



CLEAN, FLOWING WATERS FOR WASHINGTON

The Center for  
**Environmental Law & Policy**

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Dear Director Watson, Ms. Verner, and Director Tebb:

This letter is to express CELP's serious concerns over Crown Columbia Water Resources, LLC ("Crown")'s unprecedented application (No. S4-33625) for a water right that appears to be intended to allow new diversions of water almost anywhere in the Columbia Basin. An area-wide permit of this type has, to CELP's knowledge, never been approved or implemented in Washington. It would be an entirely new type of water appropriation program and raises serious legal and policy questions. We believe that approving such a permit would be unlawful, and have grave concerns about the process that is being followed.

**The application is not adequate to allow issuance of a permit under the Water Code.**

Appropriation of water in Washington is governed by the Water Code, Chapter 90.03 RCW. The right to appropriate water may be obtained only through the Water Code's procedures:

The power of the state to regulate and control the waters within the state shall be exercised as hereinafter in this chapter provided. Subject to existing rights all waters within the state belong to the public, and any right thereto, or to the use thereof, shall be hereafter *acquired only by appropriation for a beneficial use and in the manner provided and not otherwise . . .* RCW 90.030.10 (emphasis added).

Crown's application wholly fails to comply with the Water Code's procedures.<sup>1</sup> First, there is no basis in the Water Code for even *processing an application* for a water right whose quantity and rate of withdrawal, place of withdrawal, and place of use are all unspecified, let alone *granting* such a right. Application for a water right is governed in part by RCW 90.03.260:

(1) Each application for permit to appropriate water shall set forth the name and post office address of the applicant, *the source of water supply, the nature and amount of the proposed use, the time during which water will be required each year, the location and description of the proposed ditch, canal, or other work, the time within which the completion of the construction and the time for the complete application of the water to the proposed use.* (emphasis added).

Crown's scheme as we understand it would violate nearly all of these legal requirements. By its nature, an area-wide permit such as Crown proposes *cannot* state "the source of the water supply." We believe that "the Columbia River Watershed, a Tributary to the Pacific Ocean" is a wholly inadequate description of a water source and have no doubt that the courts would agree.

The "nature and amount" of the proposed new water use(s) are also unspecified and indeed are completely unknown.<sup>2</sup> The "location and description of the proposed ditch, canal or other work" for diversion cannot be known without specifying, at a minimum, where the new water use would take place. And obviously the time for construction of works and use of the water cannot be known at the time of this permit application. The absence of any one part of this information would violate RCW 90.03.260(1). Complete failure to specify *any* of it is so far beyond the statutory scheme as to border on the ridiculous.<sup>3</sup>

Second, issuance of a water permit based on this complete lack of legally required information would violate Ecology's duty to conduct the four-part test of RCW 90.03.290:

- 1) When an application complying with the provisions of this chapter and with the rules of the department has been filed . . . it shall be [Ecology's] duty to investigate the application, and determine what water, if any, is available for appropriation, and find and determine to what beneficial use or uses it can be applied.

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<sup>1</sup> The Public Notice published as a requirement of Crown's area-wide application shares these material deficiencies. This is especially egregious as this Notice appears to have been prepared by Ecology staff. CELP submits that the proper response to such a grossly deficient application would be to reject it out of hand, rather than participating in moving towards approval.

<sup>2</sup> Crown presumably would identify any new uses at the time that it sells or leases part of a water right to the new user. This fails to comply with the Water Code, and indeed is nothing more than rank speculation.

<sup>3</sup> Depending on Crown's ultimate intended water use, numerous other sections of RCW 90.03.260 would also be violated. For agricultural use, "the application shall give the legal subdivision of the land and the acreage to be irrigated, as near as may be, and the amount of water expressed in acre feet to be supplied per season" RCW 90.03.260(2); for domestic or community supply, "the application shall give the projected number of service connections sought to be served" RCW 90.03.260(2); and for municipal water supply, "the application shall give the present population to be served, and, as near as may be estimated, the future requirement of the municipality." RCW 90.03.260(2). None of this information is addressed in any way by Crown's application.

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- 3) The department shall make and file as part of the record in the matter, written findings of fact concerning all things investigated, and if it shall find that there is water available for appropriation for a beneficial use, and the appropriation thereof as proposed in the application will not impair existing rights or be detrimental to the public welfare, it shall issue a permit. . .

As a threshold matter, Crown’s application cannot possibly “compl[y] with the provisions of this chapter,” for the reasons given above. Ecology has no legal authority to even examine such an application, let alone issue the permit. CELP believes that issuing an ROE based on this application would be an *ultra vires* action by Ecology.

Even if Ecology were to (unlawfully) make such an investigation, it could not find that the four-part test of RCW 90.03.290(3) was satisfied. Without knowing the specifics of the proposed withdrawals (which would occur at an undetermined number of unidentified locations at times and rates which have not been specified) it is impossible to determine, for example, whether the proposed withdrawal would “impair existing rights,” let alone whether it might be “detrimental to the public interest.”

Third, appropriation for beneficial use rather than for speculative purposes is the very foundation of our Water Code. Under State as well as Federal law, beneficial use is the “basis, the measure, and the limit of the right.” *Department of Ecology v. Acquavella*, 131 Wn.2d 746, 755 (1997). But Crown does not propose to appropriate water “for a beneficial use” as required by RCW 90.03.010. Rather, Crown proposes to claim the *future* right to appropriate water for purely speculative purposes. Such “water hoarding” has never been allowed in Washington and should not be allowed now.

Approving a water permit under these circumstances would exceed Ecology’s statutory authority and be arbitrary and capricious, and the approval would be subject to judicial review and reversal under RCW 34.05.570(4). It is difficult to conceive of such a decision *not* being litigated.

**Ecology appears to be following an irregular process, including failure to notify stakeholders of an opportunity to comment on the actual proposal.**

Ecology’s process has also suffered from serious deficiencies. On February 3, 2021, following publication of the notice of application for water right, the Methow Valley Citizen’s Council, Okanogan Highlands Alliance, and CELP submitted a joint letter of objection to Ecology’s acceptance of the application. The letter addressed some of the same points made here regarding insufficiency of the application. CELP never received a response to this letter.

On Wednesday, March 3d, CELP Attorney Dan Von Seggern received an email from a member of the press asking about the proposal. That reporter subsequently provided Mr. Von Seggern with copies of the Focus Sheet prepared by OCR<sup>4</sup> and a story in the Methow Valley News (MVN) regarding the possible impacts of this water right application. According to the MVN article, “Ecology recently sent

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<sup>4</sup> Office of the Columbia River (2021), “Focus on: Proposed Crown Columbia water bank” (Focus Sheet).

a letter requesting input on the proposal to hundreds of local, state and federal officials, tribal leaders and other stakeholders<sup>5</sup> in the Columbia River basin in Washington.” It appears that Ecology’s request for input failed to include groups such as CELP, even though we had specifically addressed the project in our letter to Ecology.

Further, Ecology appears to be actively working to support this water right application. CELP agrees that this project is unprecedented, and that detailed consideration is an absolute requirement before any approval<sup>6</sup>. For that reason, dissemination of information is appropriate. However, the Focus Sheet distributed by OCR is of a type normally used for a project that Ecology has already determined to carry out, and usually is ongoing. CELP does not recall this kind of document being prepared for a mere water right application. At a stage when the application has not been approved (and as noted above, faces tremendous legal uncertainties), CELP believes that Ecology’s Office of the Columbia River placing its institutional thumb on the scale is improper. If nothing else, distributing information about a project in this format gives the impression that it is being approved, and creates momentum that can potentially discourage inquiry into the project and public participation in the decision-making process.

**The area-wide permit approach appears to be an attempt to minimize review of new water diversions.**

The stated reason (per OCR) for approving an area-wide permit is that it would “reduce much of the individual administrative costs associated with processing water rights.”<sup>7</sup> It is unclear how the existence of a wholly non-specific area-wide permit would be able to reduce the “administrative burden” associated with these processes unless OCR believes that the normal investigation into water availability and impairment could somehow be cut short. Nothing in Washington law would allow this, and CELP submits that any attempt to do so would be flatly unlawful. An impairment analysis based only on the area-wide permit would do nothing to ensure that other water right holders were not adversely affected by the unspecified new diversions of water that are contemplated here.

Crown appears to contemplate diverting water at multiple, not-yet-identified locations in the Columbia Basin, and mitigating the new diversions by placing other water rights in trust (possibly hundreds of miles away from the new use). Regardless of what Crown would have Ecology believe, each possible point of diversion would involve unique local conditions. Whether other water right holders or instream flows would be impaired, and whether any impairment was adequately mitigated through Crown’s water bank, would have to be examined for each such diversion. RCW 90.03.290. This process is not appreciably different from that associated with an ordinary water right application and would require that a Record of Examination be generated for each new diversion of water. RCW 90.03.290(3). That is not a process that can be waived under the Water Code, and Ecology should decline to even consider such a sweeping change in policy.

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<sup>5</sup> Again, CELP never received even a response to its letter of concern, let alone any “request for input.”

<sup>6</sup> CELP in no way concedes that such detailed consideration would substitute for following the procedures set forth in statute, as discussed above.

<sup>7</sup> “If approved, the area-wide permit will reduce much of the individual administrative costs associated with processing water rights, adding efficiency and flexibility to their use.” Focus Sheet.

Again, this strategy is overwhelmingly likely to result in litigation, and may do so for each new proposed diversion. Having to defend each new (and improper) diversion of water would surely be a larger “administrative burden” than would following the correct procedure in the first place.

For the reasons stated here, CELP urges Ecology and OCR to cease consideration of any such area-wide water permit. If such a sweeping change in water management is to be made, that is the province of the Legislature. Ecology has no authority to overturn our state’s water management framework in this manner. Please contact me if you would like to discuss CELP’s concerns, or if I can provide you any further information.

Sincerely,

A handwritten signature in black ink that reads "Trish Rolfe". The signature is written in a cursive, flowing style.

Trish Rolfe  
Executive Director  
Center for Environmental Law & Policy