

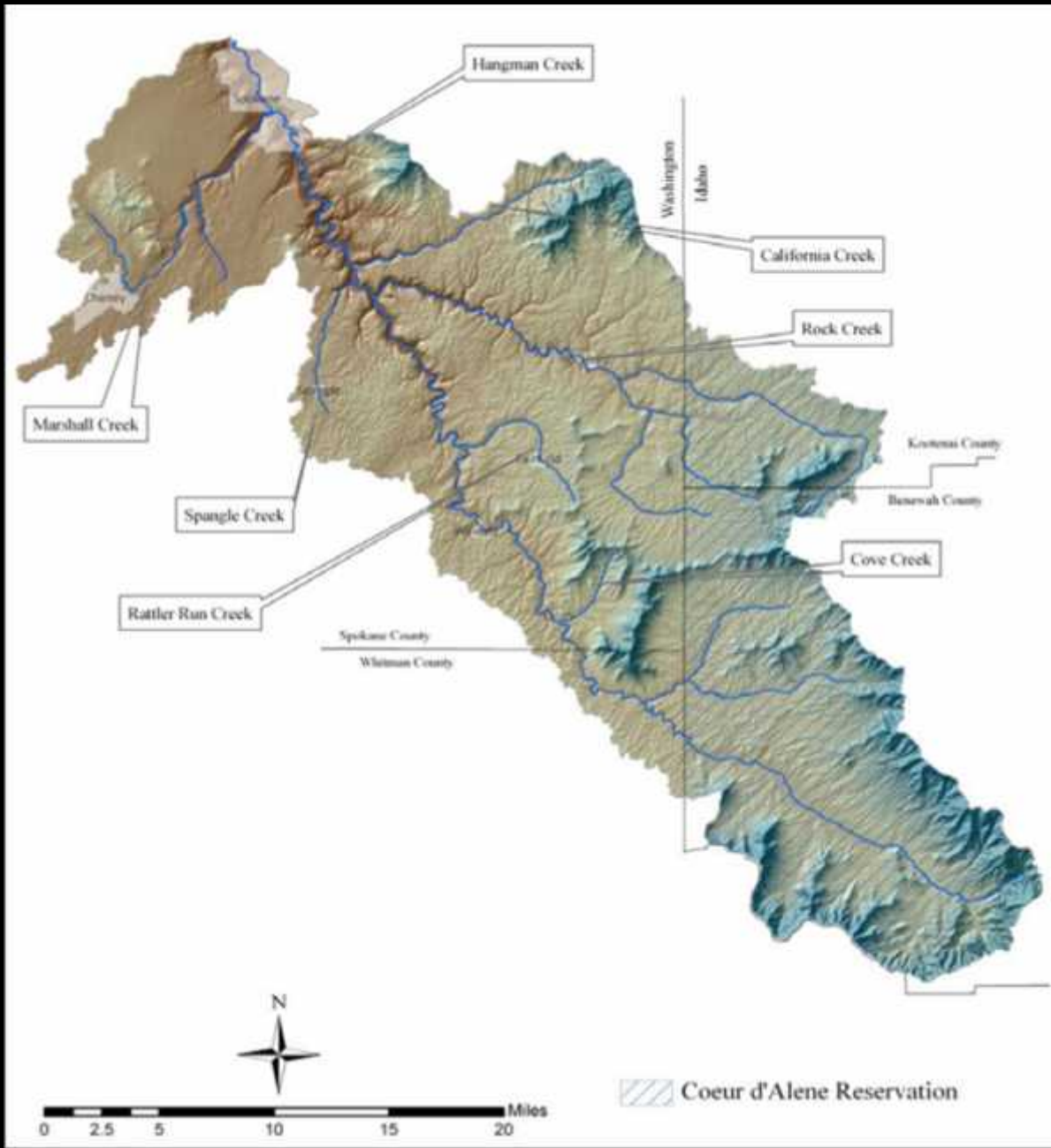




# HANGMAN CREEK TMDL Riverkeeper litigation

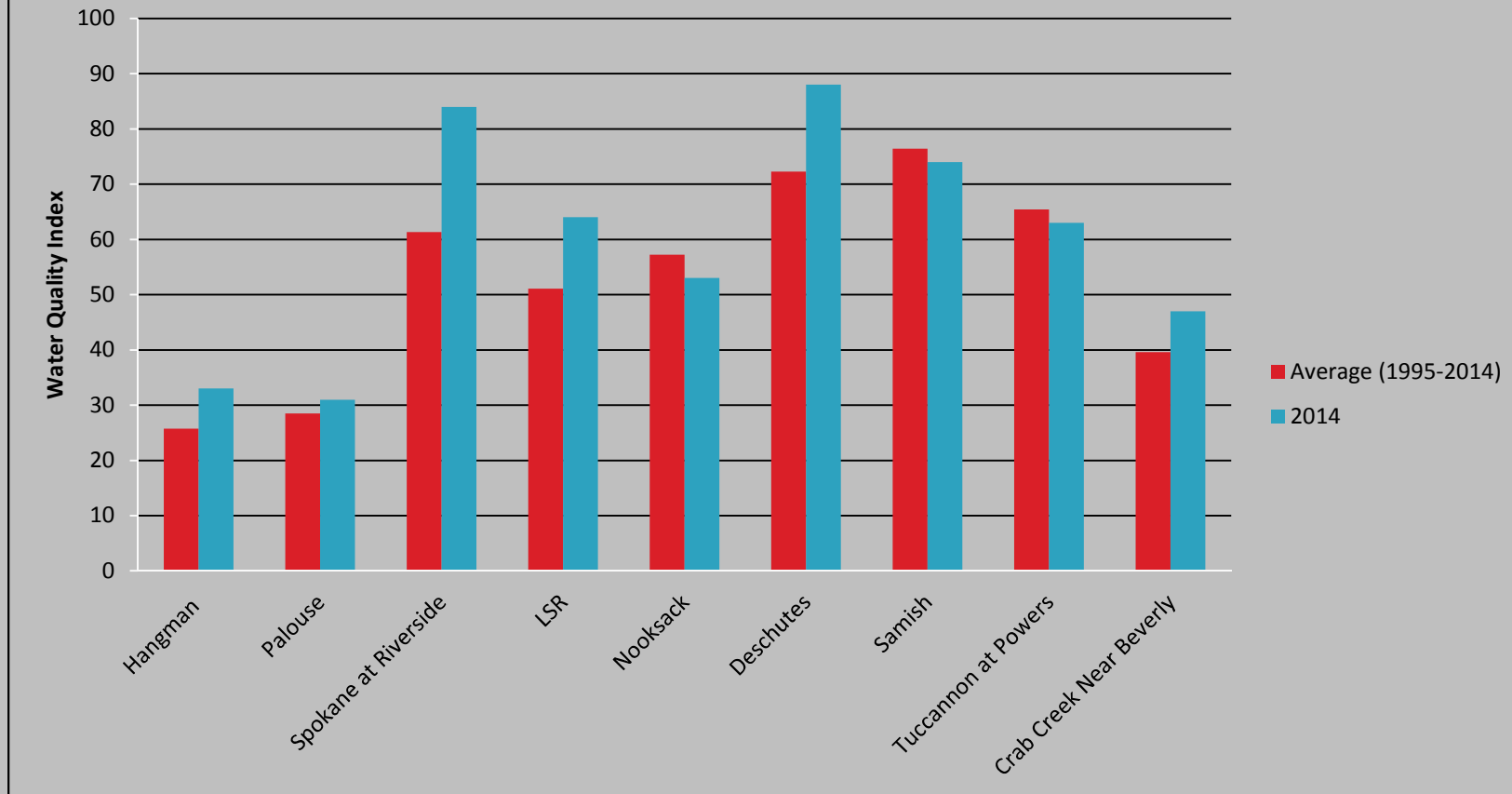


**Spokane**  
RIVERKEEPER®

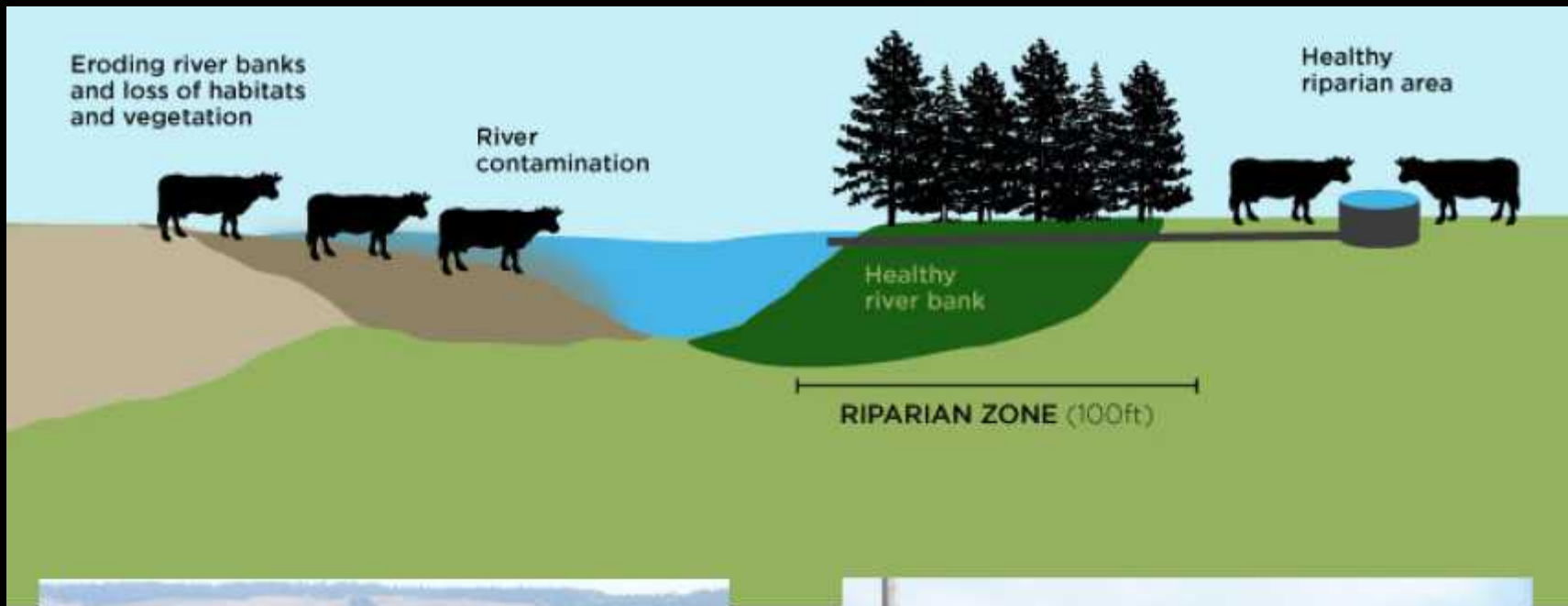


- Fecal Coliform, Temperature, Turbidity TMDL approved by EPA in 2009
- Hangman Creek suffers the poorest water quality in the state (WDOE water quality index)
- Hangman Creek suffers from degraded “site conditions” that include:
  - denuded riparian (vegetation) communities, & shorelines
  - Incised channels, perched above ground water
  - “flashy” flow regime due to:
    - Isolation from flood channels, very poor interception of runoff due to ditching and drainage systems
- Excessive sediment runoff into the creek
- High nutrient loads from runoff

## Stream Water Quality in Washington State (data courtesy of Ecology)



Hangman Creek contains the worst water quality in Washington State over the previous 20 years based on Ecology data compiled into the Water Quality Index.



Courtesy of [www.whatsupstream.org](http://www.whatsupstream.org)



# Highly erodible Palouse soils 14 tons of soil loss/acre



More than 40% of topsoil has been lost to erosion





# Water finds a way



25,000 – 150,000 tons of soil/year











**Spokane Riverkeeper**

on Monday

Hangman Creek spewing sediment pollution into an emerald, clear Spokane River. Right now we are working on the clean up plan for this river. stay tuned.

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Spokane Riverkeeper · Michelle Bledsoe · Alicia Bemiss-Fowell, Shan McPherson and 40 others like this.

21 shares



**Phil Guinand** Sorry, should have read, but this is not industrial, right?

[Like](#) · [Reply](#) · [Message](#) · February 1 at 12:41pm

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Comment input field with camera and emoji icons



# Livestock on the creek



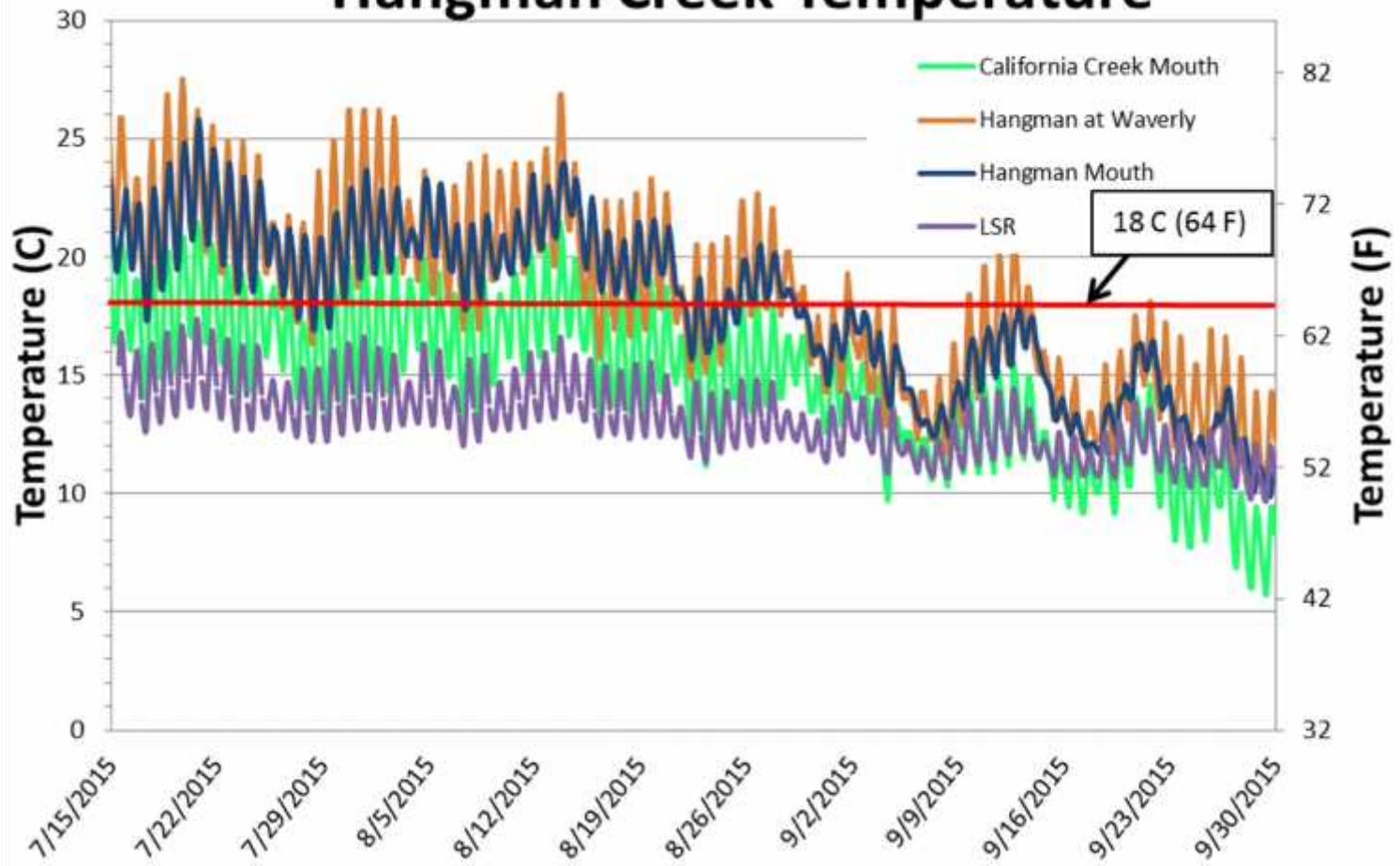


# Lack of shade/vegetaion





# Hangman Creek Temperature



# Abuse of shorelines

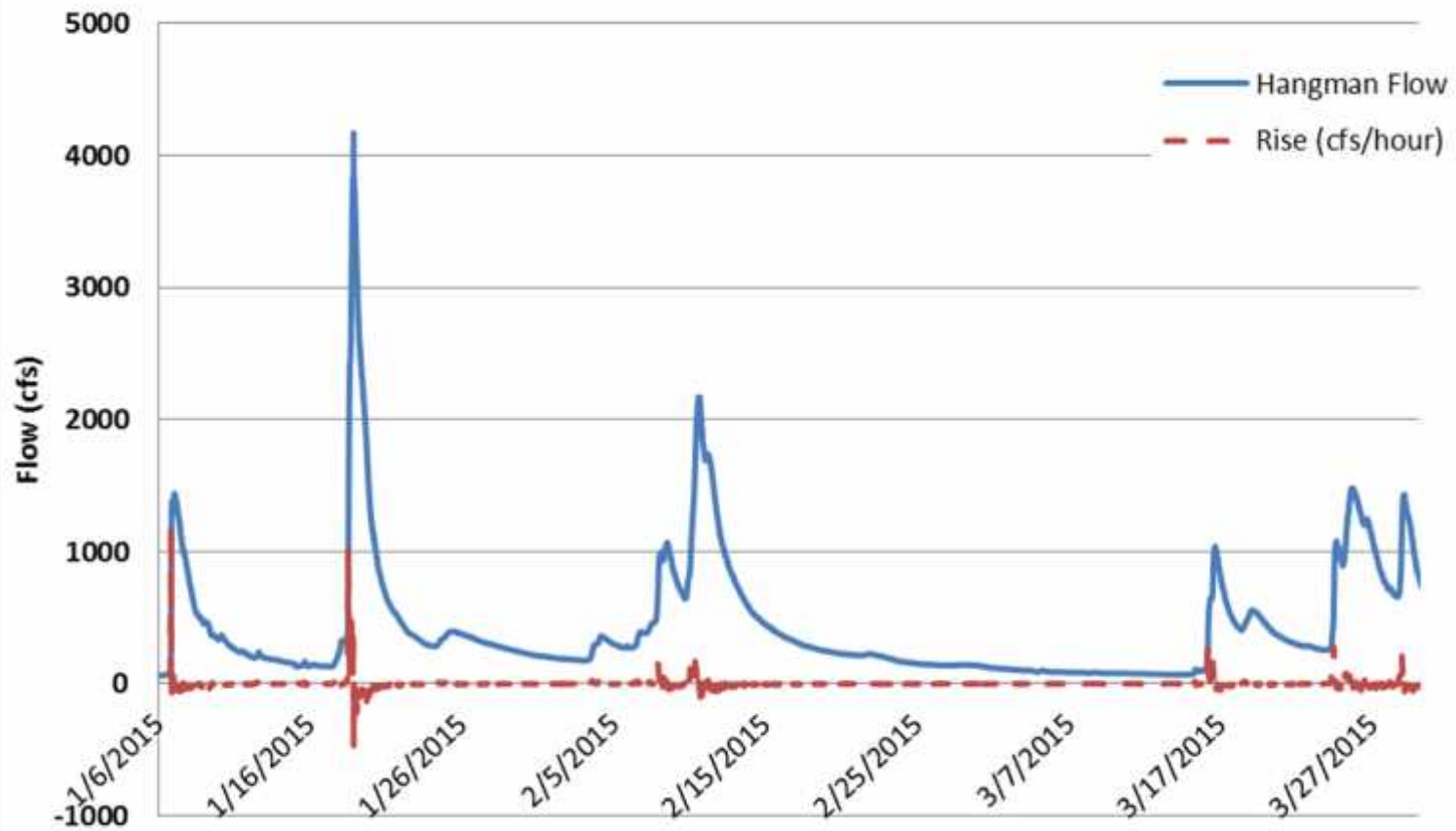




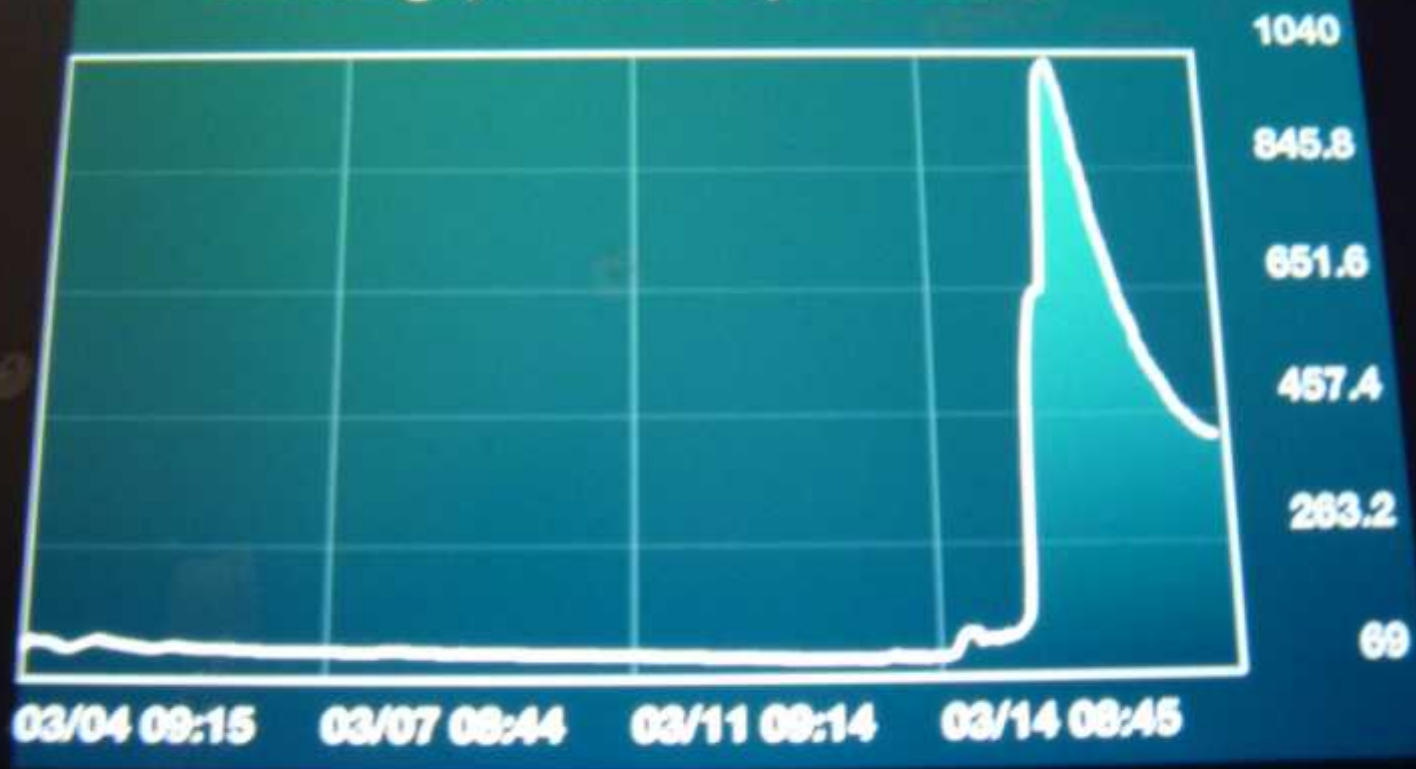




## Hangman Creek "Flashiness"

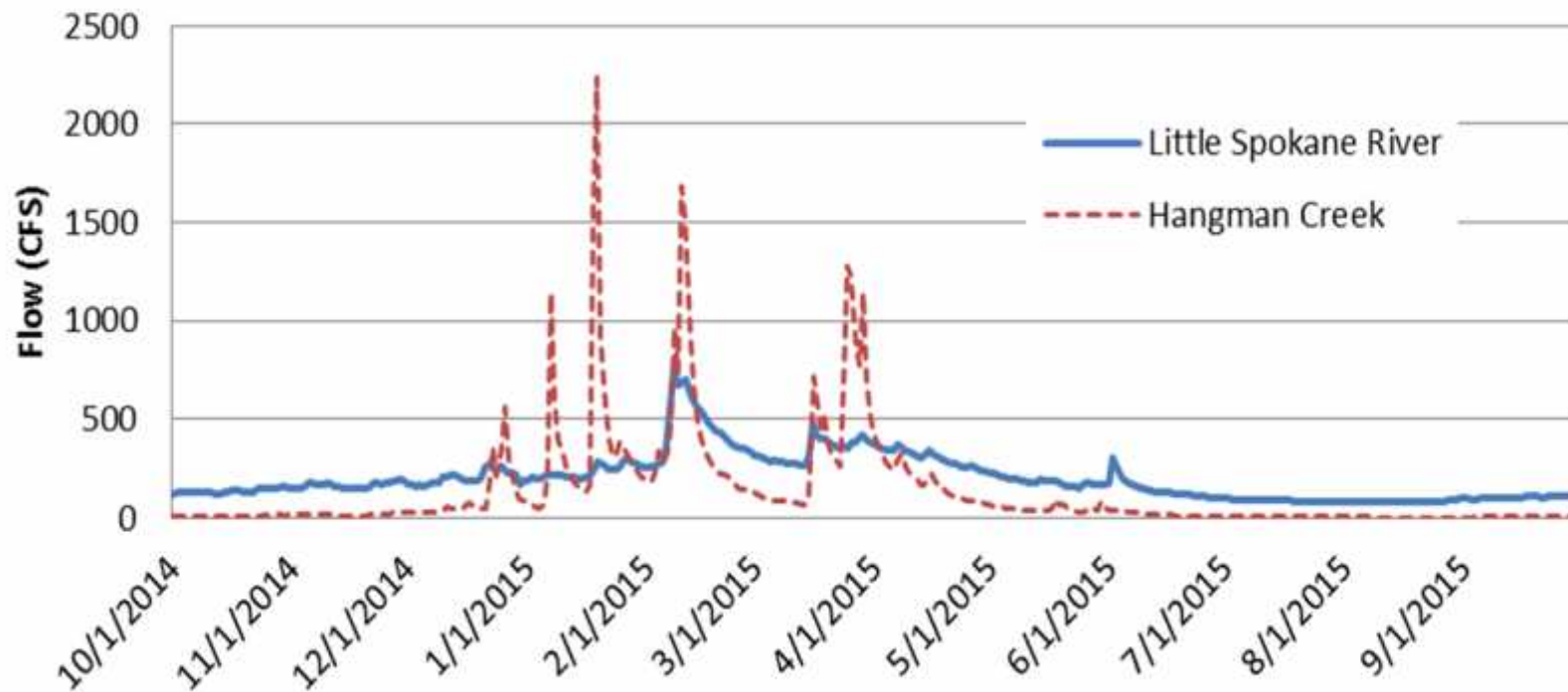


# Discharge, cubic feet per second





## Comparison of WY 2015 daily flows on Hangman Creek and the LSR





# Why litigation?

- Litigation is a “tool” to be used and not abused
- Used in concert with collaboration
- Can create dissonance/synergies that free actors up to act – Ecology?
- So we sued the EPA's approval of this TMDL (clean up plan)

# Our Reasoning

- The Reasonable Assurance is an EPA policy inside clean up plans (TMDLs) that guarantee's the clean up plans will find success.

*“ TMDLs must show “reasonable assurance” that these sources (of pollution) will be reduced to their allocated amount. Education, outreach technical and financial assistance, permit administration, and **enforcement** will be used to ensure that the goals of this water improvement plan are met”*

– Page 160, Hangman Creek temp, turbidity, bacteria TMDL

# Our issue:

- The reasonable assurance section was not substantial enough to provide a framework for success
  1. Provide assurances that are enforceable
  2. Provide transparent assurances
  3. Do not over rely on voluntary programs

# Our Asks:

*“Education, outreach technical and financial assistance, permit administration, and **enforcement** will be used to ensure that the goals of this water improvement plan are met” Page 160*

**Please enforce Washington State Law to protect the public and the attainable uses.**

# Washington State Water Pollution Control Act

- Chapter RCW90.48.080

“Unlawful for any person to throw, drain, run, or otherwise discharge into any of the waters of this state, or to cause, permit or suffer to be thrown, drained, allowed to seep or otherwise discharge into such waters any organic or inorganic matter that shall cause or tend to cause pollution...”

- Chapter RCW90.48.120

“Whenever, in the opinion of the department, **any person shall violate or creates a substantial potential to violate the provisions of this chapter.....the department shall issue such order** or directive as it deems appropriate under the circumstances, and shall notify such person thereof by registered mail.”

- Chapter RCW90.48.144

“Whenever a person.....violates the provisions of RCW [90.48.080](#), or other sections of this chapter or chapter [90.56](#) RCW or rules or orders adopted or issued pursuant to either of those chapters, shall incur, in addition to any other penalty as provided by law, a penalty in an amount of up to ten thousand dollars a day for every such violation.



## *Lemire v. Wash. Dept. of Ecology*

- Ecology issued administrative enforcement order against landowner who refused to take any action on his property
- Landowner argued that Ecology could not regulate nonpoint sources of pollution, and also argued that order to fence cows away from the stream was a taking
- Ecology argued it only had to see a “substantial potential to pollute”

# Washington Supreme Court

- Court ruled 8-1 in Ecology's favor:
  - 1) Not required to show causation: "Atkins averred that his observations of the cattle's access to the stream was consistent with the kind of pollution found in the stream such as sediment, fecal coliform, and other disturbances of the water quality. This was all Ecology was required to prove under RCW 90.48.120, RCW90.48.080, and RCW 90.48.020. It was not required to rule out other sources of pollution in the creek."
  - 2) May regulate non-point pollution: "The plain language of RCW90.48.080 and RCW90.48.020 give Ecology the authority to regulate nonpoint source pollutant discharge. Lemire's appeals to tools of statutory construction ....are unavailing. Likewise, his contention that his activities do not constitute discharges under the federal CWA...is irrelevant to the question of Ecology's authority to regulate his activities under state law."

# Visual Indicators of RCW 90.48 violation

- Areas of bare ground and exposed soil
- Contaminated run-off (active or potential)
- Slumping streambanks and erosion
- Moderate to heavy grazing
- Confinement areas near streams
- Absence of woody vegetation due to livestock action
- Manure accumulations
- Extended access to surface water
- Livestock paths and trails in the riparian area

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# Washington's Water Quality Management Plan to Control Nonpoint Sources of Pollution (July 2015)

- “For TMDLs that allocate pollutant loads to both point and nonpoint sources, the state must demonstrate reasonable assurance that the LAs will be achieved and WQ Standards will be attained. The purpose of reasonable assurance is to ensure that the WLAs and LAs established in the TMDL are not based on overly generous assumptions regarding the amount of nonpoint source pollutant reductions that will occur.”
  - P. 30 (emphasis supplied).

# Plan Cont.

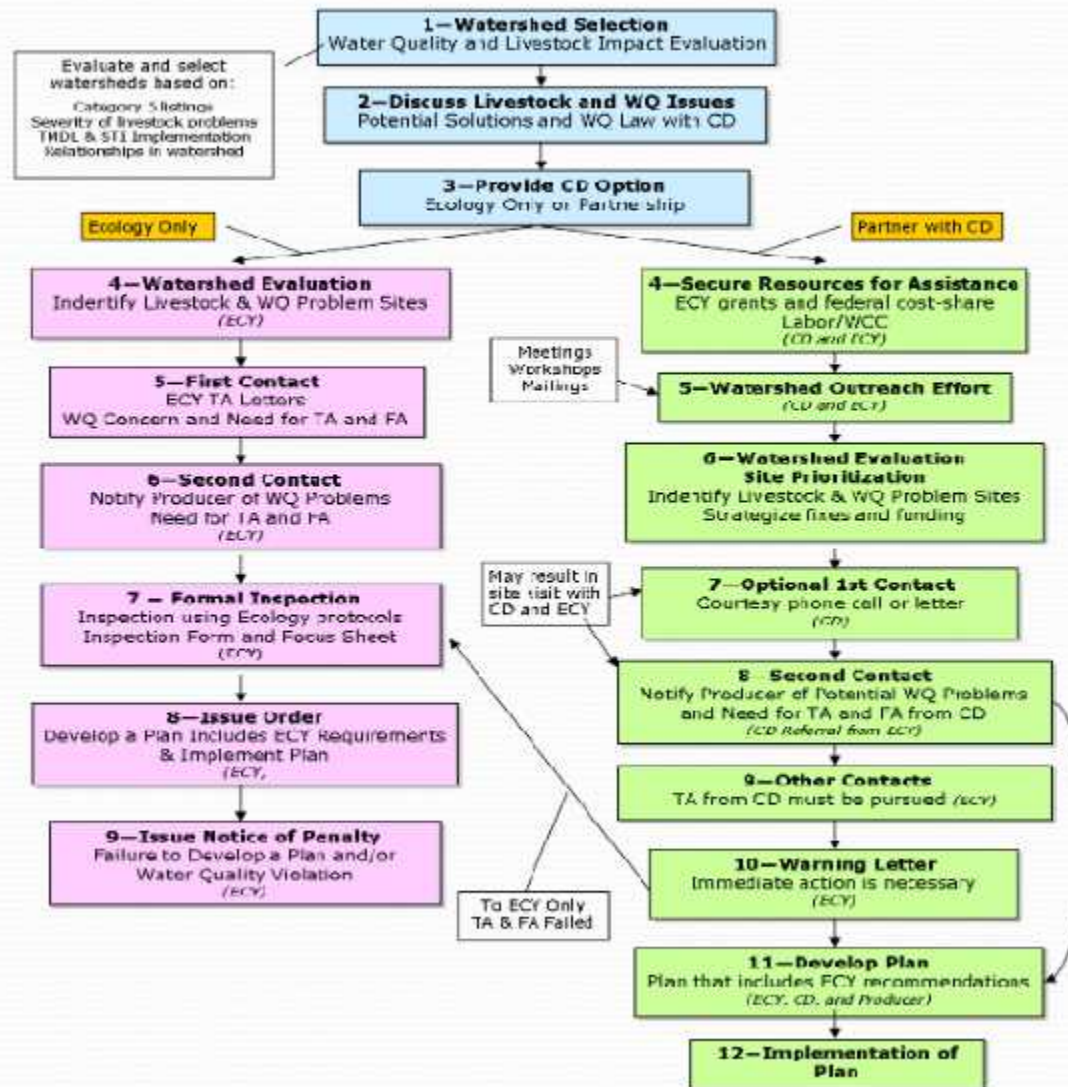
- “Ecology relies on TMDL implementation plans to ensure that we accomplish the reductions needed from nonpoint pollution sources to meet the LA required by the TMDL. Our goal is to secure the load reductions required of nonpoint sources through voluntary implementation and the use of education and outreach, technical assistance, and financial assistance. However, enforcement authority under state law provides a regulatory backstop. This regulatory backstop is necessary because there must be reasonable assurance that the abatement strategies for nonpoint sources will actually take place. If nonpoint sources are not addressed, federal law shifts reduction requirements to point source dischargers.”
  - P. 30-31 (emphasis supplied).

# Ecology Regions in Washington State

- NWRO=Northwest Regional Office
- SWRO=Southwest Regional Office
- BFO=Bellingham Field Office
- ERO=Eastern Regional Office
- CRO=Central Regional Office

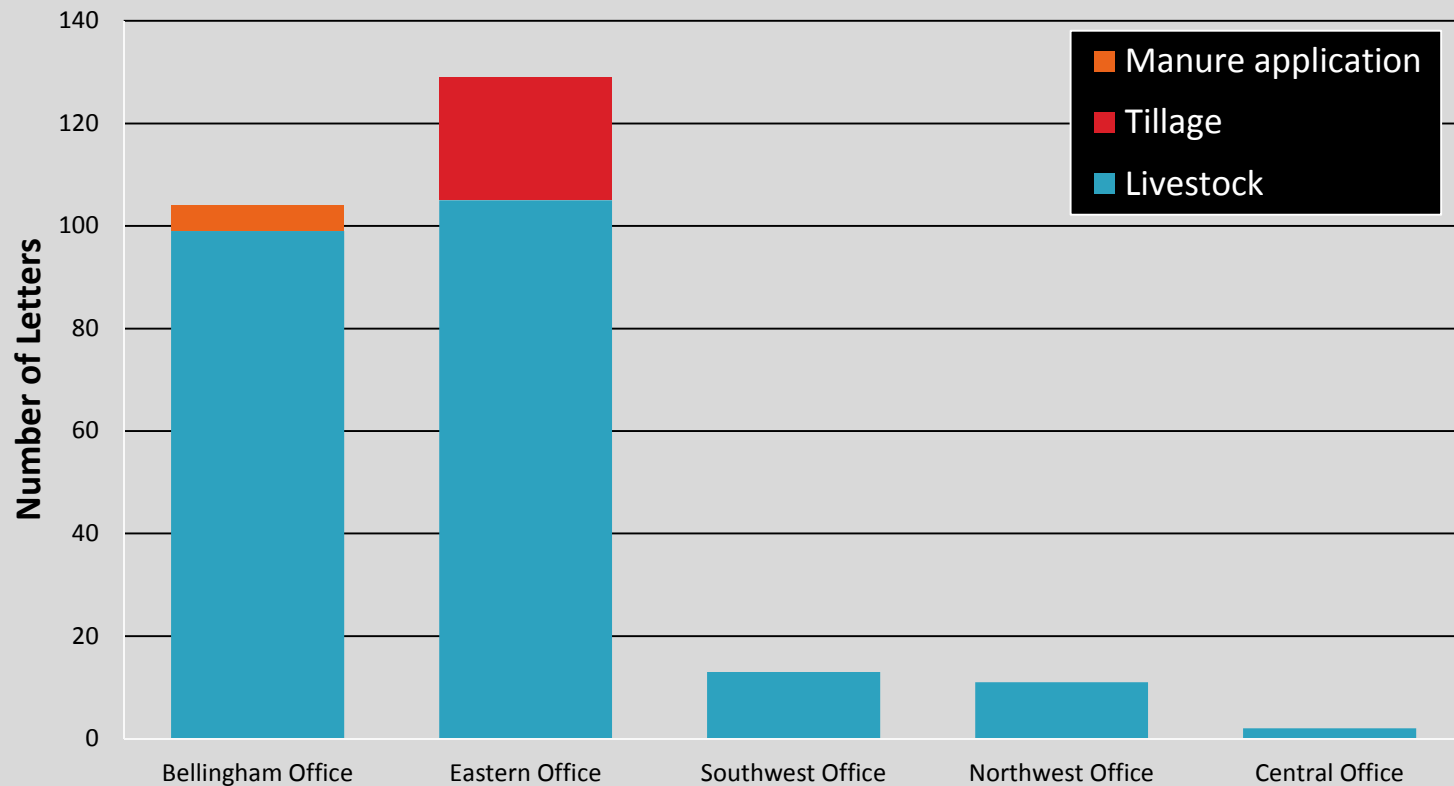


## Flow Chart for Addressing Agricultural WQ Problems in ERO



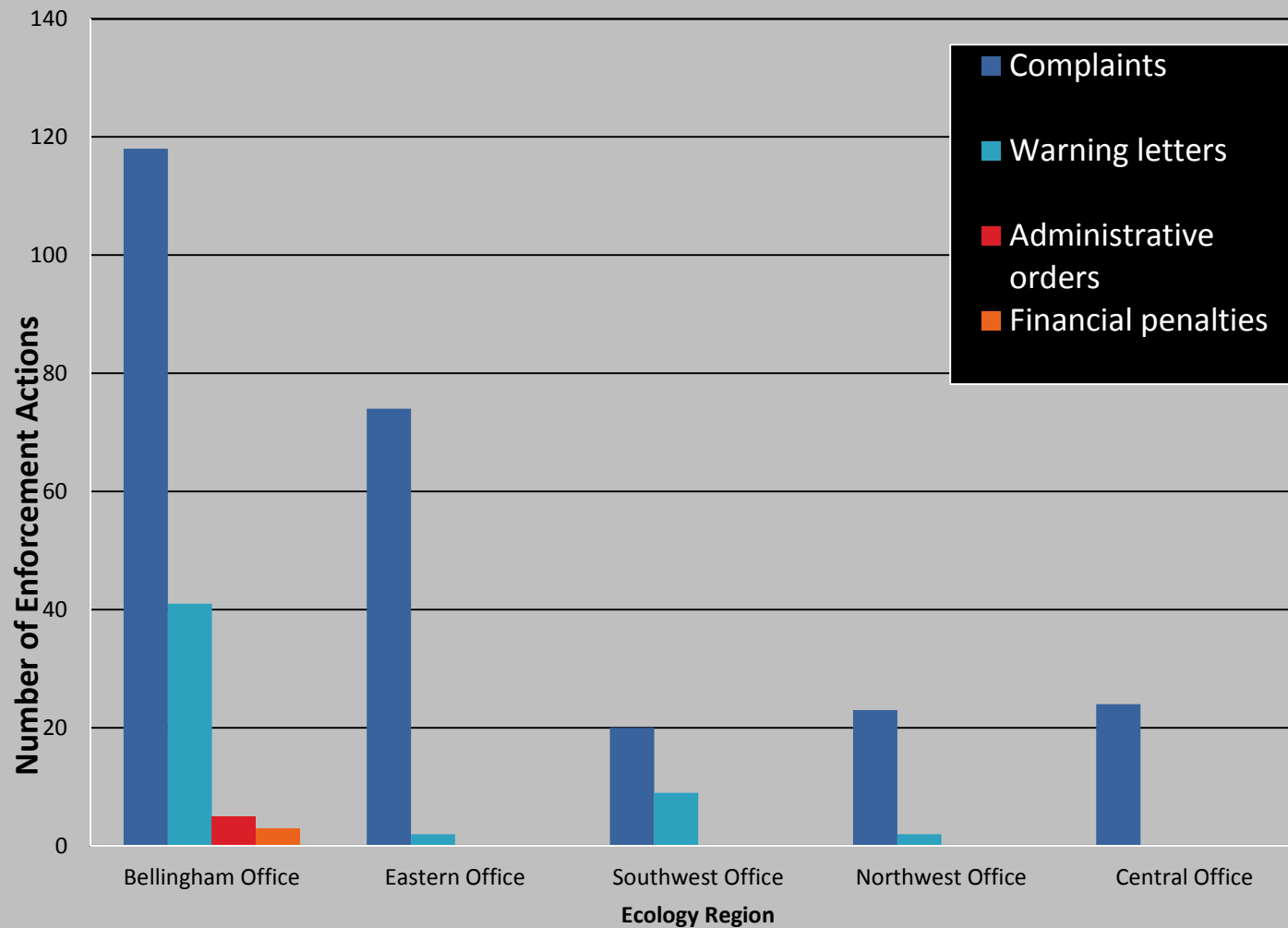


## Ecology Pollution Notification Letters by Type of Agriculture since 8/2013



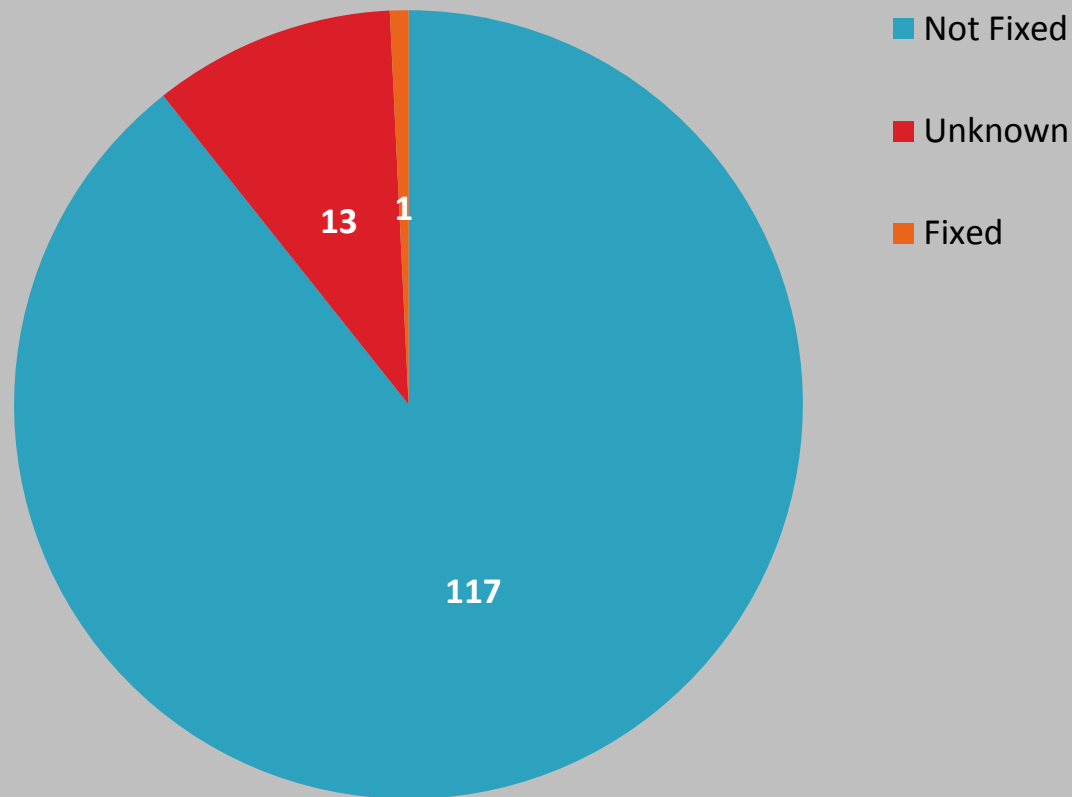
Ecology identifies locations of potential pollution sources based on site assessments. They contact the landowner with offers of financial and technical assistance. Most of the letters pertain to pollution from livestock operations.

## Enforcement Actions since 8/2013



If repeated offers of financial and technical assistance are refused, Ecology may issue enforcement actions, including warning letters, administrative orders, and financial penalties. Although warning letters warn producers immediate action is necessary, few result in further enforcement action.

## Pollution Correction in Eastern Washington since 8/2013



Ecology's pollution notification letters in Eastern Washington rarely result in fixing pollution problems. Of the 131 letters only one pollution problem has been fixed.

*“This regulatory backstop is necessary because there must be reasonable assurance that the abatement strategies for nonpoint sources will actually take place. If nonpoint sources are not addressed, federal law shifts reduction requirements to point source dischargers.”*

P. 30-31 Washington’s Water Quality Management Plan to Control Nonpoint Sources of Pollution (July 2015)









*Guidance for Water Quality-Based Decisions: the TMDL Process (April 1991).*

- In order to allocate loads among both point and nonpoint sources, there must be reasonable assurances that nonpoint source loads will in fact be achieved. Where there are not reasonable assurances, under the CWA, the entire load reductions must be assigned to point sources.

# EPA Region 10 Interim Reasonable Assurance Policy (August 2, 1999)

- Reasonable assurance is provided when all of the following elements are fulfilled:
  - Existing implementation commitments within the watershed are documented, such as currently funded BMPs and other restoration projects, letters of commitment from landowners, local ordinances, etc., and
  - Commitment is provided to:
    - Develop an implementation plan within a specified period of time, and
    - Include a monitoring program in the implementation plan which evaluates both 1) implementation of BMPs and other needed control actions, and 2) trends in relevant water quality parameters, and
    - Seek funding for the implementation plan, and
  - The process for revising the TMDL is explained.



# *American Farm Bureau v. U.S. EPA*

- “Preventing the EPA from expressing allocations and timelines and from obtaining reasonable assurance from affected states appears to frustrate those goals, and thus the phrase ‘total maximum daily load’ has enough play in the joints to allow the EPA to consider and express these factors in its final action.”
  - *American Farm Bureau Federation v. U.S. E.P.A.*, 792 F.3d 281, 300 (3<sup>rd</sup> Cir. 2015).

# Hangman Reasonable Assurances

- Spokane County Volunteer Water Quality Monitoring Project
- Spokane County Shorelines Inventory and Assessment Project
- Spokane County Conservation District
- Natural Resources Conservation Service
- Washington Dept. of Ecology
- **I WOULD LIKE TO INCLUDE SOME OF THE INACTIVE PROGRAMS HERE AS WELL**

# Ecology Employees on Enforcement<sup>1</sup>

- “I can’t believe how bad it is at Lemire’s right now. It is like the stuff up in Hangman Creek and Peone Prairie. Clear pollution coming off sites and we can’t take an enforcement action.”
  - Ben Rau to Chad Atkins, December 11, 2015
- “Yep. It has been 2 ½ years since the order was upheld by the Supreme Court and the site conditions are virtually the same as they were in 2003. The fact that we have not asked that he work to comply with the order is shameful.”
  - Chad Atkins to Ben Rau, December 11, 2015

<sup>1</sup> Obtained from Ecology Public Records Request

# What is the problem with dryland Ag?

- Nearly 6 million acres are in dryland production in Washington (area of 12 Thurston Counties)
- Average conventional farming erosion rate in Palouse is ~14 tons per acre (Can be as high as 100 tons per acre)
- ~15 million tons of soil erode annually in the Palouse and 2 million enter the Snake River
- Only a small fraction of streams have a healthy, protected riparian corridor.

# Lemire Today



















































