☐ EXPEDITE
☐ No hearing is set
☐ Hearing is set:
Date:
Time:
Judge/Calendar:

SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

CENTER FOR ENVIRONMENTAL LAW & POLICY, AMERICAN WHITEWATER, AND SIERRA CLUB, Petitioners, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, AND JAY INSLEE, Respondent,	No. 16-2-02161-34 PETITION FOR DECLARATORY JUDGMENT AND JUDICIAL REVIEW OF AGENCY ACTION AND AN ADMINISTRATIVE RULE CLERK'S ACTION REQUIRED

I. INTRODUCTION

1. The Center for Environmental Law & Policy, American Whitewater, and the Sierra Club ("Petitioners") hereby seek judicial review and declaratory judgment regarding (1) the validity of that portion of the current Instream Flow Rule for the Spokane River & Spokane Valley Rathdrum Prairie Aquifer, Chapter 173-557 WAC (hereinafter "Rule"), that adopts the 850 cubic feet per second ("cfs") summer instream

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flow for the Spokane River (Exhibit 1), and (2) the Department of Ecology's denial of Petitioners' Petition to Amend WAC 173-557 that sought to reopen the rulemaking process for Ecology to reconsider the 850 cfs summer instream flow adopted in the Rule (Exhibit 2). Petitioners seek amendments that would bring the Rule into compliance with Ecology's governing statutes and all applicable law.

2. The Spokane River ("River") flows through the City of Spokane and is an important scenic, aesthetic, and recreational resource in Washington State. The River, uniquely situated in the front yard of the urban center of Spokane, supports a whitewater rafting and kayaking industry, and a unique wild trout fishery. Existing scientific information shows that the Spokane River is experiencing a "low flow trend," due to a number of factors such as climate change, water use pattern changes, increases in municipal pumping, and reservation operations at Post Falls Dam. After fifteen years of deliberation, Ecology adopted an instream flow rule for the Spokane River that sets the summer flow so low that it does not protect all instream values, is detrimental to the recreational boating industry, and does not fulfill Ecology's statutory and constitutional mandates.

II. JURISDICTION AND VENUE

3. This court has jurisdiction to determine the validity of administrative agency rules under the Administrative Procedure Act, RCW 34.05.570(2)(a) and the Uniform Declaratory Judgment Act, RCW 7.24.010, which authorize declaratory relief, and to

determine the validity of all other administrative agency action under the Administrative Procedure Act, 34.05.570(4).

4. Venue is proper in Thurston County Superior Court under RCW 34.05.514 and RCW 34.05.570.

III. PARTIES

Petitioners

5. Petitioner Center for Environmental Law & Policy (CELP) is a member-supported Washington nonprofit corporation whose mission is to protect and promote stewardship of Washington's freshwater resources – the rivers and aquifers – through public education, public agency advocacy, policy reform, and public interest litigation. The core of CELP's work is based on the concept of the public trust doctrine – our waterways are held in trust by the state to ensure public access and use for navigation, environmental protection, recreation and aesthetics. CELP has been involved with the Spokane instream flow process since 1999, serving on the WRIA 55/57 Watershed Planning Unit ("WPU") until 2002, when the WPU elected to defer instream flow rulemaking until the WRIA 54 WPU was prepared to go forward. CELP representatives then served on the WRIA 55/57/54 Instream Flow Subcommittee for several years. CELP members frequently visit the Spokane River for recreation or to enjoy the

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aesthetic beauty of the river and its environs. The reductions in summer streamflow that will occur as a result of the 850 cfs instream flow will interfere with their recreational use of the River as well as reducing the aesthetic beauty that CELP members visit the River to enjoy.

6. Petitioner American Whitewater is a national nonprofit 501(c)(3) corporation that works to protect rivers throughout the United States. A significant percentage of American Whitewater members reside in the greater Spokane area, a short distance from the Spokane River and its remarkable recreational values. In October 2014, during the Spokane River Instream Flow rulemaking process, American Whitewater designed and administered a boater preference survey to identify flows that protect recreation values for the Monroe to Nine Mile reach of the Spokane River. On November 7, 2014, American Whitewater submitted comments on Ecology's draft Instream Flow Rule for the Spokane River. American Whitewater members frequently visit the Spokane River for recreation or to enjoy the aesthetic beauty of the river and its environs. The reductions in summer streamflow that will occur as a result of the 850 cfs instream flow will interfere with their recreational use of the River as well as reducing the aesthetic beauty that American Whitewater members visit the River to enjoy.

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7. Petitioner Sierra Club is a national non-profit 501(c)(3)/(c)(4) organization with a mission to protect, explore and enjoy the planet. The local Sierra Club group, the Upper Columbia River Group, has been a longstanding advocate for preserving the natural and public resource values of the Spokane River, and has worked on Spokane watershed issues as varied as water quality, dam relicensing, Superfund and toxics cleanup, upper watershed (forest) protection, and watershed planning and water resources. Sierra Club provided comments on the draft WRIA 55/57 Watershed Plan and instream flow recommendations, and approximately 1,800 Sierra Club members commented on the draft instream flow rule which is the subject of this petition. Sierra Club members frequently visit the Spokane River for recreation or to enjoy the aesthetic beauty of the river and its environs. The reductions in summer streamflow that will occur as a result of the 850 cfs instream flow will interfere with their recreational use of the River as well as reducing the aesthetic beauty that Sierra Club members visit the River to enjoy.

8. Attorneys for Petitioners are Andrea K. Rodgers, Western Environmental Law Center, 3026 NW Esplanade, Seattle, WA 98117, and Dan J. Von Seggern, Center for Environmental Law & Policy, 85 S. Washington St., Suite 301, Seattle, WA 98104.

Respondents

9. Respondent Department of Ecology is an administrative agency of the State of Washington that is responsible for the stewardship, management, regulation and

protection of the State's water resources. Ecology's statutory authority includes the authority to promulgate and revise regulations concerning instream flow water rights. Ecology was the agency responsible for drafting and issuing the Spokane River Instream Flow Rule, Chapter 173-557 WAC, and for denying the Petition to Amend the Rule. Ecology's mailing address is P.O. Box 47600, Olympia, WA 98504 and its physical address is 300 Desmond Drive SE, Lacey, WA 98503.

10. Respondent Jay Inslee, Governor of the State of Washington, is responsible under RCW 34.05.330 for deciding optional administrative appeals from agency denials of petitions to adopt, amend or repeal rules, and is named solely as a "party of record" under RCW 34.05.542. The Governor is currently considering Petitioners' appeal. Attached as Exhibit 3 is a true and correct copy of Petitioners' appeal letter to Governor Inslee. Governor Inslee's mailing address is: Office of the Governor, P.O. Box 40002, Olympia, Washington 98504-0002.

IV. LEGAL FRAMEWORK

Legal Protection for Instream Flows under Washington Law

11. In creating the Department of Ecology, the Legislature conferred upon the agency "the authority to manage and develop our . . . water resources in an orderly, efficient, and effective manner and to carry out a coordinated program of pollution control involving these and related land resources." RCW 43.21A.020.

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12. Ecology has several specific responsibilities as manager of the state's water resources, including (1) the supervision of public waters within the state; (2) the determination of streams, springs and other sources of water supply; and (3) the obligation to make "recommendations for legislation as the director deems advisable for the better control and development of the water resources of the state." RCW 43.21A.064.

13. Ecology has the authority to "undertake studies dealing with all aspects of environmental problems involving land, water, or air . . . ." RCW 43.21A.130.

14. In Washington, "[i]t 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 90.03.005. The Legislature has made it clear that "all waters within the state belong to the public." RCW 90.03.010.

15. Ecology is directed by statute to develop and implement a state water resources program "through the adoption of appropriate rules." RCW 90.54.040. Ecology's statutory responsibility to manage waters of the state includes a mandate to protect instream flows. In fact, recognizing the importance of maintaining instream flows, the Legislature adopted the Minimum Water Flows and Levels Act, Chapter 90.22 RCW.

Under this Act, Ecology is authorized to "establish minimum water flows or levels for streams, lakes or other public waters for the purposes of protecting fish, game, birds or other wildlife resources, or recreational or aesthetic values of said public waters whenever it appears to be in the public interest to establish the same." RCW 90.22.010. When setting instream flows, Ecology has a mandatory duty to ensure that "[p]erennial 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." RCW 90.54.020(3)(a).

16. When setting instream flows, Ecology "shall, during all stages of development [of] . . . minimum flow proposals, consult with, and carefully consider the recommendations of, the department of fish and wildlife, the department of [commerce], the department of agriculture, and representatives of the affected Indian tribes." RCW 90.03.247. The Spokane Tribe submitted a letter to Ecology in support of Petitioners' petition to amend the Instream Flow Rule for two reasons: "(1) its ability to protect the River during years of higher flow from new interruptible water users, and (2) its ability to provide for more protection for the Spokane River during a future apportionment between Idaho and Washington."

17. Once enacted by rule, instream flows constitute appropriations with priority dates of their effective date of establishment. RCW 90.03.345. And while instream flows set by rule are not retroactive, "[n]o right to divert or store public waters shall be

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granted by the department of ecology which shall conflict with" the instream flows set by rule. RCW 90.22.030. The Washington Supreme Court has expressly stated that that streamflows set by rule are to be maintained to protect beneficial uses of water, including aesthetics, recreation and navigation. *See Swinomish Indian Tribal Cm'ty v. Ecology*, 178 Wn.2d 571, 591-2, 311 P.3d 6 (2013).

18. The Spokane River Instream Flow Rule, WAC 173-557, implements numerous provisions of Washington water law, including RCW 90.54; RCW 90.22; RCW 90.82; RCW 90.03; RCW 90.44; RCW 90.42; RCW 18.104; RCW 43.27A; RCW 43.21A; and the Public Trust Doctrine.

19. WAC 173-557-100 provides that Ecology may "review and if necessary amend" the Rule if certain events take place, including if "[s]ignificant new scientific information becomes available." Statutory authority for this regulation comes from RCW 90.54.040, which provides "the department is further directed to modify existing regulations and adopt new regulations, when needed and possible, to insure that existing regulatory programs are in accord with the water resource policy of this chapter . . . .").

Washington Administrative Procedure Act

20. RCW 34.05.570(4)(c) allows a person aggrieved by the performance of an agency action, including the exercise of agency discretion, to seek relief if the court determines the action is outside the statutory authority of the agency or the authority conferred by a provision of law, is arbitrary or capricious, or is unconstitutional.

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21. RCW 34.05.570(2) allows the court to declare an administrative rule invalid if it finds that the rule exceeds the agency's statutory authority, is arbitrary and capricious or unconstitutional.

Declaratory Judgment

22. RCW 34.05.574(1) allows the court to enter a declaratory judgment order when reviewing a challenge to an existing administrative rule. Under the Uniform Declaratory Judgments Act, RCW 7.24.020, "[a] person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder."

V. FACTS

23. The Spokane River originates from Lake Coeur d'Alene in Idaho and flows into Washington State from the east. After flowing through the Spokane Valley and the City of Spokane, it joins the Columbia River at Roosevelt Lake.

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24. The River's lowest flows are seen in late summer, with seven-day low flows (the lowest seven-day period observed in the year) averaging 1141 cfs since 2008. The River's flow has been significantly diminished since the arrival of European settlers. River flow has been continuously monitored since 1891 at the "Spokane gage," just downstream of the Monroe Street dam. In that time, the average seven-day low flow during the summer has dropped from approximately 1800 cfs to 1141 cfs. Low flows also now occur significantly earlier in the summer due to climate change and other factors.

25. While the River is dammed in several places, there are significant free-flowing sections. The section of the River that is the subject of the Rule flows through the City of Spokane, and includes the scenic and aesthetically important Spokane Falls and is widely used for recreation. The Centennial Trail, a popular hiking and cycling route, parallels the River from the Washington/Idaho state line through the City of Spokane and offers numerous aesthetically pleasing viewpoints of the River. The Centennial Trail and the Spokane River environs are widely used for hiking, cycling, picnicking and swimming.

26. The reaches of the River above and below Spokane Falls, including the reaches flowing through the City of Spokane, are navigable. The River contains readily accessible whitewater that is used by thousands of kayakers, rafters, and river floaters

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during the summer season. The rafting industry on the River supports many jobs in the Spokane area and is a major draw for tourists.

27. One major attraction for whitewater rafters and kayakers is the segment of the River flowing through Riverside State Park, which includes the famous Devil's Toenail and Bowl & Pitcher rapids.

28. The Spokane River also hosts a unique fishery for wild Redband Trout, which supports sales of fishing equipment and use of guiding services as well as bringing visitors to the Spokane area. The opportunity to fish for Redband Trout in an urban setting is unique to the Spokane River. These fish are dependent on adequate summer river flows for rearing and growth. Fishing outfitters and guides depend on streamflow to access the River by floating and report that the aesthetic values of higher flows are important to their business. The flow adopted in the rule for summer season protection, 850 cfs, is considered by fishing outfitters to be inadequate for protection of the fish and for a viable guiding industry.

29. Groundwater withdrawals in the Spokane Valley dramatically affect river flow because of the region's unusual geology. The River is in hydraulic continuity with the Spokane Valley/Rathdrum Prairie Aquifer (SVRP) for much of its length. In "losing reaches" of the river, water seeps out through the riverbed into the aquifer, and is a major source of recharge for the aquifer. In "gaining" reaches, water discharges from

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the aquifer into the river, adding to its flow. This cold groundwater is important in that it both increases flow in the River and maintains a relatively cool water temperature in the River.

30. Ecology has issued numerous water rights, leading to large withdrawals of ground water that is in hydraulic continuity with the River. Over the last 100 years, water discharge from the aquifer to the River has decreased as pumping from the aquifer has increased.

31. Pressure for further water withdrawals from the River and the aquifer is likely to increase in the future. The City of Spokane holds inchoate rights for large additional withdrawals of groundwater. Exercise of these rights would significantly reduce streamflows, especially in the summer when flows are already at their lowest. The effects of climate change are predicted to shift streamflow earlier in the year, and to also decrease river flow in summer. This will further exacerbate the already low summer flows.

32. The Little Spokane-Middle Spokane (WRIAs 55 and 57) Watershed Planning Unit was convened in 1999. After fifteen years of negotiations, this group was ultimately unable to reach a consensus as to instream flows. Responsibility for establishing an instream flow then defaulted to Ecology.

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33. After consultation with WDFW, Ecology promulgated a draft rule with a summer instream flow of 850 cfs from June 16 – September 30. According to Ecology, river flows in late summer currently drop below 850 cfs about every other year. In other years, the lowest summer flows exceed 850 cfs. Streamflow is above 850 cfs in early summer (June 16 – early August) in essentially all years, but that may change in the future due to factors such as climate change and the exercise of inchoate water rights.

34. Setting the summer instream flow at 850 cfs makes it lawful for Ecology to issue water rights to the point that the 850 cfs threshold is reached. Given the demands on Spokane River water, this makes it highly likely that summer streamflows in all years will ultimately be no higher than 850 cfs at any time from June 15-October 1.

35. The draft rule was released for comment on September 17, 2014. During the public comment period, the vast majority of comments supported a summer instream flow greater than 850 cfs. Many commenters specifically referred to the impact that the 850 cfs low flow would have on navigation and recreation, including fishing, rafting, hiking, and aesthetics.

36. Despite the overwhelming number of comments received in support of higher summer instream flows, Ecology finalized the Rule with the 850 cfs summer flow as originally proposed. The Rule became effective February 27, 2015.

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37. In performing the Cost-Benefit Analysis (CBA) required by statute, Ecology considered only four types of costs associated with the Rule: the costs associated with streamflow gauging, the increased cost of changing/transferring water rights under the Rule, Ecology's costs for managing compliance, and the cost to mitigate certain new permit-exempt water uses.

38. A summer instream flow of 850 cfs would greatly diminish opportunities for summer use of the river, both for the general public that recreates on and near the River, and for businesses such as river rafting companies and fishing guide service. In the CBA, Ecology did not assess the costs of financial losses to recreational business due to decreased opportunity for river use, even though that information is readily available. Despite this omission, the CBA did contain information about the alleged "recreational and aesthetic benefits" as positive features of the instream flow rule.

39. Petitioners filed their Petition to amend the Rule on February 29, 2016. The Petition requested that Ecology amend the Rule to provide for higher instream flows in summer.

40. The petition included two expert reports, which were not available at the time that the Rule was finalized. Dr. Allan Scholz of Eastern Washington University provided a detailed report regarding the effect of streamflow on fish populations. Drs.

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206-696-2851

Bo Shelby and Doug Whittaker of Confluence Research & Consulting studied recreational and navigational opportunities at various streamflows.

41. The Spokane River Redband Trout population has decreased in recent years. Professor Scholz concluded "reductions in stream discharge between 1980 and 2015, appears to be the most plausible explanation for the decline in redband trout abundance." His report noted that lower streamflows may reduce production of invertebrates that serve as food for fish. He also notes that under conditions where food is limiting, fish are less able to cope with elevated water temperatures.

42. Drs. Shelby and Whittaker, Aesthetic and Recreation Flow experts, reported that the 850 cfs low flow was below the levels generally considered to be acceptable for aesthetics, recreation and navigation on the River. Their analysis of existing data and their own research showed that river users generally preferred flows considerably higher than 850 cfs and that such low flows eliminated recreational opportunities that could be protected with a higher flow.

43. In support of the petition to amend the Rule, Petitioners submitted declarations from the owners of two whitewater rafting companies and one fly-fishing retailer/guiding service. Their testimony indicated that adequate streamflows in the River were important to the economic viability of their businesses and to their ability to

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provide employment. Finally, the operators stated that regular summer flows of 850 cfs would be detrimental to their business operations.

44. Ecology denied the Petition for Amendment on April 27, 2016 (Exhibit 2). On May 26, 2016, Petitioners filed an optional appeal to Governor Jay Inslee pursuant to RCW 34.05.330(3) (Exhibit 3). The Governor has forty-five days after receiving the appeal to make his decision. RCW 34.05.330(3).

VI. CAUSES OF ACTION

COUNT 1

Violation of the APA: Invalidity of the Spokane River Instream Flow Rule

45. The allegations of paragraphs 1-44 are incorporated by reference and re-alleged here.

46. RCW 34.05.570(2) allows the court to declare a rule invalid if it finds that the rule exceeds the agency's statutory authority, is arbitrary and capricious or unconstitutional. Under RCW 34.05.570, the court has the authority to enter a declaratory judgment order regarding the validity of an administrative rule.

47. The provisions of the Rule that set summer flows at 850 cfs are outside Ecology's statutory authority, including but not limited to RCW 90.54, RCW 90.22, RCW 90.82, RCW 90.03, RCW 90.44, RCW 90.42, RCW 18.10, RCW 34.05, RCW

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43.27A, RCW 43.21A, are arbitrary and capricious, are unconstitutional, and/or violate the Public Trust Doctrine for reasons including but not limited to:

a. The 850 cfs summer instream flow fails to protect and enhance all instream values, including fish, aesthetics, recreation and navigation, as required by law.

b. Ecology failed to analyze, assess and/or study the impacts of the Rule on aesthetics, recreation and navigation and disregarded existing scientific information regarding how the 850 cfs instream flow will affect aesthetics and recreation.

c. Ecology failed to properly consider all of the costs and benefits of the Rule, as required by law. In particular, Ecology failed to consider the business losses that would be imposed by the Rule on rafting companies, fishing guides, outfitters, and other recreational businesses.

d. The current Rule improperly fails to take climate change into account.

e. The current Rule improperly fails to consider or accommodate future instream flow impacts of inchoate water rights and increased demand for water in Washington and Idaho.

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f. Ecology arbitrarily and capriciously relied upon flawed scientific information and analysis in determining whether the 850 cfs summer instream flow would protect Spokane River fisheries.

g. Ecology arbitrarily and capriciously assumed that flows for fish are satisfactory flows for aesthetics and recreation, even though that assumption is contrary to the law and the evidence in the record.

h. The 850 cfs summer instream flows do not fulfill or comply with Ecology's responsibilities under the Public Trust Doctrine.

i. By adopting the 850 cfs summer instream flows, Ecology arbitrarily and capriciously violated existing state-wide instream flow policies and practices.

COUNT 2

Violation of the APA: Unlawful Denial of the Petition to Amend the Spokane River Instream Flow Rule

48. The allegations of paragraphs 1-47 are incorporated by reference and re-alleged here.

49. RCW 34.05.570(4)(c) allows a person aggrieved by the performance of an agency action, including the exercise of discretion, to seek relief if the court determines that the action is outside the statutory authority of the agency, is arbitrary and capricious, or is unconstitutional.

50. WAC 173-557-100 provides that Ecology may "review and if necessary amend" the Rule if certain events take place, including if "[s]ignificant new scientific information becomes available."

51. The new information submitted by Petitioners shows that the 850 cfs low instream flow does not preserve or enhance flows for fish, aesthetic, scenic, and navigational values and indeed will allow those values to be degraded and impaired, in violation of law.

52. Ecology's decision denying the petition to amend is outside the statutory authority of the agency, including but not limited to RCW 90.54, RCW 90.22, RCW 90.82, RCW 90.03, RCW 90.44, RCW 90.42, RCW 18.10, RCW 34.05, RCW 43.27A, RCW 43.21A, is arbitrary and capricious, is unconstitutional, and/or violates the Public Trust Doctrine for the reasons described above.

COUNT THREE

Violation of the Public Trust Doctrine.

53. The allegations of paragraphs 1-52 are incorporated by reference and re-alleged here.

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54. The Public Trust Doctrine secures for citizens the right to a healthy environment and continued use and access to common natural resources, including navigable waters and fisheries. The Doctrine imposes an affirmative and mandatory duty on the State to prevent substantial impairment to the state's essential natural resources, including tidelands, shorelands, and water. *Caminiti v. Boyle*, 107 Wn.2d 662, 670, 732 P.2d 989 (1987); *Ill. Cent. R.R. v. Illinois*, 146 U.S. 387, 453 (1892).

55. The public trust doctrine applies to all navigable waters of the state, and protects public rights to use such waters for navigation, fishing, commerce, recreation and environmental purposes.

56. Under the Constitution, "[t]he state of Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes." Wash. Const. art. XVII, § 1.

57. The State has a constitutional obligation to both affirmatively protect and prevent substantial impairment of the public's interest in natural resources held in trust for the common benefit of the people of the State.

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58. Ecology has a legal responsibility to protect instream flows in a manner that fulfills its fiduciary responsibilities as trustee of the state's water resources. By adopting a low instream flow of 850 cfs from June 16-September 30 that neither protects nor enhances the fishery, recreation and aesthetics, and substantially impairs public rights to navigate, fish, recreate and make commercial use of and on the Spokane River, Ecology has failed to fulfill its responsibilities under the Public Trust Doctrine and the Washington Constitution.

COUNT FOUR

Uniform Declaratory Judgment Act

59. The allegations of paragraphs 1-58 are hereby incorporated by reference and re-alleged here.

60. The Uniform Declaratory Judgment Act, Chapter 7.24 RCW, allows courts to determine questions of validity of certain writings, and to declare rights, status and other legal relations where a person's interests or rights are affected.

61. For the reasons set forth above, the portion of WAC 173-557-050 relating to the 850 cfs summer instream flow is invalid under the Washington Constitution, the Public Trust Doctrine, RCW 90.54, RCW 90.22, RCW 90.82, RCW 90.03, RCW 90.44, RCW 90.42, RCW 18.10, RCW 34.05, RCW 43.27A, and/or RCW 43.21A.

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VII. REQUEST FOR RELIEF

WHEREFORE, Petitioners respectfully requests that this Court:

A. Set aside Ecology's denial of Petitioners' Petition;

B. Declare under RCW 34.05.574(1) and RCW 7.24.010 that the portions of the Spokane River Instream Flow Rule relating to the 850 cfs summer instream flow are invalid under RCW 34.05.570(2) as outside the statutory authority of the agency, including but not limited to RCW 90.54, RCW 90.22, RCW 90.82, RCW 90.03, RCW 90.44, RCW 90.42, RCW 18.10, RCW 34.05, RCW 43.27A, RCW 43.21A and/or the Public Trust Doctrine, as arbitrary and capricious, and/or as unconstitutional, for the reasons described above.

C. Remand the matter to Ecology with an order directing Ecology to, by a date certain, initiate amendment of the Spokane River Instream Flow Rule to reconsider the summer instream flows protected by the Rule for the reasons set forth above.

D. Order Ecology, pursuant to RCW 34.05.530 and RCW 34.05.574(1), to propose for rulemaking revisions to the Rule that are identical or substantially similar to the revisions proposed by Petitioners in their Petition to Amend the Spokane River Instream Flow Rule.

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E. Pursuant to RCW 4.84.350, RCW 7.24.100 or other applicable statute or court rule, award Petitioners the costs of this action, including reasonable attorneys' fees and other expenses.

F. Grant such other relief as this Court deems just and proper.

RESPECTFULLY SUBMITTED this 26th day of May, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on the 26 day of May, 2016 I served one true and correct copy of the foregoing Petition for Declaratory Judgment and Judicial Review of Agency Action and an Administrative Rule on the following recipients:

Office of the Director
Washington State Department of Ecology
300 Desmond Drive SE
Lacey, WA 98503

X Personal Service __ First Class Mail

The Honorable Jay Inslee
Governor, State of Washington
Office of the Governor
P.O. Box 40002
Olympia, WA 98504-0002

__ Personal Service X First Class Mail

Washington State Attorney General's Office
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Olympia, WA 98504-0100

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Dan J. Von Seggern
Attorney for Petitioners
Center for Environmental Law & Policy, American Whitewater, and Sierra Club

EXHIBIT 1

Chapter 173-557 WAC
WATER RESOURCES MANAGEMENT PROGRAM FOR THE SPOKANE RIVER AND SPOKANE VALLEY RATHDRUM PRAIRIE (SVRP) AQUIFER

NEW SECTION

WAC 173-557-010 Authority and purpose. (1) The department of ecology (ecology) adopts this rule under the authority of the Watershed Planning Act (chapter 90.82 RCW), Water Resources Act of 1971 (chapter 90.54 RCW), Water code (chapter 90.03 RCW), Regulation of public groundwaters (chapter 90.44 RCW), Minimum Water Flows and Levels Act (chapter 90.22 RCW), Water well construction (chapter 18.104 RCW); RCW 43.21A.064(9) and 43.21A.080; and in accordance with the water resources management program regulation (chapter 173-500 WAC).

(2) The purposes of this rule are to:

(a) Establish instream flow levels necessary to protect wildlife, fish, scenic, aesthetic, recreation, water quality and other environmental values, navigational values, and stock watering requirements;

(b) Meet water resource management objectives of the Spokane area watershed plans adopted under chapter 90.82 RCW;

(c) Protect existing water rights; and

(d) Establish and protect Washington state interests in the water resources of the Spokane River.

(3) In accordance with RCW 90.82.130(4), in developing this chapter ecology refers to the Middle Spokane water resource inventory area (WRIA 57) and Lower Spokane water resource inventory area (WRIA 54) watershed plan recommendations as a consideration in determining the public interest in water resource management for the Spokane River.

The plan recommendations were approved by the Spokane area watershed planning units. The joint watershed plan for the Middle Spokane watershed (WRIA 57) and the Little Spokane watershed (WRIA 55, which is not included in this rule) was adopted by Spokane County, Stevens County, and Pend Oreille County commissioners on January 31, 2006. The Lower Spokane (WRIA 54) watershed plan was adopted by Spokane County, Lincoln County, and Stevens County commissioners on October 22, 2009.

(4) This rule establishes ecology's policies to guide the protection, use, and management of Spokane River basin surface water and the SVRP aquifer within the boundary of the rule area. It protects existing water rights, establishes instream flows, and sets forth a program for the management and administration of future water allocation and use.

NEW SECTION

WAC 173-557-020 Applicability. (1) This rule applies to the mainstem of the Spokane River and all surface water and groundwater within the boundary of the SVRP aquifer, as identified in *U.S. Geological Survey Scientific Investigations Report 2007-5041*. The map provided in WAC 173-557-110 is for informational purposes only. Hydrologic evidence of the SVRP aquifer determines applicability of this rule.

(2) This rule does not supersede the instream flow rule of the Little Spokane River (chapter 173-555 WAC), except where a proposed withdrawal is from waters in hydraulic continuity with the SVRP aquifer as determined by ecology. In the area where this rule and chapter 173-555 WAC overlap, the application of each rule shall be determined as follows:

(a) New water use from the Little Spokane River, its tributaries, and the shallow aquifer associated with the Little Spokane River and its tributaries that is not part of the SVRP aquifer shall be regulated under chapter 173-555 WAC; and

(b) New water use from the SVRP aquifer shall be regulated under chapter 173-557 WAC.

(3) Chapter 173-557 WAC applies to the use and appropriation of surface water and groundwater begun after the effective date of this chapter. This chapter shall not affect:

(a) Existing surface water and groundwater rights established prior to adoption of the state surface water and groundwater codes, or by water right permit authorized under state law, unless otherwise provided for in the conditions of the water right in question;

(b) Groundwater rights established under the groundwater permit-exemption in RCW 90.44.050 where regular beneficial use began before the effective date of this chapter; and

(c) Federal and tribal reserved rights.

(4) Changes to or transfers of existing rights are addressed in WAC 173-557-070.

NEW SECTION

WAC 173-557-030 Definitions. **"Appropriation"** means the process of legally acquiring the right to use specific amounts of water for beneficial uses, consistent with the ground and surface water codes and other applicable water resource statutes.

"Consumptive use" means use of water that diminishes the volume or quality of the water source.

"Ecology" or **"department"** means the Washington state department of ecology.

"Hydraulically connected" means saturated conditions exist that allow water to move between surface water and groundwater, or between groundwater sources.

"Instream flow" means a stream flow level set in rule to protect and preserve fish, wildlife, scenic, aesthetic, recreational, water quality, and other environmental values; navigational values; and stock watering requirements. The term "instream flow" means "base flow" under chapter 90.54 RCW, "minimum flow" under chapters 90.03 and 90.22 RCW, and "minimum instream flow" under chapter 90.82 RCW.

"Mitigate" or **"mitigated"** means actions taken to offset adverse impacts by new water appropriations on senior water rights, including the instream flow levels set in WAC 173-557-050.

"Municipal water supplier" means an entity that supplies water for municipal water supply purposes as defined in RCW 90.03.015.

"Permit-exempt groundwater withdrawal" means a groundwater withdrawal exempted from ecology water right permitting requirements under RCW 90.44.050, but which is otherwise subject to the groundwater code and other applicable regulations.

"Stream management unit" means a stream segment, reach, or tributary used to describe the area to which a particular use, action, or instream flow level applies. Each of these units contains a control station. A map of the control stations is included in WAC 173-557-110.

"SVRP aquifer" means the Spokane Valley Rathdrum Prairie aquifer.

"U.S. Geologic Survey Scientific Investigations Report 2007-5041" refers to the hydrogeologic framework and groundwater budget of the Spokane Valley Rathdrum Prairie aquifer, Spokane County, Washington, and Bonner and Kootenai counties, Idaho; *U.S. Geologic Survey Scientific Investigations Report 2007-5041* by Kahle, S.C., and Bartolino, J.R., 2007.

"Water resource inventory area (WRIA)" means one of the sixty-two areas designated by the state of Washington through chapter 173-500 WAC to delineate area boundaries within the state for water management purposes.

"Withdrawal" means the extraction and beneficial use of groundwater, or the diversion and beneficial use of surface water.

NEW SECTION

WAC 173-557-040 Stream management units. Stream management units, control stations, and their application to surface water and groundwater withdrawals are established as shown in Table 1. Control stations are shown in the map in WAC 173-557-110.

Table 1
Stream Management Unit Information

Stream Management Unit Name and Control Station Gauge #	Control Station by River Mile (RM); Latitude (Lat.), Longitude (Long.)	Application to Surface Water and Groundwater Withdrawals
Spokane River at Spokane USGS gauge #12422500	RM 72.9; 47.65983N, 117.44911W (NAD 83)	Year-round instream flows for regulating surface water withdrawals from Sullivan Road bridge to Seven Mile bridge, and for regulating groundwater withdrawals within the boundary of the SVRP aquifer in Washington state
Spokane River at Greenacres (Barker Road) USGS gauge #12420500	RM 90.5; 47.67740N, 117.15215W (NAD 83)	June 16 - September 30 instream flows for regulating surface water withdrawals between the Idaho state line and Sullivan Road bridge

NEW SECTION

WAC 173-557-050 Instream flows. (1) The priority date of the instream flows established in this chapter is the effective date of this chapter.

(2) Instream flows, expressed in cubic feet per second (cfs), are shown in Table 2 of this section. Instream flows are monitored at the stream management control stations and apply to the stream management units described in WAC 173-557-040, Table 1.

Table 2

Instream Flows for the Spokane River

Spokane River at Spokane	
October 1 - March 31	1,700 cfs
April 1 - June 15	6,500 cfs
June 16 - September 30	850 cfs
Spokane River at Greenacres (Barker Road)	
June 16 - September 30	500 cfs

NEW SECTION

WAC 173-557-060 Future new uses of water. (1) Instream flows established in this rule are water rights and shall be protected from impairment by:

(a) New water right permits approved by ecology after the effective date of this chapter; or

(b) Permit-exempt withdrawals established within the area regulated under this chapter after the effective date of this chapter.

(2) Based on the hydrogeology of the SVRP aquifer as described in *U.S. Geologic Survey Scientific Investigations Report 2007-5041*, ecology determines that surface water in the Spokane River and groundwater within the SVRP aquifer are hydraulically connected. New appropriations from the SVRP aquifer will be managed to protect the instream flows established in this rule.

(3) Within the area regulated under this rule, municipal water suppliers are the primary sources of water for new uses. If water is not available in a timely and reasonable manner from a municipal water supplier, the consumptive use impacts to surface water from new permit-exempt groundwater withdrawals must be interrupted when stream flow is below the instream flows established in this rule, unless those impacts are mitigated. Mitigation must be achieved through an ecology-approved mitigation plan.

(4) The consumptive use impacts to surface water from water right permits approved by ecology after the effective date of this rule must be interrupted when stream flow is below the instream flows established in this rule, unless those impacts are mitigated. Water right permits approved by ecology after the effective date of this rule shall be conditioned to prohibit impairment of instream flows established in this rule.

NEW SECTION

WAC 173-557-070 Changes and transfers of existing water rights. No changes to, or transfers of, existing surface water and groundwater rights in the area covered under this rule shall hereafter be granted if they conflict with the protection of the instream flow levels established in this chapter. Any change or transfer proposal can be approved only if there is a finding that existing rights, including the instream flows established in this chapter, will not be impaired.

NEW SECTION

WAC 173-557-080 Compliance and enforcement. Ecology shall enforce this rule in accordance with chapters 90.03 and 90.44 RCW, and any other applicable laws and rules.

NEW SECTION

WAC 173-557-090 Appeals. All final written decisions of ecology pertaining to water right permits, regulatory orders, and related water right decisions made pursuant to this rule are subject to appeal to the pollution control hearings board in accordance with chapter 43.21B RCW.

NEW SECTION

WAC 173-557-100 Regulation review. Ecology, after consultation with local, tribal, and state governments, may initiate a review, and if necessary amend this chapter, following the procedures of chapter 34.05 RCW, if: Significant new scientific information becomes available; a significant change in conditions occurs; anadromous fish are reintroduced; a large storage project is proposed in the area affected by this rule; or statutory changes are enacted, that are determined by the department to require review of this rule.

NEW SECTION

WAC 173-557-110 Map of the rule area with control points. In administering this chapter, hydrologic evidence of the SVRP aquifer as defined in WAC 173-557-020(1) determines applicability. The map in Figure 1 of this section, generally reflects the boundary of the SVRP aquifer and is provided for informational purposes only.

Figure 1 - Spokane River and Spokane Valley Rathdrum Prairie Aquifer—Rule Area and Control Stations

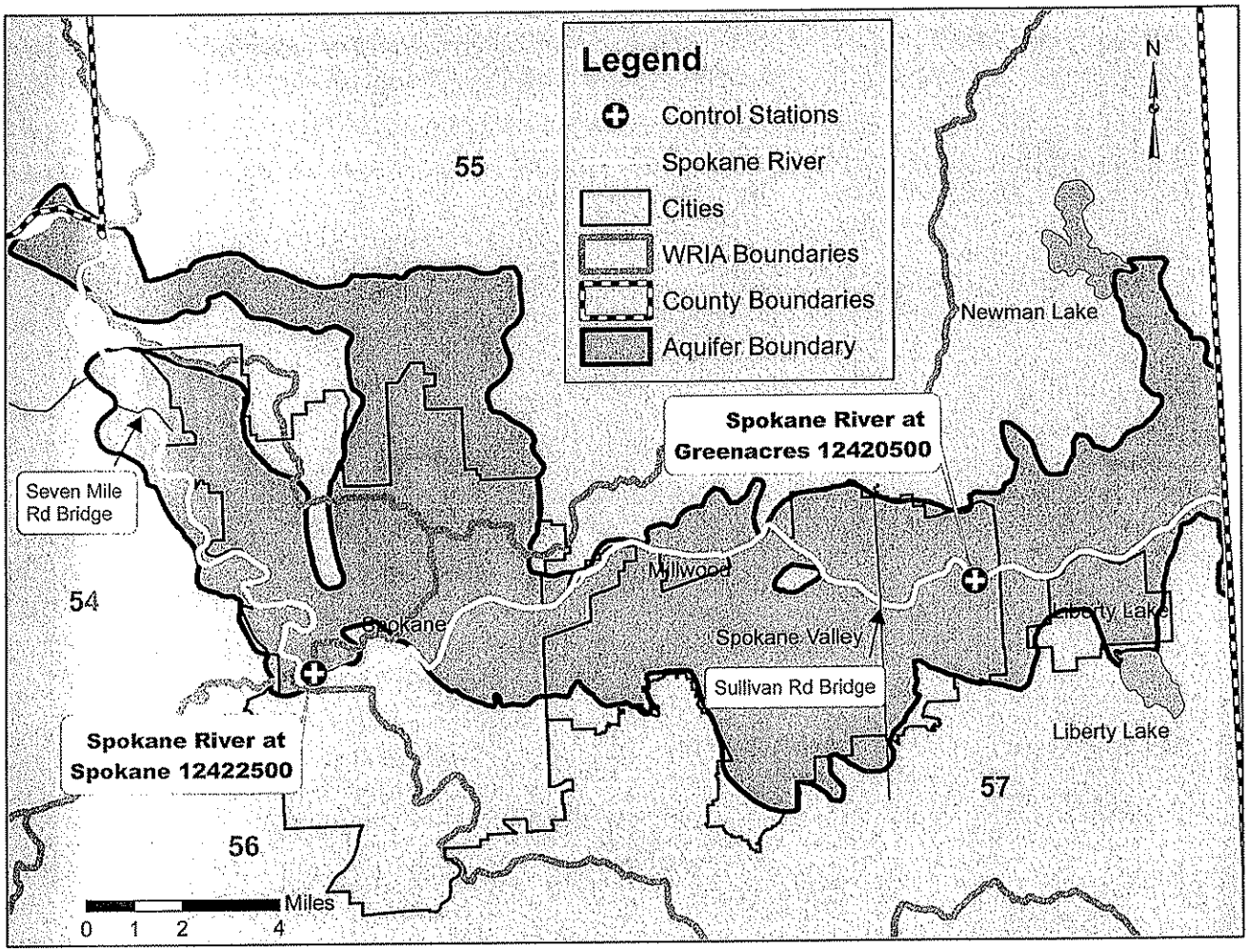
Legend
Control Stations
Spokane River
Cities
WRIA Boundaries
County Boundaries
Aquifer Boundary
N
55
Newman Lake
Spokane River at
Greenacres 12420500
Seven Mile
Rd Bridge
Millwood
54
Spokane
Spokane Valley
Sullivan Rd Bridge
Liberty Lake
Spokane River at
Spokane 12422500
57
56
Miles
0 1 2 4

EXHIBIT 2

STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY
PO Box 47600 • Olympia, WA 98504-7600 • 360-407-6000
711 for Washington Relay Service • Persons with a speech disability can call 877-833-6341

April 27, 2016

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RE: Petition to Amend Chapter 173-557 WAC, Water Resources Management Program for the Spokane River and Spokane Valley Rathdrum Prairie (SVRP) Aquifer

Dear Ms. Rodgers and Mr. Von Seggern:

Pursuant to RCW 34.05.330(1), this letter formally responds to the petition for amendment of WAC 173-557, which the Department of Ecology(Ecology) received on March 1, 2016, from the Center for Environmental Law & Policy (CELP), American Whitewater, and Sierra Club.

The petition asserts that the instream flows established in WAC 173-557-050 of 850 cubic feet per second (cfs) at the Spokane gage and 500 cfs at Greenacres for the period from June 16 - September 30 "do not protect wildlife, fish, scenic, aesthetic, recreation, water quality and other environmental values, nor does the rule comply with other laws protecting the waters of the state." Petitioners request that Ecology consider the best available science and amend the rule, WAC 173-557-050, in accordance with RCW 34.05.320. The petition does not suggest any amendatory rule language, however.

Ecology has thoroughly evaluated and considered the issues raised in the petition. After careful consideration and review, and as explained below in specific responses to the concerns presented in your petition, Ecology is denying your request to initiate a rule amendment. Ecology relied on tested, well established, standard methods for establishing the instream flow levels in WAC 173-557. Ecology is confident in the legality of the rule and that the adopted instream flows will protect and preserve instream values consistent with statutory requirements of RCW 90.22 and RCW 90.54. Ecology is not persuaded that the information you have submitted in your petition and exhibits warrants Ecology dedicating its resources towards a rule amendment at this time.

Ecology agrees that the Spokane River is a vibrant, valuable resource for the area and for the State of Washington. The recently adopted instream flow rule will help preserve and protect its flow while balancing the needs of all water uses such as municipal supply, hydropower, and instream values. Ecology is already implementing the rule to protect flows in the Spokane River and intends to deny applications for new consumptive water rights from the aquifer that cannot be mitigated or interrupted. The process to issue permit decisions, most of which will be denials, has been initiated.

It is important to note that like Ecology's other instream flow rules, this rule does not control flows or put more water into the river. Many of the assertions in the petition appear to assume establishing higher summer instream flow levels in the rule results in those flows appearing in the river each year from June 16 through September 30. That is a mistaken assumption. This complex river system and its flow are influenced by a variety of factors including seasonal weather, groundwater use from existing water rights, and operation of hydropower facilities.

Areas of concern expressed in the Petition to amend WAC 173-557-050.

In our review of your petition letter, Ecology identified the following primary areas of concern, summarized as follows:

1. The summer instream flow levels established in the rule do not protect or enhance recreation and aesthetics.
   The petition asserts that the summer instream flow levels established in the rule are set too low to protect and enhance recreational and aesthetic instream values in the Spokane River. The petition asserts that Ecology erred in choosing to rely on fish studies to determine instream flow levels, and that Ecology must select instream flows to optimize and enhance all protected uses.

   The petition asserts that Ecology should have relied on scientific studies of recreation and aesthetic flows; that Ecology has relied on such studies when setting instream flow requirements for hydropower facilities as part of the 401 certification process; and that it was arbitrary for Ecology to claim in the rulemaking context that an aesthetic/recreation flow study is not appropriate or needed to set minimum instream flows for the Spokane River.

   Further, the petition asserts that there is new information available from studies prepared after rule adoption that Ecology can use to amend the instream flow rule in a manner that would better protect recreational interests and aesthetics.

2. The summer instream flow levels established in the rule may not protect the Spokane River fisheries.
   The petition asserts that the instream flow incremental methodology (IFIM) study Ecology and Washington Department of Fish and Wildlife (WDFW) relied on for the rule is flawed, and that "Ecology should perform additional studies that include three-

dimensional characterization of fish use of the river, along with evaluation of insect habitat (food sources for the fish) and temperature parameters in order to ascertain what minimum flows would protect and enhance the Spokane River fishery."

The petition asserts that summer season instream flows higher than 850 cfs will not harm native fish, and that the 850 cfs instream flow level is not optimal for redband trout.

3. The summer instream flow levels established in the rule ignore future impacts of inchoate water rights in Washington and Idaho.
   The petition asserts that Ecology should have added approximately 300 cfs, the volume of unused inchoate water rights in both Washington and Idaho, to the instream flow level. The petition claims this additional flow is determined by models to be necessary to protect instream resources from the future use of inchoate water rights.

4. The summer instream flow levels established in the rule fail to account for how climate change will affect instream flows.
   The petition asserts that setting higher instream flow levels is needed to account for climate change impacts that will result in declining flows and warmer temperatures, and that instream flows must be based on instream values in the future, not today.

5. Ecology failed to properly consider costs imposed by the rule and the rule's impacts on business.
   The petition asserts the summer instream flow levels established in the rule impose unreasonable costs on the recreational boating industry in the form of lost revenue. The petition asserts that these costs were not properly analyzed in the Cost Benefit Analysis, the Least Burdensome Analysis, and Small Business Economic Impact Statement prepared for the rule.

6. The summer instream flow levels established in the rule violate Ecology's fiduciary responsibilities as manager of our state's water resources under the Public Trust Doctrine.
   The petition asserts that Ecology's statutory authority to set instream flows is analogous to the Shoreline Management Act, and that the agency has an affirmative responsibility to set instream flows that protect and enhance all instream values of the Spokane River in order to comply with RCW 90.54.020(3), RCW 90.22, and the Public Trust Doctrine.

7. By adopting such low summer flows, Ecology has violated state-wide instream flow policies.
   The petition asserts that it is state policy to adopt 10 percent exceedance flows and that the 850 cfs summer instream flow level adopted in the rule violates this policy.

Reasons for Denial

Under RCW 34.05.330(1), the following discussion provides Ecology's reasons for denial of the petition, and specifically addresses the concerns raised in the petition:

RECREATION AND AESTHETICS

- The instream flow levels established in WAC 173-557 are protective of the instream resources of the Spokane River and are set in a manner the meets the requirements of Ecology's statutory authorities. Ecology does not interpret its statutory obligation to protect instream flows as a mandate to optimize and enhance all uses. Ecology's authority to adopt instream flows in rule stems from Chapter 90.22 RCW, Minimum Water Flows and Levels. Further, RCW 90.03.247 grants Ecology exclusive authority to establish minimum flows.

  RCW 90.22.010 states that Ecology may establish minimum flows *"for the purposes of protecting fish, game, birds or other wildlife resources, or recreational or aesthetic values"*. Under RCW 90.22 Ecology is not required to establish minimum flows for fish **and** recreational values **and** aesthetic values. The Legislature has provided Ecology with total discretion to determine the purposes to protect when establishing minimum flows in a rule.

  The instream flow levels in WAC 173-557 are based on studies of fish habitat. This is consistent with several provisions in statute that call for protection of instream flows for fish:
  - RCW 90.54.005 states that the intent of water resource management strategies are to supply water in sufficient quantities to satisfy three water resource objectives:
    (1) Residential, commercial, and industrial needs;
    (2) Productive fish populations; and
    (3) Productive agriculture.

  - RCW 77.57.020 states that it is the policy of this state that a flow of water sufficient to support game fish and food fish populations be maintained at all times in the streams of this state.

  - RCW 90.22.060 calls for establishing a statewide list of priorities for evaluation of instream flows. "In establishing these priorities, the department shall consider the achievement of wild salmonid production as its primary goal."

  - Chapter 90.82 RCW, the Watershed Planning Act, includes several provisions addressing fish and fish habitat. The required Water Quantity planning element, RCW 90.82.070, calls for an assessment that includes "data necessary to evaluate necessary flows for fish," and strategies "to supply water in sufficient quantities to satisfy the minimum instream flows for fish."

  To meet the clear statutory directive to ensure the protection of fish populations, Ecology invests its resources in studies that assess the habitat needs of fish. When establishing instream flows in a rule, Ecology sets instream flows at levels that will sustain healthy

fish populations. In turn, preserving and protecting healthy fish populations serves to preserve and protect other listed values in RCW 90.22 and RCW 90.54.

Additional statutory authority for Ecology's instream flow protection program is found in RCW 90.54, the Water Resources Act of 1971. RCW 90.54.020 is the general declaration of fundamentals for utilization and management of waters of the state. These fundamentals are applied by Ecology through all its water resource management activities including water right permitting, the Trust Water Rights Program, and instream flow rules.

RCW 90.54.020(3)(a) reads as follows:

> "(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, and aesthetic and other environmental values, and navigational values. Lakes and ponds shall be retained substantially in their natural condition. Withdrawals of water which would conflict therewith shall be authorized only in those situations where it is clear that overriding considerations of the public interest will be served."

This statute provides that Ecology manage water in such a way that streams have sufficient water to preserve and protect the listed values. The statute does not serve as a legislative mandate for Ecology to manage the state's water resources such that all of the listed values, including aesthetics and recreation, be enhanced or optimized. The statute does, however, give Ecology the discretion, where possible, to enhance the listed values.

In adopting WAC 173-557, Ecology determined and set minimum flows necessary for preservation of fish at flow levels that will sustain healthy fish populations. Ecology is confident that the flows levels established in the rule, while based on fish habitat studies, additionally serve to preserve wildlife, scenic, aesthetic, other environmental values, and navigational values in the Spokane River, in accordance with RCW 90.54.020.

Moreover, if Ecology issues any new, junior consumptive water rights after the adoption of WAC 173-557, such rights will be conditioned to be either interruptible or fully mitigated to comply with RCW 90.54.

Under RCW 90.54.020(3), Ecology has the authority to enhance the natural environment, including recreational and aesthetic values, "where possible." In adopting WAC 173-557, Ecology exercised its discretion to not set flows at enhancement levels and instead set minimum flows necessary to preserve and protect environmental values consistent with statutory authority. Throughout the state, Ecology typically relies on other water resource management tools, such as water right acquisition, the Trust Water Rights Program (RCW 90.42), and the Irrigation Efficiencies Program to enhance flows.

- Ecology does not agree with the Petitioners' assertion that it was arbitrary for Ecology to claim in the rulemaking context that an aesthetic/recreation flow study is not appropriate or needed to set minimum instream flows for the Spokane River.

  Under RCW 90.22, Ecology has discretion to determine the primary purposes for establishing flows in a rule. In adopting WAC 173-557, Ecology chose to rely on science-based fish studies to develop the instream flow levels for the rule when the local Watershed Planning Units failed to reach consensus on instream flow recommendations during the planning process (RCW 90.82.080(5)).

  Since the Legislature first adopted RCW 90.22 in 1969, Ecology has adopted numerous instream flow rules throughout the state. Fish based studies have served as the backbone of minimum instream flow rule levels that have been adopted in the respective rules. Methodologies have changed over the time and exceptions undoubtedly exist, but Ecology is confident in its approach.

  In addition to conducting fish studies, Ecology fully considered the recreational, aesthetic, and navigational values comments for protecting the Spokane River throughout the rule adoption process for WAC 173-557. The subject was addressed in detail during:
  - Avista's Federal Energy Regulatory Commission (FERC) relicensing process for it's Spokane hydroelectric facilities;
  - The Watershed Planning process in all Spokane water resource inventory areas (WRIAs);
  - The comment period on the preliminary draft of the rule; and
  - Again before final rule adoption.

  Ecology read and considered the Whitewater Paddling Study conducted under the FERC process, and listened to the positions and interests of many river users. Ecology also reviewed the observations, opinions, and photos submitted by whitewater enthusiasts and others.

  Flows that serve the recreational community occur every year in the Spokane River. What varies from year-to-year is the timing and duration of those recreational flows. Unlike instream flows set for a hydropower facility, WAC 173-557 does not control the hydrograph of the river. It does not require or control the release of water from storage. The instream flow rule is a tool that, in addition to preserving and protecting listed values, is used to regulate junior water users to protect the senior instream flow, and to provide specific criteria for making water right decisions. Moreover, to change the actual flow in the Spokane River in order to enhance a particular recreational use, one would need to seek changes in Avista's FERC license, which controls water storage, ramping rates, and the shape of the hydrograph (for parts of the year at least). The FERC licenses for Avista's dams were last re-issued in 2009.

- Ecology based its decision to adopt instream flow levels for the Spokane River on all relevant information that was available prior to rule adoption. That information is

included in the rule adoption record for WAC 173-557 that is incorporated by reference into this petition response. Moreover, WAC 173-557-100 allows Ecology to initiate a review of the rule and amend it if significant new information becomes available.

Moreover, rulemaking is a discretionary agency activity. Ecology is not persuaded that the information you have submitted in your petition and exhibits warrants Ecology dedicating its resources towards a rule amendment at this time.

PROTECTING FISH

- Ecology does not agree that the instream flow levels in WAC 173-557 do not protect redband trout or other fish species in the Spokane River.

  Four instream flow studies on the Spokane River have been conducted and made publically available since 2003. These scientific studies, which are part of the rule record, were conducted specifically to evaluate the instream needs of the fisheries resources present in the river at all life states. These studies focused on resident redband trout and whitefish. The instream flow numbers in the rule were derived from these studies and were chosen to optimize the weighted useable area of habitat to protect the instream resources.

  The instream flow methodology used by Ecology was affirmed by the Washington Supreme Court in it's 1993 Elkhorn decision (State of Washington, Department of Ecology, Department of Fisheries and Department of Wildlife, Respondents, v. PUD No. 1 of Jefferson County and City of Tacoma, Department of Public Utilities, Appellants. No. 58272-6. April 1, 1993).

  As for the three-dimensional characterization of fish use in the river called for in the petition, the petitioners do not point to a specific model or methodology. Ecology is not currently aware of such a model. If one exists or is developed, it would need to be extensively researched and tested before it would supersede the widely accepted methods Ecology and WDFW currently use.

- Ecology and WDFW experts considered broader ecological values and the full range of species in the Spokane River before choosing to focus on redband trout and whitefish for developing instream flow levels. Many native fish species were considered and the most flow-sensitive were modeled. Modelling flow sensitivity of other species requires significant new information on their preferences for depth, velocity, and substrate. Such a major undertaking is unprecedented, beyond the resources available to Ecology, and not necessary to set instream flows.
- Ecology addressed temperature concerns in the Concise Explanatory Statement that contains responses to all comments received on the proposed rule. Our response on that topic has not changed:

Temperature in the river is a complex issue, and data to date do not have the density to permit conclusions about habitat. In the upper, perched reach of the river, data gathered as a requirement of the FERC license indicate maximum summer temperatures approach that of Lake Coeur d'Alene at discharge from Post Falls, and then are further warmed by the sun and ambient air temperature. Once these discharged flows reach the point where the aquifer begins discharging to the river near Sullivan Bridge, temperature effects moderate and cool due to that contribution of cool groundwater.

In the lower river, data is scarce. The observed condition shows increased temperatures in the summer relative to the winter. Over a year's time, it seems to vary between a minimum of 3 and a maximum of 20 degrees C. In this reach that gains roughly 300 cfs from the aquifer, logically, lower flows should actually result in a cooler river, as a larger proportion of the total flow will be cool groundwater. Actual conditions will be highly variable both diurnally and by specific river-reach.

Thus, while there is limited lower river data specific to the question, there is enough knowledge and measurements in the upper river to alleviate major concerns about temperature issues.

- Ecology agrees that natural higher flows, above 850 cfs, would not be detrimental to fish. However, it is important to reiterate that adopting higher flows in an instream flow rule cannot provide flows in the river.

  In developing flow recommendations, Ecology and WDFW attempted to maintain the seasonality and flow variability of the natural flow (to the extent that the gauge record reflects the natural flow), as well as to protect the most flow-sensitive species. The 850 cfs summer instream flow level is based on the best quantitative information available.

- Ecology disagrees that 850 cfs is insufficient to protect redband trout. The IFIM studies conducted for the Spokane River indicate that the optimal flows for redband trout rearing are at 400 cfs and that 850 cfs is above the optimal redband trout flow. Flows even higher than 850 cfs are therefore not necessary to protect redband trout.

  The adopted 850 cfs is not an ultra-low flow for redband trout. It is double the flow that maximizes useable habitat area for that important species. The 850 cfs flow is lower than optimum for mountain whitefish. The resultant flow is a blended flow that does not select one native species over the other. It provides the maximum habitat protection for both redband trout and mountain whitefish and is based on physical measurements of habitat conditions in the Spokane River at locations where the fish live and reproduce.

INCHOATE WATER RIGHTS

- Ecology does not agree that setting instream flow levels higher to compensate for use of senior, inchoate water rights is supported in statute. In accordance with RCW 90.22,

instream flows are a regulatory tool that must be justified on the basis of studies that identify the flow levels necessary to protect listed values.

- Ecology recognizes that there is a substantial quantity of inchoate water in rights held by municipal suppliers and that the future use of those rights may have an impact on flows in the Spokane River. However, under Washington's prior appropriation law, those rights are senior to the instream flow.

CLIMATE CHANGE

- Climate change is an important issue. The predicted effects of climate change are an important reason to adopt instream flows and put a sustainable water management framework in place for the Spokane River and Spokane Valley Rathdrum Prairie Aquifer. However, Ecology does not agree that climate change models can justify setting higher instream flow levels. Climate change models provide good information on the range of future effects due to climate change, but do not provide a legal methodology for determining specific instream flow levels. In accordance with RCW 90.22, instream flows are a regulatory tool that must be justified on the basis of studies that identify the flow levels necessary to protect the listed values.

- Climate change impacts on the Spokane River will happen independently of the instream flow rule. If climate change reduces water supply, then any interruptible water rights that have been issued will be curtailed more often and for longer periods of time. If climate change increases water supply, then flows will be higher or additional consumptive uses could be authorized. In either situation, the instream flow levels that have been established are set at levels necessary to protect fish habitat.

ECONOMIC ANALYSES

- Under the Administrative Procedures Act RCW 34.05.328(1)(d) it is Ecology's job to "determine that the probable benefits of the rule are greater than its probable costs." To address this requirement, Ecology prepares a Cost Benefit Analysis (CBA) that compares the cost impact of rule adoption against the baseline of not adopting the rule. The CBA does not analyze options that are not included in the proposed rule.

  The CBA acknowledges and analyzes the impact of the rule on recreational businesses. It describes the benefit stemming from protecting instream flows that recreational businesses rely on, contrasted against the possibility of losses to these businesses if instream flows are not protected. The CBA did not specifically quantify this benefit since the analysis had already met the requirement to determine that the probable benefits exceeded the probable costs. The CBA calculated benefits of 6 to 15 million dollars, and costs between $550,800 and $670,800, for the twenty year time frame that is the planning horizon for the analysis.

- The Least Burdensome Alternative provision of RCW 34.05.328(1)(e), and the Small Business Economic Impact Statement requirement of the Regulatory Fairness Act, RCW 19.85, both require analysis of the cost to comply with the rule:

  - RCW 34.05(1)(e) "Determine, after considering alternative versions of the rule and the analysis required under (b), (c), and (d) of this subsection, that the rule being adopted is the least burdensome alternative for those required to comply with it that will achieve the general goals and specific objectives stated under (a) of this subsection;"

  - RCW 19.85.040(1) "A small business economic impact statement must include a brief description of the reporting, recordkeeping, and other compliance requirements of the proposed rule, and the kinds of professional services that a small business is likely to need in order to comply with such requirements. It shall analyze the costs of compliance for businesses required to comply with the proposed rule adopted pursuant to RCW 34.05.320, including costs of equipment, supplies, labor, professional services, and increased administrative costs. It shall consider, based on input received, whether compliance with the rule will cause businesses to lose sales or revenue."

  - WAC 173-557 applies to all new uses of water from the Spokane River and the Spokane Valley Rathdrum Prairie Aquifer, including: new water right permits; changes and transfers of existing water rights; and new permit-exempt uses of groundwater. Businesses that do not require a new water right to do business are not included in these analyses.

PUBLIC TRUST DOCTRINE

- The regulatory instream flow levels established in WAC 173-557 represent ecologically-based minimum flows necessary to protect and preserve fish populations, and other instream resources. The adopted instream flows were set in a manner to fully satisfy the statutory requirements of RCW 90.22 and RCW 90.54.

  Ecology's authority is delimited by the Water Code and other Acts, including RCW 90.54 and RCW 90.22, all of which contain multiple public interest components. Our courts have held that the Public Trust Doctrine does not serve as an independent source of authority for Ecology to use in its decision-making (See, e.g., Postema v. Pollution Control Hearings Bd., 142 Wn.2d 68, 99, 11 P.3d 726 (2000)).

STATE-WIDE INSTREAM FLOW POLICIES

- The policies and procedures of the Water Resources Program are posted on Ecology's webpage at: http://www.ecy.wa.gov/programs/wr/rules/pol_pro.html. There is no policy to adopt instream flows at the 10 percent exceedance level, as asserted in the petition.

- Petitioners cited a public education video as the source for their statement about the policy. The video states that "...instream flows are commonly set at the rare higher flows. Even if those higher flows are only met one season in ten, the benefits to the fish population could last for many years." Explaining common practice to the public is not an official policy statement.

- Ecology and WDFW conduct either a toe-width or a PHABSIM study to determine a stream flow that attempts to optimize fish habitat. If that "habitat flow" is above the 10 percent exceedance flow, we believe it does not occur often enough or with enough duration to benefit fish. Ecology therefore often lowers the recommendation to the 10 percent exceedance level. This is the point where Ecology and WDFW have found the flow duration would occur at a frequency that would benefit fish. If the habitat flow is met at a frequency below the 10 percent exceedance level, Ecology proposes adopting the optimal habitat flow. Ecology has never recommended raising it to the 10 percent exceedance level in any instream flow rules.

Keeping the Spokane River healthy and flowing is vital to everyone in the region. Ecology is confident that the instream flows set in WAC 173-557 are based on the correct studies, and on a careful review of all the information available during rule adoption process.

In closing, your petition to amend WAC 173-557, the Spokane River instream flow rule, is denied. While Ecology is not granting your rulemaking petition, we are sincerely committed to applying the existing rule, ensuring sustainable water management, and protection of the Spokane River into the future.

Sincerely,

Maia D. Bellon
Director

cc: Tom Loranger, Water Resources Program Manager
Grant Pfeifer, Director, Eastern Regional Office
Keith Stoffel, Water Resources Section Manager ERO

EXHIBIT 3

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May 26, 2016

Via Electronic Mail

Governor Jay Inslee
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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

Andrea K. Rodgers
Attorney for Petitioners

Dan Von Seggern
Attorney for Center for Environmental Law & Policy

Cc: Petitioners
Jon Snyder, Policy Advisor, Outdoor Recreation & Economic Development
Maia Bellon, Department of Ecology Director
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