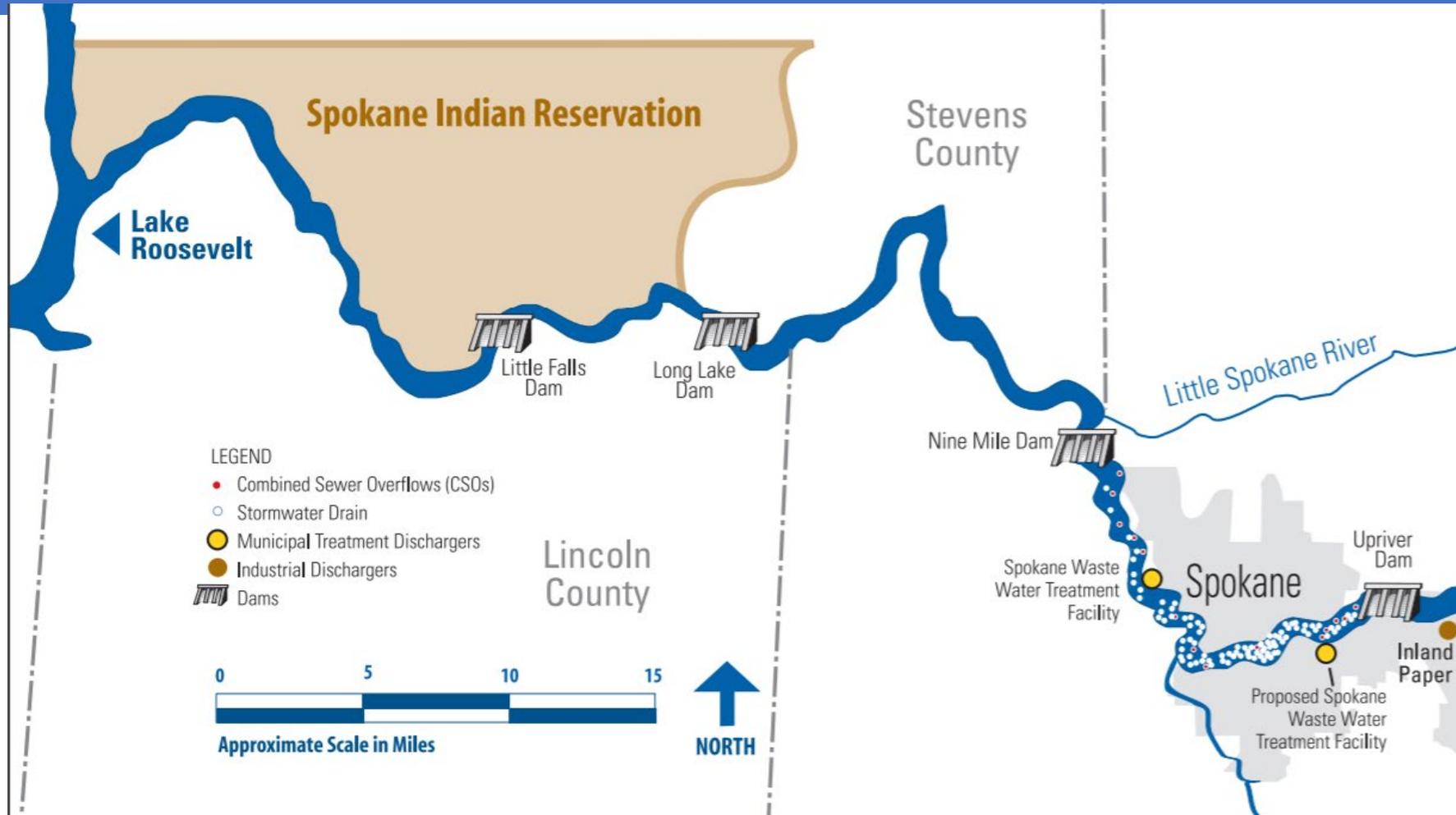


# Spokane River Panel

## PCBs and the Clean Water Act

Marc Zemel, Smith & Lowney PLLC

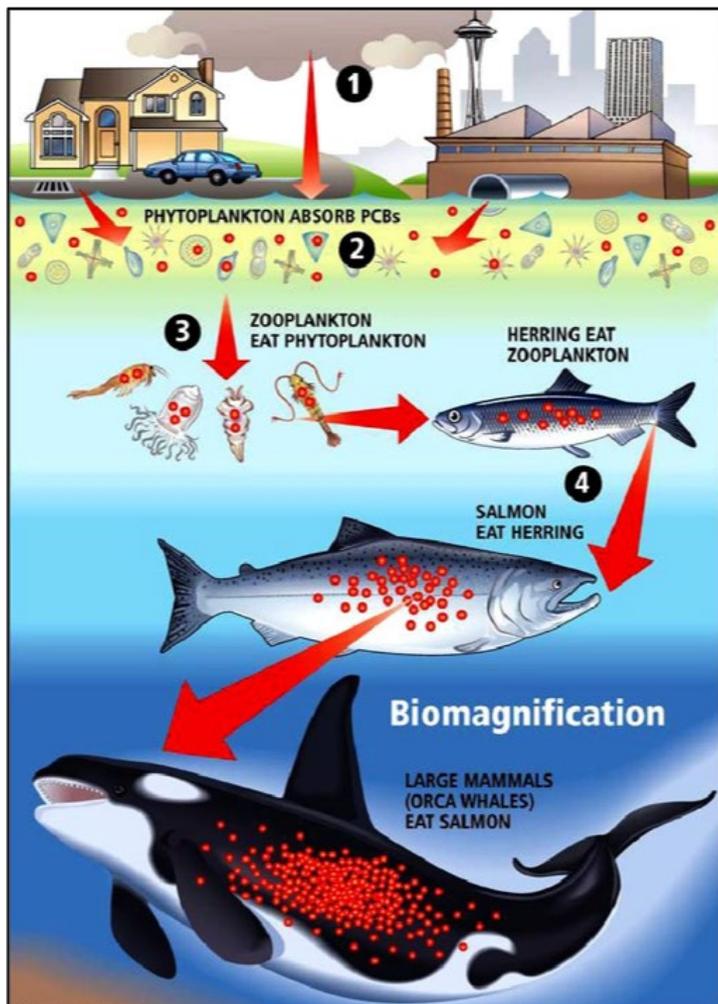


**DANGER**

# PCBs

POLYCHLORINATED BIPHENYLS

SmartSign.com • 800-952-1457 • 5-5720



## IMPACTS OF PCBs ON HUMAN HEALTH

### Liver disorders

Elevation of serum triglycerides,  
Induction of mixed function oxidases

### Failure of reproduction

Reduced sperm counts, accumulation in breast milk, neurobehavioral deficits in newborns, conception rates, reduced birth weight

### Risk of Cancers

Every commercial PCB mixture tested caused cancer,  
Increases in rare liver cancers and malignant melanoma

### Hormone system

Several PCB metabolites induce gene mutations,  
chromosome breaks, chromosome loss and polyploidization in cells in culture.

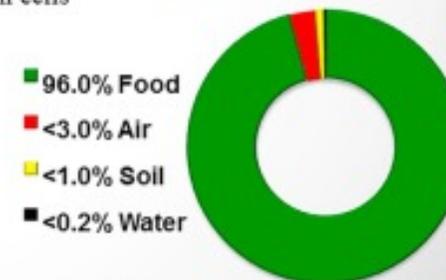
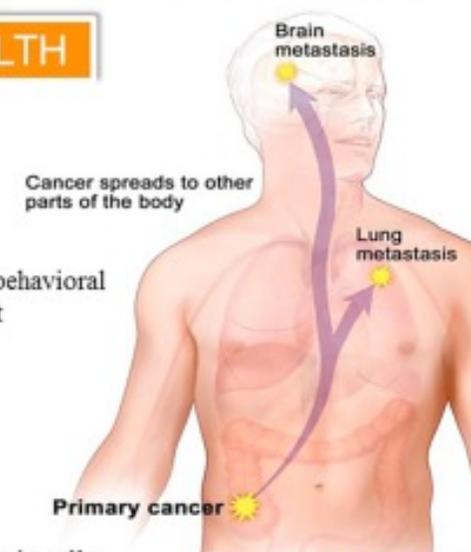
### Suppress immune system

Decreases in IgA and IgM antibody levels,  
decreases in monocyte and granulocyte counts,  
decreases in natural killer cell count

### Carcinogenic effects

EPA and DHHs consider PCBs a carcinogen for human  
Based on animal studies data.

\* Also, IARC classified PCBs as Group-I carcinogen to humans.



Human exposure to PCBs  
via food, water, air and soil

# Goals of the Clean Water Act (1972)

33 U.S.C. sec. 1251

“The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”

“It is the national goal that the discharge of pollutants into navigable waters be eliminated by 1985”

“It is the national goal . . . of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water . . .”

# State and Tribe Implementation of CWA

- In general, states implement CWA
- CWA Section 518(e) (33 U.S.C. § 1377(e)) expressly provides for Indian tribes to play essentially the same role in Indian country that states do within state lands
  - Eligible “TAS” tribes may implement and manage certain CWA programs including the following:
    - [Water Quality Standards](#) (CWA Section 303(c))
    - [Water Quality Certifications](#) (CWA Section 401)
    - [National Pollutant Discharge Elimination System \(NPDES\) permitting](#) (CWA Section 402)
    - [Dredge and Fill Permitting](#) (CWA Section 404)
    - [Impaired Waters Listing](#) (CWA Section 303(d))
- *See 40 C.F.R. sec. 123.31 for Tribe eligibility requirements.*

# CWA sec. 303

## Water Quality Standards and Impaired Waterbodies

- Under the CWA, Washington State and Spokane Tribe developed:
  - (1) **Water Quality Standards** and **Designated uses** for the Spokane River:  
including habitat for salmonids, and safe fish harvesting (WAC 173-201A-602).
  - (2) **human health-based water quality criteria** for PCB concentrations. → Submitted to EPA for approval
    - 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. §§ 130.0(b), 130.2(d) and 130.3.

### Applicable PCB Water Quality Criteria for the Spokane River:

- Washington State
    - **170 pg/L** (parts per quadrillion)
      - Determined not protective enough by EPA in November 2016 → established 7 pg/L criteria
      - 2019-20 → EPA rescinded, reverting back to 170 pg/L
      - Litigation ensued.
  - Spokane Tribe
    - **3.37 pg/L**
  - Difference due to assumption about fish consumption rate
- 
- States must do periodic **water quality assessment** → identify waterbodies that do not meet the WQS established for them. 33 U.S.C. § 1313(d) and (e).

## CWA sec. 303(d) – 33 U.S.C. sec. 1313(d) Impaired Waterbodies and Total Maximum Daily Loads

- States must identify waters not meeting water quality standards and rank them by priority, taking into account the severity of the pollution and their designated uses.
- States must establish “the **total maximum daily load**” for certain pollutants, “established at a level **necessary to implement the applicable water quality standards** with . . . a margin of safety which takes into account any lack of knowledge . . . .”

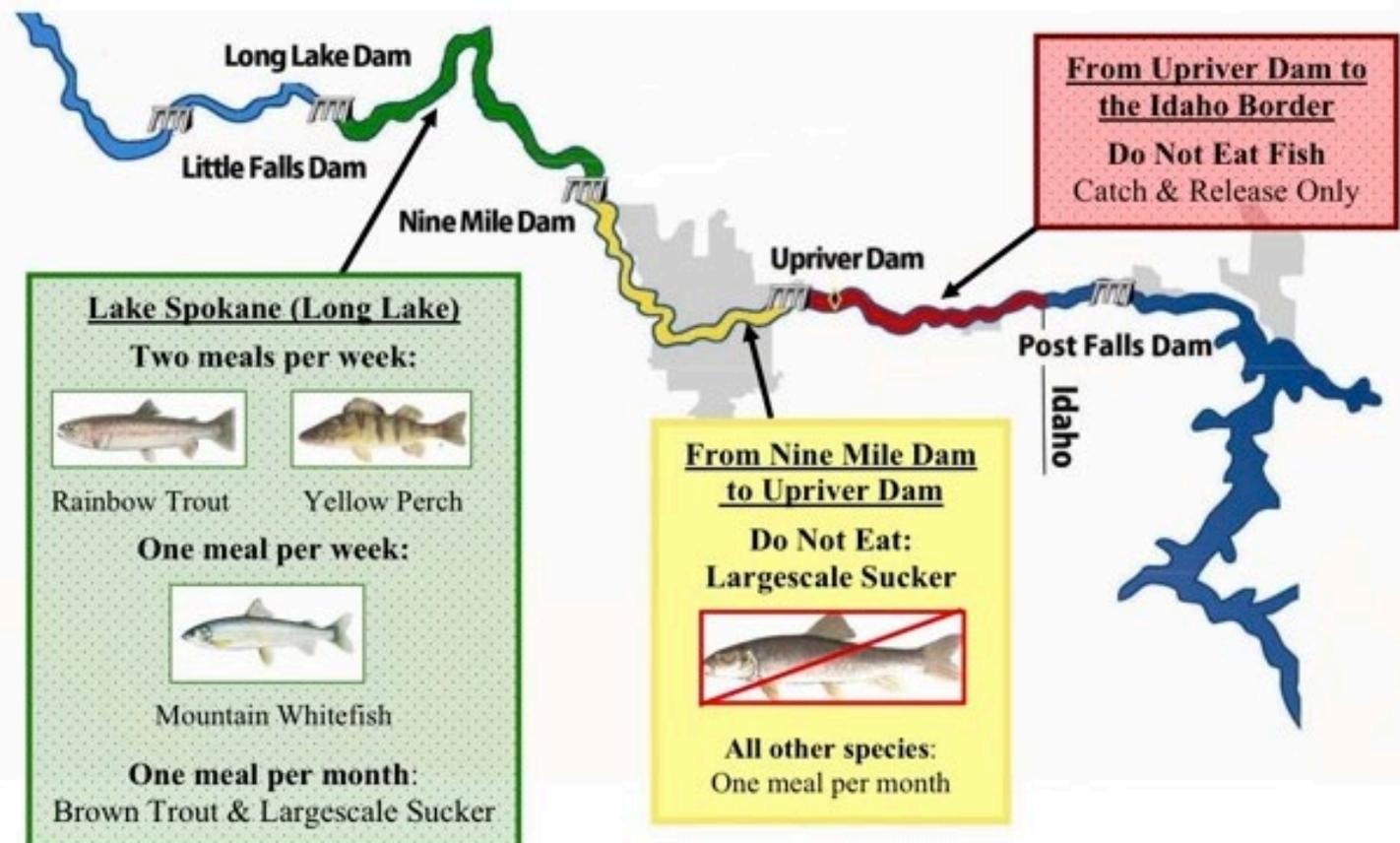
## CWA sec. 303(d) – Total Maximum Daily Load

### 33 U.S.C. sec. 1313(d)(2)

- Each State shall submit the TMDL to EPA for approval.
- “The Administrator shall either approve or disapprove [such TMDL] not later than thirty days after the date of submission. If the Administrator approves such [TMDL], such State shall incorporate them into its current [water quality planning process] under subsection (e) of this section. **If the administrator disapproves such [TMDL], he shall not later than thirty days after the date of such disapproval . . . establish such [TMDL] as he determines necessary to implement the water quality standards applicable to such waters** and upon such identification and establishment the State shall incorporate them into its current plan under subsection (e).”

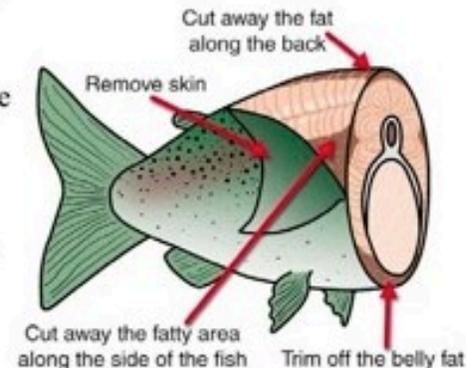
# The Spokane River's impairment

- The Spokane River does not meet PCB water quality standards in several segments.
- This triggered Washington State (through the Department of Ecology) to establish a PCB TMDL for the Spokane River.
- But states are given latitude to prioritize TMDLs and determine the timing of any particular TMDL according to its resources.



## You can reduce your exposure to PCBs if you prepare your fish this way:

- When cleaning fish, remove the skin, fat, and internal organs before cooking
- Cook fish on a rack so the juices and fat will drip off
- Do not eat the head, juices, bones, organs/guts, fat, and skin
- Consume younger, smaller fish



## Questions?

**Spokane River Fish Advisory:**  
Spokane Regional Health District  
Mike LaScuola 509-324-1574  
[www.srhd.org](http://www.srhd.org)

**Fish Advisories in Washington State:**  
WA Department of Health  
Toll-Free 1-877-485-7316  
[www.doh.wa.gov/fish](http://www.doh.wa.gov/fish)

# What if a state ignores sec. 303(d)?

- The CWA isn't always implemented as designed.
- It didn't take long for states to ignore the mandate to establish TMDLs for impaired waterbodies.
- The public had to find a way to enforce the requirement
  - CWA citizen suit provision or Administrative Procedure Act?

# The Constructive Submission Doctrine (CWA)

*Scott v. City of Hammond*, 741 F.2d 992, 998 (7th Cir. 1984)

- In this seminal case, *Scott v. City of Hammond*, the court evaluated EPA's obligations when multiple states failed to submit TMDLs for 303(d) listings in Lake Michigan:
- “[W]e think the state’s inaction here, in view of the short statutory deadlines, may have **ripened into a refusal to act. A refusal to act would amount to a determination that no TMDL is necessary and none should be provided.** In effect, we may have a **‘constructive submission’ of no TMDLs.** As a matter of law, under CWA § 303(d)(2), 33 U.S.C. § 1313(d)(2), a state determination to set no TMDLs must be reviewed by the EPA, and the EPA is then required to approve or disapprove the submission. If EPA disapproves, it must set its own TMDLs. *Id.* If the district court determines that the states have made a ‘constructive submission’ of no TMDLs, the failure of the EPA to act would amount to failure to perform a nondiscretionary duty.”

# The Constructive Submission Doctrine

*San Francisco Baykeeper v. Whitman*, 297 F.3d 877 (9th Cir. 2002)

- 9<sup>th</sup> circuit endorses constructive submission doctrine.
- State inaction can amount to a constructive submission if a state “clearly and unambiguously” indicates that it will not submit any TMDLs.
  - No constructive submission found in *San Francisco Baykeeper* under its facts.

# Sierra Club and CELP file suit (2011)

8 UNITED STATES DISTRICT COURT  
9 WESTERN DISTRICT OF WASHINGTON  
10 AT SEATTLE

10 SIERRA CLUB; and CENTER FOR )  
11 ENVIRONMENTAL LAW AND )  
12 POLICY, ) COMPLAINT  
13 Plaintiffs, )  
14 v. )  
15 DENNIS McLERRAN; LISA JACKSON; )  
16 and UNITED STATES )  
17 ENVIRONMENTAL PROTECTION )  
18 AGENCY )  
19 Defendants. )  
\_\_\_\_\_ )

20 **I. INTRODUCTION**

21 1. This action is a citizen suit brought under Section 505(a)(2) of the Clean Water  
22 Act (“CWA”) as amended, 33 U.S.C. § 1365(a)(2). Plaintiffs Sierra Club and Center for  
23 Environmental Law and Policy seek a declaratory judgment, injunctive relief, and the award of  
24 litigation expenses, including attorneys’ and expert witnesses’ fees, for defendant United States  
25 Environmental Protection Agency’s and its Administrators’ failure to perform their  
26 nondiscretionary duties under CWA Section 303(d)(2), 33 U.S.C. § 1313(d)(2), concerning  
27  
28

March 16, 2015:

## Order on cross motions for summary judgment CWA Claim – Constructive Submission

- “A constructive submission occurs only when a state has clearly and unambiguously abandoned its obligation to produce a TMDL or TMDLs. *See e.g. , San Francisco BayKeeper*, 297 F.3d at 883; *see also Alaska Cr. For the Env’t*, 762 F. Supp. at 1427...It does not occur merely because a state has prioritized one TMDL over another. *See Hayes*, 264 F.3d at 1024.
- The Court found that in 2015, no constructive submission had yet occurred.
  - “The Court need not define the precise contours of this doctrine at this time. The facts in the record readily demonstrate that Ecology had sufficient reasons for not completing the TMDL: The Court finds that Ecology lacked sufficient scientific data and had not satisfied certain pre-submission requirements, i.e. public notice and consultation.”
  - BUT →
- “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....”

March 16, 2015:

# Order on cross motions for summary judgment APA Claims

- **APA Section 706(1)** → EPA failure to disapprove Ecology's constructive submission constitutes "**agency action unlawfully withheld or unreasonably delayed.**"
  - "This claim **fails** because it is premised on an assumption that Ecology's inaction amounted to a constructive submission. As set forth above, no constructive submission has occurred."
- **APA Section 706(2)(A)** → Final agency action upheld unless they are "**arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.**" → EPA acted contrary to law and abused its discretion in approving the Task Force as an alternative to the TMDL → Yes.
- "the EPA does not have the statutory authority to approve a Task Force in lieu of a TMDL. . . . the CWA does not give the EPA authority to approve an indefinite delay; the CWA commands the EPA to ensure prompt compliance with the CWA. . . . Therefore, the EPA may not approve a task force as an alternative to a TMDL, i.e. a task force not designed to complete or assist in completing a TMDL. . . . The Task Force as presently proposed provides no way of determining if the Task Force has been effective in furthering the preparation of a TMDL."

March 16, 2015:

## Order on cross motions for summary judgment Spokane Tribe Breach of Trust Claim

- Tribe's Breach of Trust claims →
  - A trust obligation to the Tribe 'does not impose a duty on the government to take action beyond complying with generally applicable statutes and regulations.' (citing *Gros Ventre Tribe v. United States*, 469 F.3d 801, 812 (9<sup>th</sup> Cir. 2006)).
  - "Since the Court has already found that the EPA violated generally applicable law with respect to its April 12, 2013 determination and will remand the matter to EPA, the Court need not consider whether the EPA has any specific trust obligations at this time."

# Remand Order to EPA

- “A firm schedule and concrete goals are important in this case, especially since the state is pursuing an alternative route that may delay an already delayed TMDL. Accordingly, the Court sets aside the EPA’s decision and remands this issue to the EPA . . . Specifically, the **EPA shall work with Ecology to create a definite schedule with concrete goals, including: clear statements of how the Task Force will assist in creating a PCB TMDL in the Spokane River by reducing scientific uncertainty; quantifiable metrics to measure progress toward that goal; regular checkpoints at which Ecology and the EPA 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.**”

# July 14, 2015 – EPA’s Remand Response

- Although the EPA Plan purports to provide a schedule that could result in the PCB TMDL, it clarified that EPA **“does not interpret its regulations at 40 CFR 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 . . . The regulation speaks to the collaborative nature of the development of such schedules. However, it does not authorize EPA to establish a legally enforceable schedule for State submissions of TMDLs or for work by an independent task force...”**
- Schedule included:
  - If “instream concentrations of PCBs” “based on the annual central tendency of the preceding year” do not meet the following concentrations by the following dates, “Ecology would immediately initiate development of a PCB TMDL for impaired segments of the Spokane River.”
    - 12/15/20 – 200 pg/L PCBs
    - 12/15/24 – 170 pg/L PCBs
- 12/15/27 – must meet applicable water quality standards. If not met, Ecology would submit the TMDL to EPA by **July 15, 2030**. (undermined by the preamble disclaiming authority to require Ecology to do this)

# December 20, 2019: 9<sup>th</sup> Circuit Reaffirms Constructive Submission Doctrine

## Columbia Riverkeeper v. Wheeler, 944 F.3d 1204 (9<sup>th</sup> Circ)

- Affirmed finding constructive submission by Oregon and Washington of no temperature TMDL for Columbia and Snake Rivers.
- **“Where a state has failed to develop and issue a particular TMDL for a prolonged period of time, and has failed to develop a schedule and credible plan for producing that TMDL, it has no longer simply failed to prioritize this obligation. Instead, there has been a constructive submission of no TMDL, which triggers the EPA’s mandatory duty to act.”**

After a long case  
abeyance and defeating  
two dispositive motions  
by EPA, Plaintiffs moved  
for summary judgment  
in July 2021.

EPA offered to settle  
before they responded

6  
7  
8  
9  
10  
11  
12  
13  
14

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  
)  
and ) SUMMARY JUDGMENT  
)  
)  
SPOKANE TRIBE OF INDIANS, )  
)  
)  
Plaintiff-Intervenor, )  
)  
)

# Consent Decree

☰ Menu

🔍 Search

News

Sports

AE

Weather

# THE SPOKESMAN-REVIEW

[Washington](#) [Idaho](#)

[NEWS > SPOKANE](#)

## **In court ruling, EPA agrees to set PCB standard in Spokane River by 2024**

UPDATED: Thu., Feb. 17, 2022

# Remaining issues

- NPDES Permit – PCB effluent limits for point source dischargers
- PCB Laboratory Methods
  - QL. A comparison between DLs and QLs for unmodified Method 608, modified Method 608 and Method 1668 can be found below:

**Table 26: EPA Method Comparison**

EPA Method	DL, µg/L	QL, µg/L
<a href="#">608</a> (unmodified)	0.25	0.5
<a href="#">608</a> (INITIAL proposal)	0.008	0.016
<a href="#">608</a> (REVISED proposal)	0.05	0.2

- Method 1668 – approved for water quality monitoring, but not for discharger compliance monitoring. *See Puget Soundkeeper Alliance v. Dept. of Ecology*, 191 Wn.2d 631 (2018)

# Thank you

- Marc Zemel, Smith & Lowney PLLC
- [marc@smithandlowney.com](mailto:marc@smithandlowney.com)