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Western Environmental Law Center

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Via Electronic Mail

Governor Jay Inslee
Office of the Governor
P.O. Box 40002
Olympia, WA 98504-0002
T: (360) 902-4111

Re: Appeal of Department of Ecology's Denial of Petition to Amend WAC 173-557
(Spokane River Instream Flow Rule) under RCW 34.05.330

Dear Governor Inslee,

Thank you for considering this appeal of the Department of Ecology's ("Ecology's") denial of a petition for a rule amendment submitted on behalf of the Center for Environmental Law and Policy, American Whitewater, and Sierra Club (collectively, "Petitioners"). We respectfully request that you grant the petition and protect all instream values of the Spokane River, including recreational boating opportunities, a significant navigational use of the river. A copy of the original petition, supporting exhibits, and Ecology's decision denying our petition are included on a CD attached to this letter.

We would like to make it clear that our goal in bringing this appeal to you is to reach an amicable agreement with Ecology to amend the Spokane River Instream Flow rule in a manner that takes into account and protects aesthetic and recreational values, while also protecting fish habitat. While we are simultaneously appealing Ecology's decision to Thurston County Superior Court, we are required to do so to preserve our appeal rights pursuant to the Washington Administrative Procedure Act. Our hope is that you will be willing to resolve the issues raised in our appeal without the need for protracted litigation. If we are able to reach an agreement, we would withdraw our appeal filed in Thurston County Superior Court. We are asking that you direct the Department of Ecology to re-open the Spokane River Instream Flow Rule and reassess the minimum summer flows that are needed to protect and preserve recreational and aesthetic uses of the river. Because the Petitioners and Ecology agree that higher flows than those protected in the existing rule will not harm the fish, we believe that a mutually agreeable resolution is possible that is best for the Spokane River.

As background, in February 2015, after fifteen years of deliberation, Ecology adopted an instream flow rule for the Spokane River. WAC Ch. 173-557. The rule establishes flow targets at the Monroe Street Dam, including a 6,500 cubic feet per second (cfs) flow for the spring months, a 1,250 cfs flow for the autumn and winter months, and a summer season flow of 850 cfs. It is the low summer flow of 850 cfs that we are asking Ecology to revise upward through our petition to amend the instream flow rule.

Unfortunately, the Spokane River is under threat for a number of reasons, including declining summer flows caused by over-allocation and climate change, increased demand for out-of-stream use due to population growth, and increased demand on the Spokane-Rathdrum Valley Aquifer on the Idaho side of the border. In light of these conflicting demands on the Spokane River, Ecology is presented with a unique opportunity to manage and protect instream flows by adopting a rule that protects all instream values and applies valid scientific principles. The Petitioners filed the petition to amend the Spokane River Instream Flow Rule because it does not fulfill Ecology's statutory responsibilities to protect ALL instream values, including recreation and aesthetics. RCW 90.22.010; RCW 90.54.020(3) ("Perennial rivers and streams of the state shall be retained with base flows necessary to provide for the preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values.").

There is no question that the Spokane River is a treasured recreational resource uniquely located in the backyard of Eastern Washington's urban center, the city of Spokane. Sadly, Ecology has taken the position that it is not required to study and protect flows for aesthetics and recreation, and that it may choose to protect flows just for fish. This approach is not only contrary to the plain language of RCW 90.54.020(3), it takes away a valuable tool Ecology can use to protect Washington rivers to facilitate the growth of the recreational boating and tourism industry. In our petition to Ecology, we submitted a detailed expert report prepared by leading Aesthetic-Recreation Flow Researchers, Drs. Bo Shelby and Doug Whittaker, which concludes that "Ecology's instream flow rule substantially reduces the number and quantity of boating opportunities in a typical recreation season." Petition to Amend at 38 (Exhibit 7). We also submitted declarations from operators of rafting and river guiding businesses that confirmed that the low summer flows Ecology selected in the rule would be detrimental to their business operations. (Exhibits 30-32). Ecology should not be taking action that is detrimental to the recreational boating industry and the jobs that it supports. Instead, the state should be doing more to encourage the growth of the industry. An amended instream flow rule that protects higher summer flows is one way to do that.

Ecology contends that it set instream flows at levels that will sustain healthy fish populations, but in reality Ecology selected an instream flow that the Washington Department of Fish and Wildlife found was "the floor" of flows suitable for fish habitat. An instream flow rule should not be used as a race to the bottom. Washington's precious and finite water resources deserve more protection than the bare minimum, especially given the increasing threats to healthy instream flows, such as increased demand in

Idaho. The drought that we experienced last year makes it clear that Ecology must use all tools available to protect instream flows in a proactive manner that fosters resiliency in the face of climate change. Ecology does not dispute that “natural higher flows, above 850 cfs, would not be detrimental to fish,” and cites to no reason why higher flows (which are necessary for recreational boating) cannot be protected as well. Ecology Denial at 8.

The legislature has made it clear that Ecology must protect, optimize and, where possible, enhance all uses of the state’s public waters, including instream values. RCW 90.03.005 (“It is the policy of the state to promote the use of the public waters in a fashion which provides for obtaining maximum net benefits arising from both diversionary uses of the state’s public waters and the retention of waters within streams and lakes in sufficient quantity and quality to protect instream and natural values and rights.”); RCW 90.54.020(3) (“The quality of the natural environment shall be protected and, where possible, enhanced as follows: (a) Perennial rivers and streams of the state shall be retained with base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values.”). Here, Ecology has found that enhancing the quality of flows in the Spokane River *is* possible in light of the undisputed fact that higher summer flows would not be detrimental to fish. Ecology must therefore capitalize on this opportunity and fulfill its statutory mandate by protecting higher summer flows for the Spokane River. Furthermore, it is important for the Governor’s office to establish the statewide precedent of assessing recreation impacts as part of the process to set in-stream flows.

Ecology does not disagree with the overwhelming evidence in the record showing that the recreational boating and tourism industry needs Ecology to protect summer flows that are higher than 850 cfs. Indeed, nearly 2000 comments were submitted during the rulemaking process asking Ecology to study aesthetic and recreation impacts and protect higher summer flows. The testimony of operators of rafting and river guiding businesses submitted in support of the petition lend further support for the notion that higher summer flows should be protected. Very few comments were submitted in opposition to higher flows.

Ecology has repeatedly reiterated that protecting higher flows in an instream flow rule “cannot provide flows in the river.” Ecology Denial at 8. But that misses the point and does not accurately reflect what we are asking Ecology to do. Protecting higher flows today will inevitably mean that there will be a greater number of days in which higher flows occur in the future. A range of stream flows, including high-flow years, is important in maintaining the health of a river’s ecosystem. Unfortunately, the 850 cfs summer instream flow would ultimately mean that summer flows would rarely be higher than 850 cfs – in effect making every year a drought year, so that the River never benefits from the effects of higher flows.

Furthermore, protecting higher summer flows can serve as a buffer in the face of climate change, which is expected to reduce stream flows and increase temperature. Ecology recognizes that the instream flow rule “is used to regulate junior water users to

protect the senior instream flow, and to provide specific criteria for making water right decisions.” Ecology Denial at 6. If Ecology fails to protect higher flows in the rule, then it loses all of its leverage and ability to protect flows above 850 cfs in the future, which would be highly detrimental to the recreational boating industry. This is especially problematic given the threats to Spokane river flows that are outside of Ecology’s control, such as reduced stream flow due to climate change or increased water withdrawals in Idaho.

We believe Ecology’s decision was contrary to law, arbitrary and capricious, and unfairly disadvantageous to the recreational boating industry. We respectfully request that you direct Ecology to initiate the process to amend the summer low flows in the Spokane River Instream Flow Rule. We would like to meet with you to discuss our appeal. Thank you for your time and attention to this matter.

Sincerely,

s/ Andrea K. Rodgers

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