

# The PCB Settlement with Monsanto

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## Abstract

In 2015, the City of Spokane commenced a local lawsuit against Monsanto seeking reimbursement for costs incurred by Monsanto's alleged contribution to PCB contamination in the Spokane River. Over time, various lawsuits popped up in other cities nationwide with similar allegations. Ultimately, a class action suit involving over 2,500 members was consolidated, ending in a settlement that distributed funds from Monsanto across the nation. Currently, the funds that the City of Spokane is supposed to receive are anticipated to provide utility ratepayers tax breaks on existing projects.

The City of Spokane ("the City") filed an action against Monsanto Company ("Monsanto") in Washington Federal District Court on July 31<sup>st</sup>, 2015<sup>1</sup> The lawsuit claimed that Monsanto was responsible for cleanup of polychlorinated biphenyls ("PCBs").<sup>2</sup>

PCBs are a human-made chemical with a range of toxicity that "does not easily break down once in the environment."<sup>3</sup> PCBs were used in commercial products and industrial processes due to their "non-flammability, chemical stability, high boiling point, and electrical insulating properties."<sup>4</sup> Although the production of PCBs was banned in 1979, PCBs remain present in "bays, oceans, rivers, streams, soil, and air" from these past uses and cause "adverse health effects" and impacts on the environment."<sup>5</sup> For example, PCBs are found in fish tissue on the Spokane River; therefore, "human consumption of fish from affected [parts] of the River may be associated with serious health risks" such as various types of cancers.<sup>6</sup> Currently, under the Clean Water Act ("CWA") Section 303(d), the Spokane River is listed as impaired for PCB pollution.<sup>7</sup>

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<sup>1</sup> Compl. 1, *City of Spokane v. Monsanto Company et al* (E.D. Wash. 2016).

<sup>2</sup> ENVTL PROTECTION AGENCY, *Polychlorinated Biphenyls (PCBs)*, <https://www.epa.gov/pcbs/learn-about-polychlorinated-biphenyls-pcbs>

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Sierra Club et al v. McLerran et al*, No. 11-CV-1759-BJR, 2015 WL 1188522, \*4 (W.D. Wash. Mar. 16, 2015).

Ultimately, the City filed its suit seeking accountability from Monsanto for its alleged contribution to this PCB problem, specifically suing on the theories of public nuisance, products liability, negligence, and equitable indemnity.<sup>8</sup>

The City's lawsuit alleged that Monsanto has historically contributed to the PCB pollution of the Spokane River via its sale of products with PCB content with knowledge of the chemical's toxicity and durability in the environment.<sup>9</sup> The City argued that this led to unfair clean-up costs for the City and harm to the public.<sup>10</sup> Monsanto argued that other companies contributed to the PCB problem, that it stopped manufacturing PCBs in 1977, and that PCBs are not carcinogenic<sup>11</sup>.

In the complaint, the City sued on theories of public nuisance, products liability for defective design, products liability for failure to warn, negligence, equitable indemnity for damages and attorney's fees.<sup>12</sup>

First, the City alleged that Monsanto created "a public nuisance that is harmful to health and obstructs the free use of the Spokane River."<sup>13</sup> They argued that Monsanto's "conduct and presence of PCBs annoys, injures, and endangers the comfort, repose, health, and safety of others."<sup>14</sup> Second, the City alleged that "Monsanto's PCBs were not reasonably safe as designed at the time the PCBs left Monsanto's control," pointing to the ban of PCBs in 1979 and PCBs' toxicity.<sup>15</sup> Third, the City alleged that despite the knowledge from the second claim, that "Monsanto failed to provide adequate warnings that its PCBs would become a global contaminant and contaminate waterways and wildlife, such as Spokane's stormwater and fish in the Spokane River."<sup>16</sup> The City further alleged that "Monsanto knowingly failed to issue warnings or instructions concerning the dangers of PCBs in the manner that a reasonably prudent manufacturer would act in the same or similar circumstances."<sup>17</sup> Fourth, the City alleged that "Monsanto failed to exercise ordinary care because a reasonably careful company that learned of its product's toxicity would not manufacture that product if the product could not be contained during normal production and use or would warn of its toxic properties."<sup>18</sup> Finally, the City alleged that "Spokane has been and will continue to be legally obligated to spend money to remove PCBs from wastewater and stormwater before

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<sup>8</sup> Compl. 1.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Def's. Answer. 2, 4, *City of Spokane v. Monsanto Company et al* (E.D. Wash. 2016).

<sup>12</sup> Compl. \*27-\*34.

<sup>13</sup> *Id.* \*29.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* \*30.

<sup>16</sup> *Id.* \*32.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* \*33.

discharging into the Spokane River,” and “Monsanto is responsible for contaminating the waste and stormwater with PCBs.”<sup>19</sup>

Of the claims, the common law portion of the products liability claim was the only one dismissed in the October 2015 order.<sup>20</sup> In the complaint, the City had not specified whether the product liability claims were being brought under the common law or the Washington Products Liability Act (“WPLA”).<sup>21</sup> The Court found that the City did not have standing to bring a claim under the common law because the City “is not a consumer or user of the products at issue.”<sup>22</sup> Washington common law “directly adopt[s] the Restatement of Torts’ position on liability for defective, unreasonably dangerous products . . . which suggests that only a user or consumer . . . has standing to bring a claim.”<sup>23</sup> Further, Washington courts “generally have not allowed recovery to casual bystanders, and others who may come in contact with the product.”<sup>24</sup> The City’s injury is “based on the accumulated contamination resulting from leaching or migration of PCBs into its wastewater systems.”<sup>25</sup> As a result, the Court dismissed the common law claim for lack of standing because [the City] is not the type of plaintiff the common law product defect cause of action is intended to encompass.”<sup>26</sup>

Over time, lawsuits were filed by States and municipalities across the Country.<sup>27</sup> Mirroring the City’s Monsanto case, the Washington state attorney general “filed the nation’s first statewide environmental lawsuit against Monsanto over its manufacturing, marketing, and distribution of PCBs” receiving a \$95 million settlement.<sup>28</sup> On July 2<sup>nd</sup>, 2020, the City of Long Beach filed an amended complaint for class action.<sup>29</sup> This effectively merged many individual actions against Monsanto into a class action suit with over 2,500 class members.<sup>30</sup> Others such as the State of Washington chose to maintain individual lawsuits.<sup>31</sup>

In the amended complaint, the class members argued that Monsanto “knew or should have known for decades that PCBs were toxic and knew or should have known that they were widely contaminating all natural resources and living organisms.”<sup>32</sup> Specifically, the class members

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<sup>19</sup> *Id.* \*34.

<sup>20</sup> *Id.* 26.

<sup>21</sup> Order on Mot. to Dismiss. 12. (E.D. Wash. 2015).

<sup>22</sup> *Id.* \*11.

<sup>23</sup> *Id.* \*13.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* 16.

<sup>26</sup> *Id.*

<sup>27</sup> Amended Complaint for Class Action 1. July 2, 2020.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> See e.g. Settlement Agreement for State of Washington v. Monsanto case no. 16-2-29591-6-SEA. June 24, 2020.

<sup>32</sup> Amended Complaint \*2.

focused on stormwater systems that “discharge PCB contaminated water into a body of water that has been designated ‘impaired’ [under the Clean Water Act], and have incurred costs or will incur costs to monitor . . . and/or remove the levels of PCBs in those discharges.”<sup>33</sup>

Attorney John Fiske, who represented the class action plaintiffs, emphasized:

The cities, ports, and counties alleged that a product manufacturer, which no longer manufactures the product, created an environmental tort and a public nuisance in storm water through the manufacture, promotion, sale, and distribution of legacy chemicals. We understand this exact factual and legal scenario is unique. While the legal theories have been successfully alleged and resolved previously, we understand the application to a legacy contaminant in storm water is a unique advancement in environmental tort litigation.<sup>34</sup>

On August 7<sup>th</sup>, 2020, the plaintiffs filed a motion for certification of the class action suit and the parties reached a settlement.<sup>35</sup> In the recitals, the Plaintiffs indicated a few reasons for settlement, including “the extensive burdens and expense of litigation, [and] the risks and uncertainties associated with protracted trials.”<sup>36</sup> Monsanto corroborated this concern, indicating the reasons of “uncertainty, risk, delay, and costs inherent in litigation.”<sup>37</sup>

The proposed settlement provided that the “parties . . . agree to file joint motions to stay all the pending litigation,” until either “the Effective Date of the Settlement” or “if the Settlement Agreement is not approved and/or does not become effective, all litigation . . . will be stored.”<sup>38</sup> Ultimately, \$550,000,000 dollars would be distributed among the class members, over 2,500 cities with Phase 1 and 2 NPDES permits from approximately 39 different states nationwide<sup>39</sup> The funds would be further allocated into specific funds: a monitoring fund, a TMDL fund, a sediments fund, and a special needs fund.<sup>40</sup>

The Monitoring Fund would divide \$42,895,000 among all Settlement Class Members and is “intended to pay for PCB sampling and/or any other mitigation efforts in the Settlement Class Member’s sole discretion.”<sup>41</sup> Specifically, the Monitoring Fund would distribute the funds based “whether the Initial Class member is a Phase I or Phase II NPDES Permittee, and whether the Initial Settlement Class Member contains a population of at least 100,000.”<sup>42</sup> The TMDL Fund would provide \$250,000,000 for Initial Settlement Class Members who are “subject to and/or responsible for, as of June 24, 2020 only, but not later, a TMDL, TMDL Alternative, or TMDL

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<sup>33</sup> *Id.* \*3.

<sup>34</sup> Zoom Interview with John Fiske, Attorney at Law, Baron and Budd Pc, San Diego, CA (Oct. 21, 2020).

<sup>35</sup> Certify Class Action 1. August 7, 2020; Class Action Settlement Agreement 1. August 7, 2020.

<sup>36</sup> Settlement \*5.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* \*13.

<sup>39</sup> *Id.* \*15.

<sup>40</sup> *Id.* \*15, \*16.

<sup>41</sup> *Id.* \*16.

<sup>42</sup> *Id.*

Direct-to-Implementation regulation, promulgated or updated after January 1, 2010, wherein PCB is a named constituent.<sup>43</sup> The Sediment Sites Fund would provide \$150,000,000 to qualifying Sediment Sites wherein PCBs have contaminated sediments due to stormwater regulations.<sup>44</sup> The Special Needs Fund would be divided into two parts and total \$107,105,000.<sup>45</sup> First, there would be funds to “compensate and accommodate those Litigating Entities whose time, energy, effort, attorney work product, costs, expenses, and risk of litigation.”<sup>46</sup> This fund would award funds to applicants who “make a showing . . . of a significant regional, state, or national benefit, cost, or contribution regarding . . . bodies of water impaired by PCBs through stormwater and/or dry weather runoff.”<sup>47</sup> After division of the monitoring funds between the Initial Settlement Class Members, cities would receive anywhere from \$15,000 to \$30,000 dollars.<sup>48</sup> Spokane specifically received \$25,000 dollars from the Monitoring Fund.<sup>49</sup> The specific amount of funds Cities may additionally receive outside of the Monitoring Fund is not specifically delineated in the Settlement.

In regards to the City’s plans for the settlement, Marlene Feist indicated that funds would “be used for building projects that would otherwise fall on utility ratepayers to pay for.”<sup>50</sup> Feist further indicated that this work was already going to be done, but now it will be “Monsanto dollars, instead of city of Spokane ratepayer dollars.”<sup>51</sup>

A recent snag included a federal judge in California refusing to approve the settlement because it only gives parties “65 days to apply for cleanup funds from the settlement if they discover the contaminants in their waterways.”<sup>52</sup>

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.* \*17.

<sup>45</sup> *Id.* \*19, \*20.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* \*21.

<sup>48</sup> *Id.* \*113-\*175.

<sup>49</sup> *Id.* \*171. Note that Spokane County received \$25,000 dollars and Spokane Valley received \$15,000 dollars.

<sup>50</sup> Kip Hill, *Maker of Roundup agrees to pay \$648 million to settle lawsuits from Spokane, other cities over water pollution*, THE SPOKESMAN-REVIEW, June 24, 2020.

<sup>51</sup> *Id.*

<sup>52</sup> Craig Clough, *Bayer’s \$650M PCB Deal Hits Snag Over Extra Funds Window*, Feb. 18, 2021.