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March 23, 2007

Travis Burns
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PO Box 47600
Olympia, WA 98504-47600

Re: Comments on Walla Walla draft rule amendments

Dear Mr. Burns,

Thank you for the opportunity to provide comments on the draft amendments to the Walla Walla basin rule, WAC Ch. 173-532. These comments are submitted by the Center for Environmental Law & Policy, Public Employees for Environmental Responsibility, and WaterWatch of Oregon.¹

Our organizations acknowledge the time and effort put forward by the agency, the watershed planning unit, and the community to address water resource issues in the basin. We understand other processes are underway to improve environmental conditions, and look forward to seeing positive results from those efforts. Our comments are submitted because of concerns that the Walla Walla watershed represents a water resource of state- and region-wide value, and that the adoption of rules must be consistent with state and federal laws and promote the public interest. We submit these comments in the spirit of improvement and understanding the challenge we all face in providing what we believe to be best for the resource.

Our organizations have several concerns with the draft rule. First, despite the fact that the waters of the Walla Walla basin are over-appropriated, to the point that a watermaster is required to manage and allocate water each summer, the rule opens groundwater to

¹ Please provide future documents relating to the rule to each of our organizations at the addresses shown above.

new, unmitigated water use. Because pumping from the shallow gravel aquifer affects flow in the river and its tributaries, the rule will worsen the condition of instream flows. Increased water pumping will create serious adverse consequences for existing (senior) water users and for ESA-listed fisheries.

Second, we are concerned that the rule is not based on adequate credible science in several respects. At least one of the instream flow allocations appears to be based on compromise, and the rule fails to establish flows for tributaries. There appears to be no basis for the quantities allocated for environmental enhancement projects. And science is lacking to determine the hydraulic connectivity of the basalt aquifers to both the Walla Walla basin surface waters and the gravel aquifer, as well as the Snake and Columbia Rivers, which are closed to new, unmitigated water rights.

Third, the rule lacks basic implementation elements to ensure that instream flows are met, and to properly manage water use in the basin. Water metering, conservation and groundwater monitoring, along with provisions for restoring flows in the Walla Walla are necessary and appropriate. This rule represents an opportunity to establish consistent, basin-wide (in Washington) standards for management, but ultimately fails to do so.

The details of our comments are set forth below.

I. General Comments:

1. The rule does not achieve instream flow protection purposes of the authorizing statutes.

As required by the implementing statutes, including RCW Chs. 90.54 and 90.22, a primary purpose of the draft rule is to establish flows in amounts necessary to preserve fish, wildlife, and aesthetic values. Unfortunately, of the actual “wet” water remaining in the Walla Walla River basin, the draft rule elects to allocate it to future permit exempt wells. While the rule designates instream flow quantities, these flows largely do not exist (particularly for the months of June-November) and are likely to be present in streams only a fraction of the time.

By establishing instream flow rules that will not be met even in the best situation and then decreasing the likelihood even further by allowing water withdrawals from the gravel and basalt aquifers, this rule conflicts with the purpose of establishing instream flows. RCW 90.54.020 requires that base flows be maintained to protect aquatic uses.

The instream flows are further undermined by allowing exempt wells in areas where groundwater withdrawals are *known* to impact stream flows. The rule allows wells to withdraw 5,000 gallons per day plus additional withdrawals for stockwatering in “low density” areas, notwithstanding the acknowledgement that withdrawals from the shallow aquifer in the basin will directly affect stream flows.

Rather than engaging in the fruitless exercise of promulgating flows that will not be met, the Walla Walla rule should establish strategies for flow restoration and protection – just as it does for out-of-stream domestic uses. Using the 30-year old template for adopting scientifically compromised flows that will rarely be met is no longer acceptable, particularly for a basin in which ESA-listed fish are present. Ecology must re-evaluate its approach to flow-setting and revise the rule to affirmatively protect the public’s interest in healthy, functioning aquatic ecosystems.

2. The rule should close and regulate water usage from the basalt aquifers.

The rule effectively determines that water is available from the basalt aquifers, because it fails to close those aquifers or otherwise require mitigation as it does for new withdrawals from the “gravel” aquifer in high-density land use areas. The distinction between basalt aquifer use and groundwater use is not supported in the science, and is problematic for three reasons.

First, both the City of Walla Walla and the Port of Walla Walla possess significant quantities of inchoate water rights that they can pump from the basalt aquifers. An ASR project is proposed by the City. The basalt groundwater source requires management as do all other water sources in the basin. The rule is deficient for failure to discuss access, closure and other management mechanisms for the basalts.

Second, the basalt aquifer may be hydraulically connected to the shallow aquifers and surface waters of the basin. Notably, some studies have shown the basalt aquifer discharges as much as 12,000 acre-feet of water per year to the gravel aquifer.² This is not an insignificant amount, as the total annual recharge for the gravel aquifer from all sources is estimated at 177,000 acre-feet per year.³ It is also known that the basalt aquifer controls flows in Mill Creek as well as discharges into surface streams in both the Blue Mountains and Horse Heaven Hills.⁴ If this is the case, then Ecology must manage the basalts as part of the larger system. While these numbers reflect broad estimates there is an absence of any studies examining the specific relationships between the two aquifers.

Importantly, the WRIA 32 Watershed Plan (2005) states "there is not enough known about groundwater conditions at this time to warrant specific revisions to portions of WAC 173-532 related to groundwater resources," predicting only that useful information may be available several years hence. We agree with the statement that not enough is known concerning connectivity between basalt and upper aquifers and surface waters. If

² Coombs, Mary Jane, *Threats to Water Quality in the Deep Basalt Aquifer, City of Walla Walla, Washington*, at 3 (April 2002). NOTE: The author cites the City of Walla Walla Comprehensive Water System Plan, as produced by Economic and Engineering Services (EES), for this data. See also, *Assessment of Surface Water and Groundwater Interchange in the Walla Walla Watershed*, at 25 (August 2005). Pub. No. 05-03-020 (“Newcomb (1965) reported that Mill Creek has a baseflow in summer of 40 to 50cfs coming from springs where the canyons reach down to the regional water table or to some of the zones of perched groundwater deep in the basalt.”)

³ Coombs, at 3.

⁴ Id.

in fact information is insufficient to determine specific connectivity to the gravel aquifer and surface flows, then it is incumbent upon Ecology to exercise the precautionary principle and take action to protect the resource, not throw it open for access to anyone who is capable of drilling a “deep” well.

On this score, the blanket repeal of Section 173-532-070, with no substitution of language for basalt aquifer management, is legally and scientifically indefensible. In the previous version of this rule, the agency determined that 125,000 acre-feet of water was available from the basalts and directed itself to monitor allocation of water rights.⁵ We do not agree that such a quantity was ever available, but how has Ecology now determined that even this limitation is no longer necessary? Section -070 should not be repealed, but should be amended to close the basalts to all new withdrawals.

Third and finally, it is known that the basalt aquifers of the Columbia Plateau, including in the Walla Walla basin, do generally discharge the Snake and Columbia Rivers. The Snake River is closed, and the Columbia is subject to a new management program that requires mitigation for new uses. To what extent will new water permits that access Walla Walla basalt groundwater affect or impact these two major river systems? Again, failure to identify and establish a management scheme for the basalt aquifers renders the Walla Walla rule incomplete.

3. The rule should impose basin-wide metering requirements.

Basin rulemaking provides an opportunity to impose specific, consistent water metering requirements on all water users. Under Washington law, water metering is required for most surface water users in watersheds where endangered salmon are present. In the Walla Walla basin, given the established fact of hydraulic connectivity between the shallow aquifer and stream systems, it is sensible to require metering and reporting for all users who affect the resource. The draft rule, however, is selective in its imposition of metering requirements (Section 173-532-050(1)(d)). Metering and reporting of water usage should be required basin-wide, with reference to metering rule requirements to establish details of the requirements.

4. The rule should impose basin-wide conservation requirements.

Basin rulemaking provides an opportunity to impose specific, consistent water conservation requirements on all water users. Under Washington water law, the exercise of water rights must be reasonably efficient and may not be wasteful. These general principles should be codified into the rule. Further, the rule should establish standards for different types of water use, including reference to plumbing code requirements, domestic household conservation elements, Ecology irrigation efficiency requirements, and other applicable standards and guidelines to promote water conservation.

⁵ The rule states 125,000 acre-feet is approximately 95 percent of the average annual recharge of the aquifer. WAC 173-532-070 (1977)

5. The rule should incorporate a groundwater monitoring plan.

Lack of scientifically-derived data impedes proper management of water resources. We recommend that the rule incorporate a provision to require and govern groundwater monitoring in order to generate the necessary data to evaluate the actual measure of water availability in the basin.

Groundwater and surface water are a single, interconnected resource and state law requires that they be so managed. In the Walla Walla basin, overdraft of groundwater is associated with declines in water levels, aquifer storage volumes, and downgradient surface flows. Understanding the abundance of water, time-scale of groundwater recharge and transport in the system is essential to protecting and managing the resource. Water levels need to be measured at a minimum twice annually according to protocols designed for consistency and utility, and logged into a web-accessible database so that the public may be informed of essential water resource information.

6. The rule fails to protect threatened species.

The rule should close the entire basin in April and May due to concerns for migrating populations of endangered salmon. Currently only two of the management units are closed in May. Because spring flows are critical for steelhead migration, the rule should be modified to provide essential protection.

New water uses that deplete flows during salmon migration periods may lead to violation of the Endangered Species Act (ESA). A primary purpose of the ESA is to conserve ecosystems upon which endangered species depend. NMFS and USFWS have determined that habitat modification or degradation, including the removal of water or other alteration to streamflow that is likely to impair spawning, migration, or other essential functions may constitute a violation of the ESA.

The Walla Walla river basin is home to two species of salmonids that are protected under the ESA: bull trout (*Salvelinus confluentus*)⁶ and summer steelhead (*O. mykiss*).⁷ These species are the focus of several studies and plans that identify inadequate streamflow as a limiting factor to species survival.⁸

Washington, through the Governor's Salmon Recovery Office (GSRO), has produced a summer steelhead and bull trout recovery plan for the Snake River Basin, which includes the Walla Walla River and its tributaries.⁹ The plan includes limiting factors to the viability of the Walla Walla Steelhead population. The report states; "Low flow, temperature, sedimentation, a lack of pool habitat, and habitat diversity are identified in

⁶ 50 C.F.R. 17.44(w); 50 C.F.R 17.31 and 17.21. Bull trout found in the Jarbidge River Basin of Idaho and Nevada are not listed. 50 CFR 17.44(w).

⁷ 50 CFR 223.102(a)(7).

⁸ See, Walla Walla Subbasin Plan, Walla Walla Habitat Conservation Plan, Snake River Salmon Recovery Board Plan.

⁹ Snake River Salmon Recovery Plan for SE Washington, (Dec. 2006).

the Walla Walla Subbasin Plan as the major factors limiting steelhead productivity in the lower Walla Walla mainstem (lower Walla Walla Mainstem is from the mouth to Dry Creek).¹⁰ These causes are the result of “historical and current land use practices....”¹¹

Upper Walla Walla mainstem limiting factors are flow and habitat diversity.¹² Flow impairment is primarily the result of irrigation withdrawals, but the “natural hydrologic regime and...gravel mining downstream of Nursery Bridge Dam” also affect flows.¹³ Specifically, the report notes, “Baseflows in the upper mainstem are also affected by numerous shallow wells (30 to 300 feet deep). There is a high degree of hydraulic continuity between surface springs and streams and aquifer levels in the region. An increase in the overall amount of well use has negatively impacted stream flows in some groundwater-influenced streams.”¹⁴ Flow and temperature are also limiting factors for the mainstem of the Touchet River.¹⁵

Several aspects of the proposed rule amendment appear to violate the protective provisions of the ESA. First, the rule allows for removal of water during the critical spring and summer months, by permitting groundwater pumping in the gravel aquifer. The rule acknowledges the hydraulic connectivity between the groundwater in the gravel aquifer and surface water (“new permit-exempt withdrawals from the gravel aquifer are likely to have cumulative impacts on existing water rights, including instream flows and the closed water sources.”)¹⁶ Although the rule requires mitigation, a determination on the efficacy of the mitigation is done after the fact, i.e.; after it has been determined that it is not working.¹⁷ By definition this means there has been an impact to instream flows significantly affecting essential functions of federally protected species.

More importantly, the rule allows for unrestricted, and un-metered, groundwater pumping in areas above the gravel aquifer not designated “high density.”¹⁸ Some of these “low density” areas include land along the Walla Walla mainstem, as well as tributaries, including the Touchet River.¹⁹ The Snake River Salmon Recovery Board found low flow and temperature as primary limiting factors in these areas. To allow continued and future groundwater pumping in this area documented to be in hydraulic continuity with salmon-bearing streams could result in harm harassment to federally listed species.

We urge the Department of Ecology to reject unmitigated water usage in the Walla Walla River basin, both during the spring migration period and year-round in areas designated

¹⁰ Id. at 162. (Dec. 2006). It should be noted that most of this report is based on the Walla Walla Subbasin Plan prepared for the Northwest Power and Conservation Council by the Walla Walla County Planning Unit and the Walla Walla Basin Watershed Council (May 2004).

¹¹ Id. at 163.

¹² Id. at 165.

¹³ Id.

¹⁴ Id. at 166.

¹⁵ Id. at 169.

¹⁶ WAC 173-532-050(2).

¹⁷ WAC 173-532-050(5).

¹⁸ WAC 173-532-050(1)(b).

¹⁹ See, Attachment “Gravel Aquifer” and App. 5 of the Economic and Least Burdensome Analyses Report.

as “low density.” Given the over-appropriated condition of the basin, it is essential that Ecology craft the rule and control water management to avoid consequences under federal laws.

7. Statewide rule consistency is needed.

As Ecology managers may recall from the “statewide” water appeals that culminated in the *Postema v. PCHB* decision, inconsistency in rule language can create confusing issues for the agency, water users and the public. In *Postema*, the Washington Supreme Court ultimately ruled that Ecology’s use of differing language in different watershed rules must be interpreted to signify that Ecology had different intent for each basin. We recognize that each watershed requires unique language regarding instream flow provisions. However, for definitions and standard implementation provisions, rule language should be identical from one basin to another.

In comparing the draft rule with recently adopted rules in the Stillaguamish and Skagit basins, it is evident that Ecology is using differing language for what should be consistent provisions statewide. Compare for example WAC 173-505-010 and -020, which contain more extensive language regarding reserved water rights and local government responsibilities and identify the purposes of the rule. The Walla Walla rule should track this language. Definitions are also inconsistent, including for important terms such as “consumptive use” “nonconsumptive use,” “mitigation plan” and “permit exemption” (the latter two of which are entirely missing in the WW rule). The Skagit rule contains a “compliance and enforcement” provision that more closely follows the governing statute (RCW 90.03.605). That language should be used here.

II. Comments on Specific Rule Provisions

Section -020 (Definitions)

Define the term “source,” which is substantively employed in several of the definitions. By limiting the scope of the rule to surface diversions and groundwater withdrawals, the rule will effectively exempt rain-catchment systems from regulation. Given the potential for use of rain and/or stormwater in the EEP process, this is a significant omission which should be corrected.

Subsection 8: Definition of the term “gravel aquifer” is very general and does not give proper meaning to the term as it is used in the rule. The rule makes it clear that “gravel aquifer” is not simply a type of aquifer, but instead is a specific location in the Walla Walla Basin. To avoid confusion and for clarity the definition should specify the specific “gravel aquifer” that is discussed throughout the rule.

Subsection 11: Definition of the term “non-consumptive use” should be expanded to ensure understanding that “no diminishment of the source” is specific to reaches and specific locations (i.e., partial de-watering of the source). Hence non-consumptive

should be defined as “return of water to the source at the point of diversion or withdrawal without change in quantity or quality.”

New Subsection 14 “Mitigation.” The term mitigation is referenced but undefined in the rule. Since mitigation measures are required for new permit-exempt users from the gravel aquifer in the high density area the term must be defined. We recommend the use of the following definition: means a scientifically sound plan, voluntarily submitted by a project proponent and approved by the department in consultation with Fish and Wildlife and affected tribes, to offset the impacts of a proposed water use or to offset a finding of non-availability of water. Such a plan must be consistent with state mitigation policy. Where impacts cannot be avoided or minimized, advance and in-kind mitigation are required.

Section -025 (Stream Management Units)

Designation of only four management points within a watershed that is 1,278 square miles (just in Washington) is wholly insufficient to determine water quantity impacts. Compare for example the Stillaguamish rule, which designates several dozen management points. WAC 173-505-040.

The lack of management points limits Ecology’s ability to determine the efficacy of mitigation, indications of possible illegal water use, and whether the overall management plan and instream flows are working. Given the carte blanche development of “low-density” zoned areas, absence of additional monitoring points will make it impossible to determine the impact of new wells on existing rights. Further, water rights are affecting a number of smaller tributaries in the basin and lack of management points means these streams will not be protected by management activities that ensure maintenance of instream flows.

Section -030 (Instream Flows)

We are concerned that 350 cfs flow established for the Walla Walla River at MP 5a in March and April is an insufficient flow for this reach and time period, that the considered opinions of fisheries resource experts were ignored, and that the flow set forth in the draft rule is a compromise approach that will not be effective in protecting the resource. We are also concerned that Ecology has not set flows (or established management points) in tributaries where new exempt wells will adversely affect streamflows.

Adoption of scientifically credible flows at the MP 5a management point is hindered by a lack of accurate historical flow data.²⁰ The draft rule proposes a flow of 350 cfs for March and April. However, the tribes and other agencies recommended a minimum flow of 450cfs for those dates.²¹ The Walla Walla Watershed Plan recommends these flows to be “interim flows” to be reevaluated after five years.²² After five years, the Planning

²⁰Walla Walla Watershed Plan, Section 6, 6-11 (May 2005).

²¹ Id.

²² Id.

Unit, initiating governments, and CTUIR will make a recommendation to either “1) extend the existing rule, 2) amend it as agreed upon, or 3) put a closure in effect at MP 5a.”²³ Ecology should adopt the recommended flow and adaptive management approach into the rule.

Ostensibly, the Planning Unit set the flow at 350cfs to allow for “greater management flexibility...”²⁴ However, this adaptive management principle is not applied equally. The burden of the “buffer zone” of flexibility falls most heavily on the instream flows. As a practical matter, a program to allow new wells to withdraw water from the gravel aquifer will provide no flexibility at all. Once a well and house are built and inhabited water use will not be curtailed. Instead, the rule allows for impacts to instream flows and hopes that increased or further future mitigation will protect the flows. As the Planning Unit makes perfectly clear, real flexibility only exists if there is “extra” water. This draft rule proposal is not an example of adaptive management; rather, it is the unequal balancing of instream beneficial uses and is contrary to the recommendations of qualified experts.

The Walla Walla Basin contains a number of smaller tributaries that are left entirely unprotected in the draft rule. The failure to set flows for smaller streams, combined with the decision to allow future groundwater withdrawals effectively means that instream resources will continue to be degraded. The rule should be revised to establish flows for tributaries to the Walla Walla and Touchet Rivers.

Section -040 (Closures)

The May 1 and June 1 closure dates are inadequate to protect spring migration of threatened steelhead. The closure date should begin no later than April 1.

See also our previous comments regarding need for improved definition of gravel aquifers, and the need to regulate basalt aquifers.

Section -045 (Future permitting)

Subsection (2) should link each of the conditions with the term “and,” not “or.” Each of these conditions must be met before a basalt aquifer water use is permitted. Also problematic is the reference to impairment, but failure to include other tests for new water permits as required in RCW 90.03.290 and other provisions of the Water Code. This rule cannot waive, for example, public interest or safe sustaining yield requirements for new water rights. By referencing one statutory test, but not others, the rule implies that other statutory requirements may be waived which is, of course, outside Ecology’s power to accomplish.

Subsection (2)(b) is also confusing in protecting only surface waters where flows are not established. The instream flows established in this rule are also protected under the water

²³ Id.

²⁴ Id.

code and this rule should either state it explicitly or (as discussed above) reference the water code, which requires protection of established instream flows.

Section -050 (Exempt Wells)

In General. The right to an exempt domestic well is conferred by statute and is not absolute. As the Washington Supreme Court noted in the *Campbell & Gwinn* decision, domestic wells are exempt from permitting requirements but not from the water code's prior appropriation hierarchy. The priority date of exempt wells is the date of first beneficial use of water. In a basin in which there is no extra water, the decision to allow new domestic uses of gravel aquifer groundwater will create a negative impact on both senior water rights and instream flows. Impairment will result. Ecology cannot adopt a rule that will lead automatically to impairment of existing water rights.

Subsection 1 (a). The decision not to limit and require mitigation for water withdrawals in the "Burbank area" based on the rationale that the groundwater discharges to the Snake and Columbia does not properly acknowledge that the Snake and Columbia are also closed to new, unmitigated water rights.

Subsection 1 (b) and (c). The gravel aquifer is hydraulically connected to surface waters in the basin, including small tributaries that are not addressed in the instream flow rules section of the draft rule. "Low-density" areas exist adjacent to the Walla Walla mainstem as well as tributaries that provide water to senior users and are significant for environmental reasons, and which already have inadequate flow. By allowing continued future use of exempt wells in these "low-density" areas, Ecology would effectively allow new junior rights holders to take and use water to the detriment of senior rights, instream flows and fisheries. All new water use in the basin, regardless of source, should be subject to the mitigation requirements of Subsection (2).

One of the problems not addressed in the rule is that, by allowing uncontrolled and unmitigated water use in one area, the rule will effectively push growth to that area. The rule will end up having the (perhaps) unintended consequence of exacerbating development of rural properties. In reality, when a basin is closed to new water rights, other mechanisms come into play to address water shortages, including transfers, banks, trust water rights, etc. By only doing the job half-way, the rule would create more problems than it solves.

In sum, the restrictions on pumping from the gravel aquifer contained in subsection 2 should apply to the entire land area above the aquifer, regardless of zoning.

Subsection 1(c). Allowing new, unmitigated water use for stockwatering will impair both senior water rights and instream flows. Further, the rule appears to assume that exempt well use for stockwatering is allowed in amounts in excess of 5,000 gallons per day. This assumption arises from a controversial and erroneous interpretation of RCW 90.44.050. It should not be codified into rule.

Subsection 1(d). As discussed above, metering should be required of all water users in the basin. Further, the rule provides no rational basis to differentiate between wells. In spite of the unquestioned connectivity of ground and surface water in this area and the likely impact on instream flows by the pumping of groundwater the rule sets metering and enforcement requirements that are so arbitrary and capricious as to render them useless. Metering is only required for wells in high density areas and only for the months of May through November. As mentioned above, the high density areas only cover approximately half of the area above the gravel aquifer and do not include vital areas adjacent to the Touchet River. By limiting metering in this way, Ecology makes it impossible to determine cumulative impacts of the rule.

Subsection 2: We applaud the adoption of a provision that forbids development of exempt wells in the high-density area unless mitigation is provided prior to use. Unfortunately, there are several infirmities in the execution of this provision.

First, the rule should dispense with the term “water-for-water mitigation” and utilize a more precise and quantifiable term, such as “equivalent quantities.” The rule should specify that mitigation must occur in the location where water depletion occurs.

Second, the time window (May 1 to November 30) for mitigation lacks scientific support. For example, Ecology cannot demonstrate that withdrawals from the gravel aquifer in April will not have an impact on surface waters and therefore senior rights, both off-stream and instream during later months. This limitation should be removed.

Third, by requiring mitigation only for outdoor use, Ecology is effectively assuming that indoor use is non-consumptive. This may be an erroneous assumption. If the household is served by the sewer system, the water is carried away from the property and area where it serves as recharge. It is common for sewer service to extend to high-density development, and in fact may ultimately be required. If the household is served by a septic system, the rule appears to assume that septic recharge will mitigate for in-house use.

This approach to mitigation has previously been rejected as not protective of senior rights:

As a policy matter, the proliferation of septic systems has been shown to cause deteriorations in water quality. As a matter of law, the right [the applicant] seeks would be perpetual. But the history of urban development shows us that septic systems near urban areas tend to be interim facilities only, and are usually replaced eventually by sewers. Sewers, with tightline removal to treatment facilities and on to Puget Sound, would eliminate the septic system’s groundwater recharge function, but the water right would live on. We conclude that the present use of septic systems, with resulting partial recharge of groundwater, should not be the basis for granting a perpetual right to Cedar River.

Cedar River Water & Sewer District v. Ecology, Final Findings of Fact, Conclusions of Law & Order, PCHB No. 96-59, 96-60 (1996).

Finally, the rule contemplates exceptions to the requirement that mitigation be provided prior to use. Because of the over-appropriation of water in the Walla Walla basin, it is difficult to imagine a situation where new water use would not ultimately impair senior rights and instream flows. In addition, the vague exception language provides too much discretion to Ecology. This exception should either be eliminated, or qualified to ensure protection of senior rights (instream and offstream) and the public interest and include standards that guide Ecology's exercise of the exemption in the future.

Subsection 5: The rule states that if mitigation is not effective, the department shall order a notice stopping all use. How does Ecology plan on making this determination? It is completely unrealistic to expect that households that are dependent on these new junior wells will stop using water that is needed for sanitation and drinking. Indeed the state Department of Health would likely not allow such a result.

Ecology has not allowed issuance of new water rights from the gravel aquifer for many years, as provided in the existing Walla Walla rule. The re-opening of this aquifer is not justified in science or law.

The only way to protect and give meaning to the instream flows established in this rule (as well as senior water rights), is to require, without exception, mitigation prior to any withdrawals from either the gravel or basalt aquifer, up to the maximum allowable use.

We suggest a program by which unused mitigation water (demonstrated via a multiple-year record of pumping) be made available via water bank purchase to other users or to satisfy instream flow requirements. Such a program would allow for the out of stream uses established in the rule and give meaning to establishing instream flows "in amounts necessary to provide for preservation of wildlife, fish, scenic, aesthetic, and other environmental values, and navigational values."²⁵

Section -055 (Future Withdrawals for EEPs)

The concept for Environmental Enhancement Projects is interesting and potentially positive for improving instream flows in the Walla Walla Basin. We are concerned, however, that Ecology failed to utilize a credible, scientific basis when establishing the quantities of water set forth in Table III as available for allocation.

The title for Table III "Maximum Allowable Allocation for EEPs" contributes to the concerns regarding the actual availability of water to serve EEP purposes. The title should be revised to indicate that these water quantities are only potentially available, and are subject to further review and possible limitations. We suggest the title of the table be changed to "Maximum Potential Allocation for EEPs" to provide clarification that the full amounts may not actually allocable in the future.

²⁵ WAC 173-500

Section -090 (Enforcement)

Even when a determination is made that mitigation is insufficient or in circumstances where water is being illegally used, the rule's weak enforcement rules will fail to protect impacts to instream flows. The rule attempts to enforce the regulations first through voluntary compliance. Although the rule provides that "in appropriate cases" some other enforcement mechanism would be used, the failure to specify alternatives is vague and problematic.²⁶ Appropriate cases is not defined, although it likely means "egregious cases", which is the language used in the Skagit instream flow rule.²⁷ However, neither rule defines such an occurrence or what Ecology would do if it discovered one. There is no reason not to include criteria and processes as to what constitutes "appropriate cases" and what actions Ecology will take. This rule could be challenged as unconstitutional due to vagueness, because water users do not know whether they are in violation to warrant being classified an "appropriate case" or the consequences of that classification.

Again, thank you for the opportunity to comment on the draft Walla Walla watershed rule.

Sincerely,

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²⁶ Id.

²⁷ WAC 173-503-090