

1 PROPOSED CONSENT DECREE – INADMISSIBLE UNDER FRE 408

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4 HONORABLE BARBARA J. ROTHSTEIN

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

12 SIERRA CLUB, *et al.*,)

13 Plaintiffs,)

14 and)

15 THE SPOKANE TRIBE OF INDIANS,)

16 Plaintiff-Intervenor,)

17 v.)

18 MICHELLE PIRZADEH, ACTING)

19 REGIONAL ADMINISTRATOR OF THE)

20 ENVIRONMENTAL PROTECTION)

21 AGENCY, *et al.*,)

22 Defendants,)

23 and)

24 SPOKANE COUNTY; KAISER)

25 ALUMINUM WASHINGTON LLC; and)

26 STATE OF WASHINGTON)

27 DEPARTMENT OF ECOLOGY,)

28 Defendant-Intervenors.)

No. C11-1759BJR

[PROPOSED] CONSENT DECREE
BETWEEN PLAINTIFFS, PLAINTIFF-
INTERVENOR, AND DEFENDANTS

1 WHEREAS, this Consent Decree is between Plaintiffs Sierra Club and Center for
2 Environmental Law & Policy (collectively “Sierra Club/CELP” or “Plaintiffs”), Plaintiff-
3 Intervenor Spokane Tribe of Indians (“the Tribe”), and Defendants Michelle Pirzadeh, the Acting
4 Regional Administrator of the Environmental Protection Agency, et al., (collectively “EPA”);

5 WHEREAS, in this lawsuit, Plaintiffs and the Tribe allege, among other things, that
6 based upon an alleged constructive submission by the Washington State Department of Ecology
7 (“Ecology”), EPA has a nondiscretionary duty under Section 303(d) of the Clean Water Act to
8 approve or disapprove and, upon disapproval, issue Total Maximum Daily Loads (“TMDLs”) for
9 polychlorinated biphenyls (“PCBs”) for certain segments of the Spokane River, the Little
10 Spokane River, and Lake Spokane (Long Lake) in Washington State, which are all listed as
11 impaired for PCBs;
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13 WHEREAS, in 2006, Ecology prepared and distributed for stakeholder review draft PCB
14 TMDLs for certain PCB-impaired segments of the Spokane River, Little Spokane River, and
15 Lake Spokane (Long Lake) in Washington State, but subsequently stopped work on and issuance
16 of PCB TMDLs for those segments;
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18 WHEREAS, this Court has previously issued rulings on a number of dispositive motions
19 in this case, including the Court’s March 16, 2015 decision, in which the Court found that
20 Ecology had prioritized development of PCB TMDLs for the referenced PCB-impaired segments
21 and that at the time Ecology had come “dangerously close” to a constructive submission for
22 those impaired segments;
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24 WHEREAS, Plaintiffs and the Tribe allege, among other things, that in the intervening
25 years, Ecology has constructively submitted no PCB-TMDLs for these impaired segments; and
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1 WHEREAS, Plaintiffs, the Tribe, and EPA (collectively the “Parties”) intend to resolve
2 Plaintiffs’ and the Tribe’s claims and this lawsuit without any further adjudication and without
3 any admission of any issue of fact or law.

4 NOW THEREFORE, it is hereby ordered, adjudged, and decreed as follows:

5 1) EPA shall issue PCB TMDLs for the following PCB-impaired
6 water segments Assessment Units in the Spokane River, the Little Spokane River, and/or Lake
7 Spokane (Long Lake) located in Washington State (or as these same PCB-impaired Assessment
8 Units have been or may be subsequently renumbered by the Washington State Department of
9 Ecology): 17010305000009; 17010305000010; 17010305000011; 17010305000012;
10 17010307000010; 17010307000774; 17010307009102; 17010307009615; 17010308000018;
11 47117H513; 47117I6C1; 47117I7D4; 47117I8C2; 47117I5A4; 47117H5J8; 47117I7E2;
12 47117I7D3; 47117I7B9 and 47117I5A5. EPA shall issue the TMDLs by a deadline of
13 September 30, 2024. For purposes of this Consent Decree, TMDL has the meaning provided at
14 40 C.F.R. § 130.2(i) as of the date of entry of this Decree.
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18 2) Until this Consent Decree terminates pursuant to paragraph 15, EPA shall file
19 status reports with the Court every 180 days to apprise the Parties and the Court of EPA’s
20 progress satisfying the requirement in paragraph 1 and of the work EPA intends to undertake
21 during the next 180 day period.
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23 3) The Parties recognize that circumstances may arise that warrant the modification
24 of the September 30, 2024, deadline in paragraph 1 above. The deadline may be extended by
25 written agreement of Plaintiffs, the Tribe, and EPA, with notice provided to the Court. To the
26 extent the Parties are not able to agree to an extension of the deadline in paragraph 1 of this
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1 Consent Decree, EPA may seek a modification of the date in accordance with the procedures
2 specified below.

3 a. If EPA files a motion requesting a modification of the September 30, 2024
4 deadline in paragraph 1 by more than 30 days but less than 91 days (that is, to no later
5 than December 29, 2024), provides notice to Plaintiffs and the Tribe at least 30 days prior
6 to filing such motion, and files the motion at least 60 days prior to the deadline in
7 paragraph 1, then the filing of such motion shall automatically extend the date in
8 paragraph 1. Such automatic extension shall remain in effect until the earlier of (i) a
9 dispositive ruling by this Court on such motion, or (ii) the date (or number of days)
10 sought in the motion (that is, to no later than December 29, 2024).
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13 b. If EPA files a motion requesting a modification of the September 30,
14 2024 deadline in paragraph 1 by 30 days or less (that is, to no later than October 30,
15 2024), provides notice to Plaintiffs at least 15 days prior to the deadline in paragraph 1,
16 and files the motion at least 7 days prior to the date for which modification is sought, then
17 the filing of such motion shall automatically extend the deadline in paragraph 1. Such
18 extension shall remain in effect until the earlier of (i) a dispositive ruling by this Court on
19 such motion, or (ii) the date (or number of days) sought in the motion (that is, to no later
20 than October 30, 2024).
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23 c. EPA may, after conferring with Plaintiffs and the Tribe, file a motion for
24 a modification of the deadline in paragraph 1 without providing notice and satisfying the
25 advance filing requirements pursuant to subparagraphs 2(a) or 2(b). No automatic
26 extension will be given if EPA seeks an extension under this subparagraph, although EPA
27 may move the Court for a stay of the deadline in paragraph 1.
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2 4) Any provision of this Consent Decree, including paragraph 1, may otherwise be
3 modified (a) in a written agreement of Plaintiffs, the Tribe, and EPA, with notice provided to the
4 Court or (b) by the Court in accordance with Fed. R. Civ. P. 60(b), provided that the movant for
5 such relief first confers with the other Parties prior to filing its motion.
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7 5) Before Plaintiffs or the Tribe may file a motion to enforce any requirement of this
8 Consent Decree, that party shall provide EPA with no less than 30 days advance written notice of
9 the basis for any alleged non-compliance and an opportunity to meet to discuss this matter.
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11 6) Nothing in this Consent Decree shall be construed to otherwise confer upon this
12 Court jurisdiction to review any decision, either procedural or substantive, made by EPA
13 pursuant to this Consent Decree, including the PCB TMDLs issued by EPA, except for the
14 limited purpose of determining EPA's compliance with any requirement of this Consent Decree.
15 The Parties agree that Plaintiffs' and the Tribe's sole remedy should they dispute the PCB
16 TMDLs EPA issues pursuant to this Consent Decree is to challenge EPA's action issuing those
17 TMDLs in a new lawsuit. EPA reserves all its defenses to any such suit or suits.
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19 7) Plaintiffs and the Tribe reserve the right to seek an award of reasonable attorneys'
20 fees and costs under the Clean Water Act fee-shifting provision, and EPA reserves the right to
21 contest any such fees and costs claimed by Plaintiffs or the Tribe. In the event that such a claim
22 for fees and costs cannot be resolved through a separate settlement, Plaintiffs and the Tribe may
23 file petitions with the Court for the award of such fees and costs no later than 165 days after the
24 effective date of this Consent Decree. Plaintiffs and the Tribe may file such petitions before
25 such time if the Parties agree that a fee settlement cannot be reached.
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28 8) No provision of this Consent Decree shall be interpreted as or constitute a
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1 commitment or requirement that the United States or EPA obligate or pay funds in contravention
2 of the Anti-Deficiency Act, 31 U.S.C. § 1341. Except as explicitly provided for in this Consent
3 Decree, nothing in this Consent Decree shall be construed to curtail the discretion afforded EPA
4 under the Clean Water Act or the Administrative Procedure Act.

5 9) This Consent Decree is the product of good faith, arm's length negotiations by the
6 Plaintiffs, the Tribe, and EPA. Each of these Parties contributed to its drafting. In any dispute
7 over the meaning of any provision of this Consent Decree, Plaintiffs, the Tribe, and EPA shall be
8 treated as having contributed equally to the drafting of that provision.

9 10) This Consent Decree represents the full and final resolution of any and all claims,
10 known or unknown, that have been, could have been, could now be, or could hereafter be
11 asserted by Plaintiffs and the Tribe under any federal, state, or local law or regulation against
12 EPA in connection with (a) the assertions in Plaintiffs' Third Supplemental Complaint (Dkt. 213)
13 and the Tribe's Fourth Amended Complaint (Dkt. 226), (b) any assertions that PCB TMDLs are
14 required for the PCB-impaired segments of the Spokane River, the Little Spokane River, and
15 Lake Spokane (Long Lake) in Washington State specified in paragraph 1 above, (c) any
16 assertions that EPA's prior Plan for addressing PCBs in the Spokane River (Dkt. 129-1), or
17 alleged actions or inactions by EPA with regard to or based on that Plan, are arbitrary,
18 capricious, contrary to law, or otherwise subject to judicial compulsion, and (d) all claims that
19 would have been precluded under res judicata and related principles of preclusion had this matter
20 proceeded to judgment on all claims in Plaintiffs' Third Supplemental Complaint and the Tribe's
21 Fourth Amended Complaint. Plaintiffs and the Tribe covenant not to bring any judicial or
22 administrative action or lawsuit under any federal, state, or local law or regulation against EPA
23 with regard to the foregoing.
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1 11) Plaintiffs, the Tribe, and EPA agree that this Consent Decree is fair, reasonable,
2 and in the public interest. This Consent Decree was negotiated and executed in good faith and at
3 arm's length and is a fair and equitable compromise of disputed claims. This Consent Decree is
4 not and shall not constitute or be construed as an admission by EPA of any factual or legal
5 allegations made by Plaintiffs or the Tribe, an admission of liability, or an admission of any other
6 kind or character whatsoever by EPA. Neither this Consent Decree nor EPA's performance
7 under this Consent Decree is intended to have, and shall not be deemed to have, any evidentiary
8 or precedential effect in any other judicial or administrative action involving claims asserted
9 against EPA.
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11 12) This Consent Decree shall be governed by and construed under federal law.
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13 13) The individuals signing this Consent Decree on behalf of Plaintiffs, the Tribe, and
14 EPA hereby certify that they are authorized to bind their respective party to this Consent Decree.
15 This Consent Decree may be executed by multiple signature pages.
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17 14) This Consent Decree shall be effective upon the date of its entry by the Court.
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19 15) The Consent Decree shall terminate when EPA has issued PCB TMDLs for the
20 impaired segments of the Spokane River, the Little Spokane River, and Lake Spokane (Long
21 Lake) in Washington State as set forth in paragraph 1 above.
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23 16) All deliverables, modifications, notices, notifications, and requests specified in
24 this Consent Decree must be in writing unless otherwise specified. Whenever, under this
25 Decree, notice is required to be given, or a document is required to be sent, by one Party to
26 another, it must be directed to the person(s) specified below at the address(es) and email(s)
27 specified below. Any Party may change the person and/or address applicable by providing
28 notice of such change to all Parties in writing or via email. All notices under this Decree are
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1 effective upon receipt, unless otherwise specified. Except as otherwise provided, written notice
2 to a party by regular mail in accordance with this Decree satisfies any notice requirement of the
3 Decree regarding such party.

4 **As to EPA:**

5 David J. Kaplan
6 United States Department of Justice
7 Environmental Defense Section
8 P.O. Box 7611
9 Washington D.C. 20044
10 david.kaplan@usdoj.gov

11 **As Plaintiffs:**

12 Marc Zemel
13 Richard Smith
14 Smith & Lowney, PLLC
15 2317 E. John St.
16 Seattle WA 98112
17 marc@smithandlowney.com
18 richard@smithandlowney.com

19 **As to the Tribe:**

20 Ted C. Knight, Special Legal Counsel
21 Office of the Spokane Tribal Attorney
22 Spokane Tribe of Indians
23 PO Box 100
24 Wellpinit, WA 99040
25 Phone (509) 953-1908
26 tedk@spokanetribe.com

27 17) This Consent Decree constitutes the final, complete, and exclusive agreement and
28 understanding among the Parties regarding the settlement embodied in this Decree. The Parties
29 acknowledge that there are no representations, agreements, or understandings relating to the
settlement other than those expressly contained in this Decree.

18) Upon entry of this Consent Decree by the Court, this Decree shall constitute a
final judgment between and among the Parties. The Court finds that there is no just reason for

1 delay and, therefore, enters this judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

2 This Court retains jurisdiction over this Consent Decree until it terminates pursuant to paragraph

3 15.

4
5 IT IS SO ORDERED, this _____ day of _____ 2022.

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8 _____
9 United States District Judge

1 Signature Page for Consent Decree

2 **FOR DEFENDANTS:**

3 Todd Kim
4 Assistant Attorney General
5 Environment & Natural Resources Division

6 /s/ _____ Dated: _____

7 David J. Kaplan
8 Attorneys for Federal Defendants
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10 Environmental Defense Section
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21 **FOR PLAINTIFFS:**

22 /s/ _____ Dated: _____

23 Marc Zemel
24 Richard Smith
25 Smith & Lowney, PLLC
26 2317 E. John St.,
27 Seattle, WA 98112
28 (206) 860-2883

29 **FOR PLAINTIFF-INTERVENOR THE SPOKANE TRIBE**

/s/ _____ Dated: _____

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