



Spokane Tribe of Indians
Department of Natural Resources
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July 22, 2020

Vincent McGowan, P.E.
Water Quality Manager
Department of Ecology

**RE: Preliminary Draft Water Quality Standards Variance for Spokane
Watershed Rulemaking**

Dear Vincent McGowan,

On behalf of the Spokane Tribe's Department of Natural Resources ("Tribe"), please accept these informal comments on the Department of Ecology's ("Ecology") preliminary draft rule for adopting five PCB variances for dischargers upstream of the Tribe's jurisdictional waters. Attached are the Tribe's scoping comments from 2019 for your review. (**Attachment 1**). Given the volume of material, the press of other work on our staff, and the preliminary status of the variances, the Tribe was unable to devote the amount of time necessary to fully review all of the material provided. With that said, it is clear from our review that Ecology must abandon this effort and complete a PCB TMDL for the Spokane River.

Almost a decade ago, Ecology and the dischargers sought to avoid the development and adoption of a Spokane River PCB TMDL. From that avoidance a compromise was struck which forced the dischargers to participate in what was described to be a straight-to-implementation plan that would come through the dischargers' participation in the Spokane River Regional Toxics Task Force ("Task Force"). At the time, the Tribe was skeptical and soon stopped participating in the Task Force because it clearly was not going to lead to quick implementation of removing PCBs from the Spokane River. (**Attachment 2**). Now many years later, we are in a similar position, the dischargers are seeking to avoid the processes outlined in the Clean Water Act, Ecology is seeking a way around the Act's directives, litigation is ongoing, and the EPA is sowing confusion. Although, the predicament is similar, several things have changed. These significant changes can support Ecology's completion of a Spokane River PCB TMDL, and address the problems with PCB pollution reduction and enforcement.

First, ten years ago, the law was unclear on the State's obligations to complete individual TMDLs. Now with the decision in *Columbia Riverkeeper, et al. v. Wheeler, et al.*, 944 F.3d 1204 (9th Cir. 2019), it is clear that the State of Washington cannot simply abandon its duty to develop a PCB TMDL for the Spokane River. Additionally, as the Tribe stated in its scoping comments, the issuance of variances and the plan submitted to Judge Rothstein in *Sierra Club, et al. v. EPA, et al.* in 2015 are simply not compatible. (**Attachment 3**). It seems unlikely that the State and EPA will be able to continue to avoid the development and adoption of a PCB TMDL for the Spokane River. Accordingly, it is entirely appropriate for Ecology to stop the variance approach and first develop, finalize and adopt a PCB TMDL for the Spokane River. Continuing to put limited resources into alternatives that will not withstand legal scrutiny is wasting time and resources.

The second significant change from a decade ago is the glaring problem addressed in *Puget Soundkeeper Alliance v. Department of Ecology*, 191 Wn.2d 631 (2018). The dissent in the case stated the obvious: "An enforcement regime that fails to enforce the law renders RCW 90.48.520 meaningless." *Id* at 650. The case centered on whether the State must use the most up-to-date PCB detection method 1668C for enforcement or could the State follow EPA's outdated Method 608. The majority of the Washington State Supreme Court deferred to Ecology, but the dissent pointed out the obvious and outlined a way to fix the problem. "Ecology must make recorded attempts to get EPA approval of a sufficient alternative testing method per WAC 173-201A-260(3)(h). NPDES permits should be denied if the required method cannot ensure compliance with our state law." *Id* at 653. This problem was highlighted in the "Preliminary Draft Environmental Impact Statement for PCB variances on the Spokane River" at page 9. Fixing this problem should be part of the solution. Otherwise, all of this process may very well be meaningless. Ecology must petition EPA to use 1668C for enforcement.

Third, cost was another excuse the dischargers and Ecology used to avoid a PCB TMDL a decade ago. In the intervening years since Ecology's decision to stop development of a PCB TMDL, both the City of Spokane and the State of Washington filed suit against Monsanto and its subsidiaries for damages related to PCB pollution. The State's lawsuit has resulted in a 95 million dollar settlement, and for the City, the class action settlement will result in new additional resources.¹ This changes the cost dynamic and the Tribe expects the City and State to use these new resources to address the PCB problem. The first step is developing the legally required PCB TMDL and having appropriate enforcement testing methods available.

In conclusion, these three changes in our collective circumstances can support the Tribe's desired result which is a clearly enforceable path to meeting our EPA approved

¹ <https://www.seattletimes.com/seattle-news/washington-state-to-get-95-million-settlement-against-monsanto-over-pcbs/>;
<https://www.spokesman.com/stories/2020/jun/24/settlement-announced-in-federal-lawsuit-from-spoka/>, (last visited July 20, 2020).

water quality standards for PCBs, and ensuring our fishing rights are no longer impacted by upstream PCB pollution. The changed circumstances also provide a roadmap for Ecology. Ecology should first, deny the variance petitions, and begin developing a PCB TMDL. If necessary Ecology can administratively extend the current NPDES permits as it has done in the past to address any delays caused by the TMDL's development. Second, and simultaneously Ecology must petition EPA for approval to use 1668C as an enforcement method. Finally, the funds supplied by the Monsanto settlements should help to defray any additional costs in following this path instead of another legally dubious one. In the end, with a legally adopted PCB TMDL in place and an appropriate testing method for enforcement approved, the Tribe would be in a much better position to consider and review compliance schedules or time limited variances. If you have any questions, you can reach me at (509) 626-4426.

Sincerely,



B.J. Kieffer
Director
Department of Natural Resources
Spokane Tribe of Indians

Cc: Carol Evans, Chairwoman, Spokane Tribe of Indians
Laura Watson, Director, Department of Ecology
Tyson Hawk Oriero, Executive Advisor for Tribal Affairs
Marla Koberstein, Rulemaking Lead