

NO. 94804-6

---

SUPREME COURT  
OF THE STATE OF WASHINGTON

---

CENTER FOR ENVIRONMENTAL LAW & POLICY, AMERICAN  
WHITEWATER, AND SIERRA CLUB,

Appellants,

vs.

WASHINGTON STATE DEPARTMENT OF ECOLOGY AND JAY  
INSLEE,

Respondents

---

CENTER FOR ENVIRONMENTAL LAW AND POLICY, AMERICAN  
WHITEWATER, AND SIERRA CLUB'S  
STATEMENT OF GROUNDS FOR DIRECT REVIEW

---

Dan J. Von Seggern, WSBA No. 39239  
Center for Environmental Law & Policy  
85 S. Washington St, Suite 301  
Seattle, WA 98104  
T: (206) 829-8299  
Email: [dvonseggern@celp.org](mailto:dvonseggern@celp.org)

Attorney for Appellants

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... iii

I. NATURE OF THE CASE AND DECISION ..... 1

II. ISSUES PRESENTED FOR REVIEW ..... 5

    1. Did Ecology exceed its statutory authority by interpreting RCW 90.54.020’s mandate that “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” as allowing Ecology to adopt an instream flow that “provide[d] for preservation” of only *one* of the listed instream values? . . . . 5

    2. Is resolution of this case as expediently as possible in the public interest, because of the need to protect Washington’s interests in any future dispute with Idaho over the Spokane River’s water? ..... 5

    3. Did Ecology’s failure to protect the River’s ecological, recreational, and navigational values in adopting the 850 cfs summer instream flow violate the Public Trust Doctrine, and is Ecology’s interpretation of RCW 90.54.020 inconsistent with the Public Trust Doctrine? ..... 5

    4. Was Ecology’s failure to include all of the directly relevant agency reports and recommendations from the agency’s own staff and other expert state agencies in the administrative record a violation of the State Administrative Procedure Act? 6

III. GROUNDS FOR DIRECT REVIEW ..... 6

    1. Ecology’s interpretation of RCW 90.22.010 and RCW 90.54.020 is inconsistent with the statutes’ plain language and with this Court’s precedents, and could result in a statewide failure to protect instream values as intended by the

Legislature. . . . .	6
2. Prompt determination of this case is in the public interest because of the need to protect the instream flow in any future dispute with Idaho over the Spokane River’s water. . . . .	8
3. The Instream Flow Rule, and Ecology’s interpretation of RCW 90.54.020, conflict with the Public Trust Doctrine. . . . .	9
a. The Spokane River Rule fails to protect the public’s interest in navigable waters, as required by the Public Trust Doctrine. . . . .	10
b. Ecology’s interpretation of RCW 90.54.020(3) conflicts with the Public Trust Doctrine. . . . .	11
4. Ecology’s failure to consider all of the relevant information in its possession or to place this information in the administrative record was arbitrary and capricious, and sets a precedent that would allow administrative agencies to tailor the record to reach a predetermined outcome in rulemaking and hinder judicial review. . . . .	12
IV. CONCLUSION . . . . .	15
V. CERTIFICATE OF SERVICE . . . . .	16

## TABLE OF AUTHORITIES

### CASES

<i>Caminiti v. Boyle</i> , 107 Wn.2d 662, 732 P.2d 989 (1987) . . . . .	10, 11
<i>Chelan Basin Conservancy v. GBI Holding Co.</i> , 2017 WL 2876140, ___ Wn.2d ___ (2017) . . . . .	10, 11
<i>Dept. of Ecology v. Theodoratus</i> , 135 Wn.2d 582, 957 P.2d 1241 (1998) . . . . .	13
<i>Envtl. Def. Fund v. Blum</i> , 458 F. Supp. 650 (D.D.C. 1978) . . . . .	14
<i>Fund for Animals v. Williams</i> , 391 F.Supp.2d 191 (D.D.C. 2005) . . . . .	14
<i>Hart v. Peoples' Nat. Bank of Wash.</i> , 91 Wn.2d 197, 588 P.2d 204 (1978) . . . . .	8
<i>Portland Audubon Soc. v. Endangered Sp. Comm.</i> , 984 F.2d 1534 (9 <sup>th</sup> Cir. 1993) . . . . .	13
<i>Postema v. Poll. Cont. Hrgs Board</i> , 142 Wn.2d 68, 11 P.3d 726 (2000) . . . . .	7
<i>Seattle v. Drew</i> , 70 Wn.2d 405, 423 P.2d 522 (1967). . . . .	12
<i>State ex rel. Evergreen Freedom Foundation v. Wash. Educ. Ass'n</i> , 140 Wn.2d 615, 999 P.2d 602 (2000) . . . . .	12
<i>Swinomish Indian Tribal Community v. Department of Ecology</i> , 178 Wn.2d 571, 311 P.3d 6 (2013) . . . . .	7
<i>Weden v. San Juan County</i> , 135 Wn.2d 678, 958 P.2d 273 (1998) . . . . .	11

### STATUTES

RCW 34.05.558 . . . . .	13
RCW 34.05.562 . . . . .	4

RCW 90.22.010 .....	3, 6, 12
RCW 90.54.020 .....	3, 5, 6, 7, 9, 11, 12
RCW 90.54.020(3) .....	6, 7

**REGULATIONS**

Chapter 173-557 WAC .....	2
WAC 173-557-030 .....	7
WAC 173-557-050 .....	11

**RULES**

RAP 4.2(a)(4) .....	<i>passim</i>
---------------------	---------------

**WASHINGTON CONSTITUTION**

Art. 17, Sec. 1 .....	9
-----------------------	---

## I. NATURE OF THE CASE AND DECISION

This case involves important questions regarding protection of Washington's public water resources; specifically, what instream values must be protected, and how does the Public Trust Doctrine operate in the context of instream flow setting? Finally, it raises the issue of whether an administrative agency may bias its decision-making by selectively including information in the agency record. All of these questions have great statewide significance and are appropriate for resolution by this Court under RAP 4.2(a)(4).

The Spokane River is a treasured natural wonder uniquely located in the city of Spokane. Many residents and visitors use the River for whitewater rafting, float trips, fishing, swimming, birdwatching, and for enjoyment of its aesthetic beauty.<sup>1</sup> The shoreline has frequently-used parks, hiking/biking trails, picnic areas, and campgrounds.<sup>2</sup> Spokane's hot, sunny summer is the peak time for use of the River. All of these residents and visitors depend on the presence of adequate water in the River.

Summer streamflows have been declining for the 118 years that

---

<sup>1</sup> AR011576-011578 (Whittaker, D and B. Shelby, *Middle Spokane River: Protecting Recreation and Aesthetic Flows*, Confluence Consulting 2015); AR000250, 266, 287, 352, 386, 399, 431 (photodocumentation of recreational river use); AR008025-27.

<sup>2</sup> *Id.*; AR002515(documenting Centennial Park visit numbers); AR001239-1273 (*Shoreline Master Program Update Inventory and Analysis*, City of Spokane, 2008); *see also* AR001324 (cataloging over 700,000 recreational visits annually).

data has been collected.<sup>3</sup> This is attributable to a number of factors, including climate change, water use pattern changes, municipal pumping increases in both Washington and Idaho, and upstream reservoir operations.<sup>4,5</sup> Low flows in the River affect both water quality and river ecology and can lead to increased temperatures in the River, which “can exceed lethal levels for trout.”<sup>6, 7</sup>

The Department of Ecology adopted an instream flow rule for the Spokane River, effective February 27, 2015. WAC Chapter 173-557 (the “Rule”). Ecology chose a summer instream flow of 850 cubic feet per second (cfs) based solely on considerations of habitat for Redband trout and mountain whitefish.<sup>8</sup> Flows currently exceed this level for most or all of the summer in most years, supporting recreational uses including kayaking, rafting, swimming, picnicking, and fishing as well as the

---

<sup>3</sup> AR002224 (*Spokane Valley-Rathdrum Prairie (SVRP) Aquifer Idaho Water Rights Report*, 2014).

<sup>4</sup> *Id.*; AR001095 (*The Spokane River: Low Flow Trends and Modeling Under a Changing Environment*, presentation to Idaho Washington Aquifer Collaborative meeting 2014); AR001487 (*Long-term Trends in the Aquifer and River*, Washington Dep’t of Ecology, undated).

<sup>5</sup> *Id.* AR010501-2 (Petition to Amend Instream Flow Rule for Spokane River and Spokane Valley Rathdrum Prairie (SVRP Aquifer) at 13-14); AR011189.

<sup>6</sup> *Id.* AR10504 (Petition to Amend Instream Flow Rule for Spokane River and Spokane Valley Rathdrum Prairie (SVRP Aquifer) at 16); AR011521 (*Impacts of Future Changes on Low Flow in a Highly Connected River-Aquifer System*, (2015) “Extremely low flows in developed areas lead to algal blooms and fish kills.”).

<sup>7</sup> *Id.* AR013611 (*Linking Temperature and Flow in Spokane River, Idaho and Washington*, WDFW (undated)); AR001083 (*Climate Change and the Columbia Basin: Implications for Water Use* (Climate Impacts Group, University of Washington 2014)(water temperature expected to increase due to climate change).

<sup>8</sup> Department of Ecology’s Response to Petitioners’ Opening Brief (Resp. Br.) at 6-7

aesthetic values associated with the River.

Ecology received thousands of public comments on the proposed Rule, nearly all of which indicated that 850 cfs was too low to support recreational activities such as navigation.<sup>9</sup> Ecology based the 850 cfs flow only on considerations of fish habitat, and did not specifically determine the flows needed to support aesthetic and recreational uses.<sup>10</sup> Ecology asserts that the instream flow statutes, RCW 90.22.010 and RCW 90.54.020, give it discretion to decide which of the listed instream values to protect and which to ignore.

Recreational users of the River, including recreation-dependent businesses, will be profoundly affected by the Rule's low summer streamflow.<sup>11</sup> Future water rights will be conditioned on the instream flow, so that new users may withdraw water so long as streamflow is at or above 850 cfs. The predictable result is that streamflow would be reduced to 850 cfs for essentially all of the summer. Navigation by many recreational craft, including the rafts used by commercial whitewater

---

<sup>9</sup> AR002982-3252 (Concise Explanatory Statement)

<sup>10</sup> See Response Br. at 5-7. Ecology used Instream Flow Incremental Methodology (IFIM) to generate curves of usable habitat as a function of flow. IFIM, by design, does not speak to any other instream values.

<sup>11</sup> AR011574-6 (Whittaker, D and B. Shelby, *Middle Spokane River: Protecting Recreation and Aesthetic Flows*, Confluence Consulting 2015); AR014151-5; AR011460-4; AR011444-9 (affidavits from recreation-dependent business owners).

operators, will become difficult if not impossible.<sup>12</sup>

Ecology based the 850 cfs summer low flow on a recommendation it received from the Washington Department of Fish & Wildlife (WDFW). Before the Rule was adopted, numerous memoranda from WDFW recommended higher flows. All were based on the same set of habitat studies, and all but one were made by the same WDFW biologist (Hal Beecher), as the 850 cfs recommendation.<sup>13</sup> Several of the memoranda reflecting these recommendations, however (and one from Ecology itself), were not included in the agency record.<sup>14</sup>

Petitioners (collectively CELP) filed a Petition for Rule Amendment on February 29, 2016, which Ecology denied April 27, 2016. CELP then filed this Petition for Declaratory Judgment in Thurston County Superior Court, alleging that both the Rule and Ecology's denial of the petition were outside Ecology's statutory authority and arbitrary and capricious.

CELP moved under RCW 34.05.562 to supplement the record with three memoranda containing flow recommendations that had not been

---

<sup>12</sup> AR002240-61 (*Whitewater Paddling Instream Flow Assessment*, Louis Berger Group 2004); 2495-2514 (*Paddling Study*, American Whitewater 2014). *Discussed in* Open. Br. at 16-17

<sup>13</sup> AR007752; AR007749, AR019091.

<sup>14</sup> *See* Petitioners' Motion to Supplement the Record, filed April 25, 2017.

included in the record.<sup>15</sup> Ecology objected on the grounds that these documents “were not in the custody of Ecology’s rule-writing team during the rule-writing process.”<sup>16</sup> The trial court denied CELP’s motion, with the result that the documents are not part of the official rulemaking file.

On June 9, 2017, the court denied the Petition for Declaratory Judgment. This appeal follows.

## II. ISSUES PRESENTED FOR REVIEW

This case presents the following grounds for review:

1. Did Ecology exceed its statutory authority by interpreting RCW 90.54.020’s mandate that “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” as allowing Ecology to adopt an instream flow that “provide[d] for preservation” of only *one* of the listed instream values?
2. Is resolution of this case as expediently as possible in the public interest, because of the need to protect Washington’s interests in any future dispute with Idaho over the Spokane River’s water?
3. Did Ecology’s failure to protect the River’s ecological, recreational, and navigational values in adopting the 850 cfs summer instream flow violate the Public Trust Doctrine, and is Ecology’s interpretation of RCW 90.54.020 inconsistent with the Public Trust Doctrine?

---

<sup>15</sup> *Id.*; Declaration of Dan J. Von Seggern in Support of Petitioners’ Motion to Supplement Record, filed April 25, 2017 at Exhibits 2-4.

<sup>16</sup> Ecology’s Response in Opposition to Petitioners’ Motion to Supplement the Record, filed May 3, 2017, at 3. Ecology did not, however, argue that it had not possessed the documents when the Rule was written or object to their authenticity.

4. Was Ecology's failure to include all of the directly relevant agency reports and recommendations from the agency's own staff and other expert state agencies in the administrative record a violation of the State Administrative Procedure Act?

### **III. GROUNDS FOR DIRECT REVIEW**

- 1. Ecology's interpretation of RCW 90.22.010 and RCW 90.54.020 is inconsistent with the statutes' plain language and with this Court's precedents, and could result in a statewide failure to protect instream values as intended by the Legislature.**

The Legislature has directed the Department of Ecology to maintain adequate streamflows to protect and preserve fish, game, birds or other wildlife resources, recreational, scenic, and aesthetic values, and navigational values. RCW 90.22.010; RCW 90.54.020(3). Ecology's incorrect view of these statutes would leave many of these instream values unprotected, both on the Spokane River specifically and in Washington generally. Review by this Court is appropriate under RAP 4.2(a)(4) because such a threat to the public's precious aquatic resources raises a "fundamental and urgent issue of broad public import which requires prompt and ultimate determination."

RCW 90.22.010 authorizes Ecology 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.” In RCW 90.54.020(3), the Legislature further directed that 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*” (emphasis added).<sup>17</sup> Read together, these statutes require that *all* of the listed instream values be protected. This Court has also emphasized this point in its prior decisions. *Swinomish Indian Tribal Cmty. v. Ecology*, 178 Wn.2d 571, 602, 311 P.3d 6 (2013) (“RCW 90.54.020(3)(a) provides that perennial streams and rivers *must* be retained with base flows sufficient to preserve fish and wildlife, scenic, aesthetic *and* other environmental values, and navigation”)(emphasis added); *Postema v. Pollution Cont. Hrgs. Board*, 142 Wn.2d 68, 94-5, 11 P.3d 726 (2000) (Ecology required to protect "base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, *and* navigational values")(emphasis added).

Despite clear statutory language and this Court’s precedents requiring protection of *all* the instream values listed in RCW 90.54.020, Ecology asserts that it has discretion to protect only *some* instream

---

<sup>17</sup> 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. WAC 173-557-030.

values.<sup>18</sup> Here, Ecology chose to establish an instream flow solely to protect fish but did not protect navigation, aesthetics or recreational use of the river.<sup>19</sup> The predictable result is that water rights will be issued allowing withdrawals of water from the River until the streamflow is too low to support its important navigational, recreational and aesthetic uses. More generally, Ecology's interpretation of the statute would result in failure to protect instream values in future instream flow settings,<sup>20</sup> and would cause widespread harm to the public's aquatic resources.

**2. Prompt determination of this case is in the public interest because of the need to protect the instream flow in any future dispute with Idaho over the Spokane River's water.**

The potential for a dispute with Idaho over water due to increased groundwater withdrawals from the Spokane Valley-Rathdrum Prairie Regional (SVRP) Aquifer, which underlies the River, also presents "a fundamental issue of broad public import which requires prompt and ultimate determination" warranting review under RAP 4.2(a)(4).

---

<sup>18</sup> This interpretation would allow degradation of any instream values and uses that Ecology decides not to protect, and violates the principle that "the interpretation which best advances the overall legislative purpose" should be adopted. *Hart v. Peoples' Nat. Bank of Wash.*, 91 Wn.2d 197, 203, 588 P.2d 204 (1978). As explained below, Ecology's view of the statute also conflicts with the Public Trust Doctrine by impairing the public's right of navigation.

<sup>19</sup> Ecology summarily asserts that the 850 cfs minimum flow levels it selected to protect fish automatically protect navigation, recreation and aesthetics. AR002985; AR009220-22. But the Instream Flow Incremental Methodology that was used by Ecology to determine the instream flow level, by design, addresses *only* habitat for fish.

<sup>20</sup> Currently, instream flows have been adopted in only 30 of the 64 Water Resource Inventory Areas (WRIAs). If instream flows were adopted in the remaining 30 WRIAs under Ecology's interpretation of the statutes, many instream values would be unprotected in those basins as well.

The River originates in Idaho, and flows into Washington.

Increasing withdrawals of groundwater from the SVRP, both in Idaho and in Washington, deplete flow in the River; in particular, Idaho continues to issue permits for groundwater withdrawals.<sup>21</sup> Ecology has expressed concern over a potential legal dispute with Idaho, and noted that establishing a protected instream flow in Washington's portion of the river is important in establishing Washington's claim to its share of the water.<sup>22</sup>

Should the outcome of this litigation be a remand to Ecology to reconsider the summer instream flow, any amended instream flow rule would have a priority date as of its adoption. The earlier a final decision is reached, the earlier any new priority date could be established. Prompt resolution of this case by this Court would therefore serve the public interest in Washington by allowing for better protection of Washington's share of the river's water through earlier adoption of an amended Rule.

### **3. The Instream Flow Rule, and Ecology's interpretation of RCW 90.54.020, conflict with the Public Trust Doctrine.**

Washington's citizens have rights to navigation, fishing and incidental uses of tidelands and rivers under the ancient Public Trust Doctrine (PTD) as well as the State Constitution.<sup>23</sup> Defining and ensuring

---

<sup>21</sup> AR010542-4.

<sup>22</sup> Resp. Br. at 2.

<sup>23</sup> Article XVII, Section 1 of the Washington Constitution asserts state ownership of the "beds and shores of all navigable waters".

protection of the public's interest is exactly the sort of "fundamental issue of broad public import which requires prompt and ultimate determination" that merits review by this Court under RAP 4.2(a)(4). Whether the PTD requires Ecology to preserve adequate streamflow to support the public's right of navigation appears to be an issue of first impression.

a. **The Rule fails to protect the public's interest in navigable waters, as required by the Public Trust Doctrine**

The PTD, stemming from English common law and perhaps grounded as far back as Roman times, protects the public's rights of navigation, fishing and other incidental activities in the navigable waters. *Chelan Basin Conservancy v. GBI Holding Co.*, 2017 WL 2876140, \_\_\_ Wn.2d \_\_\_ (2017) at \*3. Public ownership of tidelands and the beds of navigable rivers and streams is comprised of a fee interest (*jus privatum*), which may be alienated by the state, and a trust interest (*jus publicum*), which may not. *Caminiti v. Boyle*, 107 Wn.2d 662, 668, 732 P.2d 989 (1987). The *jus publicum* includes the public's rights of navigation and fishing, even where the *jus privatum* has been disposed of. *Id.* at 669.

The PTD in Washington is "quasi-constitutional," and this Court recently reaffirmed its "constitutional responsibility" to determine whether an exercise of legislative power violates the PTD. *Chelan Basin Conservancy*, 2017 WL 2876140 at \*7 (citing Ralph W. Johnson *et al.*,

*The Public Trust Doctrine and Coastal Zone Management in Washington State*, 67 Wash. L. Rev. 521, 527 (1992)). Courts review legislation implicating the PTD “with a heightened degree of judicial scrutiny, as if they were measuring that legislation against constitutional protections.” *Weden v. San Juan County*, 135 Wn.2d 678, 698, 958 P.2d 273 (1998).

The 850 cfs summer instream flow of WAC 173-557-050 violates the PTD. First, by allowing water to be withdrawn to a degree that will impair recreational use and navigation, Ecology gives up control over (and arguably will diminish or destroy) the *jus publicum*. Second, reducing streamflow to 850 cfs will impair rather than promote the public’s interest in the *jus publicum*. *Caminiti*, 107 Wn.2d at 670. See also *Chelan Basin*, 2017 WL 2876140 at \*6 (reaffirming *Caminiti* test in context of recreational navigation).

**b. Ecology’s interpretation of RCW 90.54.020 conflicts with the Public Trust Doctrine**

When “dealing with a public trust impairment,” this Court has required that a statute “be strictly construed in preservation of the public trust interest absent express contrary language or necessary implication.” *Chelan Basin*, 2017 WL 2876140 at \*5. Ecology’s interpretation of RCW 90.54.020 conflicts with the public trust doctrine because it would impair the public trust. Selecting only one of the values listed in the statute (here,

fish) for protection would allow instream flow levels to be reduced such that other values, in this case including navigation (the very essence of the *jus publicum*), are no longer protected. On the other hand, interpreting RCW 90.22.010 and RCW 90.54.020 as requiring protection of all the listed instream values, including navigation, would comport with the quasi-constitutional nature of the PTD and best preserve the public trust.<sup>24</sup>

Ecology argued below that “Ecology’s enabling statute does not permit it to assume the public trust duties of the state.”<sup>25</sup> But Ecology’s position addresses the wrong question. At issue here is not whether Ecology *assumed* a public trust duty, but whether its actions (in rulemaking) *violated* the public trust doctrine. Ecology has only those powers granted it by the Legislature under statute and may not alter or extend a legislative enactment. *State ex rel. Evergreen Freedom Foundation v. Wash. Educ. Ass’n*, 140 Wn.2d 615, 634, 999 P.2d 602 (2000). Ecology exceeds its statutory authority when it extends RCW 9022.010 and RCW 90.54.020 to impair the PTD.

**4. Ecology’s failure to consider all of the relevant information in its possession or to place this information in the administrative record was arbitrary and capricious, and sets a precedent that would allow administrative agencies to tailor the record to reach a**

---

<sup>24</sup> If a statute is “reasonably capable of a constitutional construction, it must be given that construction.” *Seattle v. Drew*, 70 Wn.2d 405, 423 P.2d 522 (1967).

<sup>25</sup> Resp. Br. at 16.

**predetermined outcome in rulemaking and hinder judicial review.**

Judicial review of an administrative rule is ordinarily limited to the agency record as contained in the rulemaking file. RCW 34.05.558. But effective review relies on the agency producing a complete record. An incomplete record must be viewed as a "fictional account of the actual decisionmaking process." *Portland Audubon Soc. v. Endangered Sp. Comm.*, 984 F.2d 1534, 1548 (9<sup>th</sup> Cir. 1993).

An agency's failure to act "with regard to the attending facts and circumstances" during rulemaking renders the rule arbitrary and capricious. *Dept. of Ecology v. Theodoratus*, 135 Wn.2d 582, 598, 957 P.2d 1241 (1998). A court cannot determine whether the "facts and circumstances" were given proper consideration without knowing what those "facts and circumstances" actually *were*, which in turn must be determined from the record.

Here, the available information regarding streamflows needed to protect fish was unquestionably part of the "attending facts and circumstances" relevant to Ecology's decision-making. Ecology's 850 cfs summer instream flow was ultimately based on a recommendation from Dr. Hal Beecher at WDFW.<sup>26</sup> Ecology received a number of different recommendations for the summer instream flow from Dr. Beecher and

---

<sup>26</sup> AR007752 (This was one of two memos from Dr. Beecher dated January 9, 2008; the other recommended a flow of 1100 cfs. AR019091).

from Ecology staff, but it failed to include several of those (all of which argued for higher flows) in the rulemaking file.<sup>27</sup> This was arbitrary and capricious.

Ecology attempts to justify its failure to consider this information by stating that the memos were not “in its rulewriters’ possession,” and that the agency did not “rely” on them in making its decision. While no Washington appellate decision appears to have reached this precise question, Federal courts have held that an agency may not “skew the ‘record’ for review in its favor by excluding from that ‘record’ information in its own files which has great pertinence to the proceeding in question.” *Envtl. Def. Fund v. Blum*, 458 F. Supp. 650, 661 (D.D.C. 1978). An agency also may not “exclude information on the grounds that it did not ‘rely’ on the excluded information in its final decision.” *Fund for Animals v. Williams*, 391 F.Supp.2d 191, 197 (D.D.C. 2005).

The issue here is not whether Ecology should have followed one of these higher flow recommendations, but whether an agency can omit available information from the record and thereby shield it from judicial review. If so, an agency could readily avoid addressing issues of public

---

<sup>27</sup> See Resp. Br. at 7 and Petitioners’ Motion to Supplement Record. As a result of the trial court’s ruling on that Motion, the record was not supplemented with these memoranda; CELP refers to them for the limited purpose of calling this Court’s attention to the fact that Ecology improperly chose to omit this highly relevant information from the record.

concern<sup>28</sup> by selectively providing its rulewriters only a subset of the information available to the agency.<sup>29</sup> Such an outcome would fly in the face of the APA's purposes of open decision-making and meaningful public involvement and raises a "fundamental issue of broad public import which requires prompt and ultimate determination" that merits review by this Court under RAP 4.2(a)(4).

#### IV. CONCLUSION

This appeal raises important questions as to the manner in which Washington's public waters are to be managed and protected, a topic of critical statewide importance as pressure on our water resources increases, as well as the issue of an agency's duty to provide a complete record in rulemaking, which has import far beyond the water law context. Review is therefore justified under RAP 4.2(a)(4).

RESPECTFULLY SUBMITTED this 14th day of August, 2017,

s/ Dan J. Von Seggern

Dan J. Von Seggern, WSBA No. 39239  
Center for Environmental Law & Policy  
85 S. Washington St, Suite 301  
Seattle, WA 98104  
T: (206) 829-8299  
Email: [dvonseggern@celp.org](mailto:dvonseggern@celp.org)  
Attorney for Petitioners

---

<sup>28</sup> In this case, the omitted documents were directly relevant to the very strong public concern over streamflow level.

<sup>29</sup> Where information relating to public concerns is omitted from the record, interested members of the public would likely be unaware of it. In this case, CELP was aware of these documents only because of a public records request it made to WDFW.

**CERTIFICATE OF SERVICE**

I hereby certify that on the   14   day of August, 2017, I caused the forgoing Statement of Grounds for Direct Review to be served on the parties herein as indicated below:

Attorneys for Respondent Washington Department of Ecology Office of Attorney General Ecology Division Stephen H. North	<input type="checkbox"/> US Mail <input type="checkbox"/> Hand Delivered <input checked="" type="checkbox"/> email: <a href="mailto:stephen.north@atg.wa.gov">stephen.north@atg.wa.gov</a> <a href="mailto:ecyolyef@atg.wa.gov">ecyolyef@atg.wa.gov</a>
--	---

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Dated this 14th day of August, 2017, in Seattle, Washington.

          s/ Dan J. Von Seggern            
Dan J. Von Seggern, WSBA No. 39239  
Attorney for Intervener/Respondent CELP

**CENTER FOR ENVIRONMENTAL LAW AND POLICY**

**August 14, 2017 - 3:35 PM**

**Transmittal Information**

**Filed with Court:** Supreme Court  
**Appellate Court Case Number:** 94804-6  
**Appellate Court Case Title:** Center for Environmental Law & Policy, et al v. State of Washington, et al.  
**Superior Court Case Number:** 16-2-02161-9

**The following documents have been uploaded:**

- 948046\_State\_of\_Grounds\_for\_Direct\_Rvw\_20170814153418SC075828\_7471.pdf  
This File Contains:  
Statement of Grounds for Direct Review  
*The Original File Name was 94804-6 CELP v Ecology Statement of Grounds.pdf*

**A copy of the uploaded files will be sent to:**

- ECYOlyEF@atg.wa.gov
- stephenn@atg.wa.gov

**Comments:**

---

Sender Name: Daniel Von Seggern - Email: [dvonseggern@celp.org](mailto:dvonseggern@celp.org)

Address:

85 S WASHINGTON ST STE 301

SEATTLE, WA, 98104-3404

Phone: 206-829-8299

**Note: The Filing Id is 20170814153418SC075828**