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NO. 97684-8

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,

Appellant,

v.

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

Respondents.

DEPARTMENT OF ECOLOGY'S SUPPLEMENTAL BRIEF

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I. INTRODUCTION

When Ecology establishes minimum instream flows by rule, it uses a scientific and judicially approved methodology based on the needs of fish. This methodology also ensures that other uses and values of the river are protected. Here, Ecology thoroughly considered a range of recommended values and flows in adopting the now-invalidated summer regulatory flows for the Spokane River that are before this Court. Ecology's rule record includes, for example, information from unsuccessful watershed planning efforts where participants could not reach a consensus on flows and a public rulemaking process where Ecology again considered comments and flow recommendations from many competing River-user communities.

In consideration of all of this information and more, Ecology made a reasoned decision to establish summertime flow levels for the Spokane River based on the biological needs of fish, a decision that is expressly consistent with the agency's rulemaking authorities, RCW 90.22.010 and RCW 90.54.020(3)(a), and one that results in the balanced protection and preservation of multiple competing values for the Spokane River, including rafting and aesthetics, the values of greatest interest to the challengers in this case. The Court of Appeals was thus wrong to conclude that Ecology focused "too narrowly" on fish when it established summertime instream flows for the lower Spokane River. Instead, Ecology considered a range of

values, set flows based on science, and got challenged by a group of users who would prefer higher flows for their preferred interests, but cannot show, as is their burden, how the chosen flows do not preserve their interests.

The ironic and unfortunate consequence of the Court of Appeals' decision is that the Spokane River is now entirely unprotected during the summer months, and other instream flow rules for other river basins throughout the state are vulnerable to challenge and invalidation. Ecology respectfully requests the Court reverse the Court of Appeals and uphold the summer flows in the Spokane Rule. Those flows are expressly consistent with Ecology's rulemaking authorities, protect all values, and are supported by a comprehensive record that shows that the agency reached its decision through a process of reasoned analysis.

II. STATEMENT OF THE ISSUES

1. Consistent with the express language of RCW 90.22.010, Ecology established the summer minimum flows based upon the scientifically determined needs of fish. Ecology further determined that the minimum flows also meet the base flow needs of the other instream values that must be retained under RCW 90.54.020(3)(a). Did Ecology properly exercise its rulemaking authority?

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2. Ecology based the summer flows on the scientifically determined needs of fish, while also providing for base flows to preserve other instream values. Are the summer flows arbitrary and capricious?

III. STATEMENT OF THE CASE

A. The Spokane River and its Flows

The Spokane River originates at the outlet of Lake Coeur d'Alene in Idaho and flows west through the heart of Spokane for approximately 111 miles to the Columbia River in Eastern Washington. Administrative Record (AR) 8062. The River is central to both the area's economy and its sense of community. AR 2983.

The Spokane River is heavily managed. The River's actual flows are largely governed by the Avista Corporation, which operates five hydroelectric projects on the River in Northern Idaho and Eastern Washington. AR 8063. Avista uses its Post Falls project to regulate flows in the Spokane River in accordance with minimum flow requirements in its federal power license, typically for six months per year starting in late June or July. AR 8067.

Avista received a renewed federal license in 2009 for its projects following a lengthy public process that involved multiple stakeholders, including Ecology and the challengers here, who intervened in the relicensing process before the Federal Energy Regulatory Commission

(FERC). AR 8060, 8177. The relicensing process involved thorough consideration of recreation, including flows for whitewater rafting, aesthetics, fish, and other instream and out-of-stream values. AR 6936–60 (fish); AR 7016–20 (recreation). Its renewed license requires Avista to implement numerous measures to protect these values, including the release of flows for whitewater boating from Post Falls Dam. AR 8074–78. Under Avista’s licensed regulation of the River, flows that serve the recreational community occur every year on the Spokane River, but the timing and duration of those recreational flows varies. AR 2985.

B. Ecology’s Adoption of the Spokane Water Management Rule

Efforts to develop minimum flows in the Spokane River date back to 1998, when Ecology started working with local watershed planning groups. AR 72, 2984. The watershed planning efforts highlighted the challenges involved in balancing competing demands for a scarce resource; particularly, in ensuring sufficient water for out-of-stream consumptive uses and also protecting instream values. Stakeholders proposed a range of flows for the summer period, from a low of 565 cfs (from the City of Spokane) to a high of 1,350 cfs (from the Environmental and Recreational Communities). *See, e.g.*, AR 3703. Despite their best efforts, participants in watershed planning could not reach consensus on minimum flow levels. AR 2985, 3648–49. Rulemaking to set flows thus defaulted to Ecology by

law under the Watershed Planning Act. RCW 90.82.080; AR 72. Ecology formally commenced rulemaking in January 2014. AR 72.

The record Ecology compiled for its rule incorporates most of the work that went into the Avista relicensing proceeding. AR 3003; *see also*, *e.g.*, AR 8058–8224 (FERC’s 2009 order issuing a new license to Avista). This includes a whitewater paddling study prepared for Avista, which Ecology considered in response to comments that flows should be higher for the whitewater community. AR 2225–89. Dr. Hal Beecher, a Washington Department of Fish and Wildlife biologist, developed a recommended minimum summertime flow of 850 cfs in cooperation with Ecology, with an emphasis on fish and based on four scientific fish studies. AR 3831–41. During the rulemaking process, not surprisingly, Ecology also received comments expressing a desire for a range of flows. For example, Spokane Riverkeeper proposed summer flows between 1,500 cfs and 1,800 cfs. AR 3219; *see also* AR 15550. The Spokane Tribe did not oppose summer flows at 850 cfs for August and September, but recommended higher flows in June and July. AR 3227. The Backcountry Hunters and Anglers supported the scientifically determined minimum flows. AR 3132. Pertinent here, the environmental and whitewater rafting community submitted comments expressing a desire for a significant range of higher flows, mostly for whitewater rafting. AR 3025–50.

Ecology ultimately decided to set flows based upon the scientific needs of fish because no objective studies had been presented to Ecology showing that flows of 850 cfs were insufficient or that the proposed summer flows did not preserve and protect other instream values. *See, e.g.*, AR 3031. One of the studies that Dr. Beecher and Ecology relied upon to determine what the minimum flow levels should be used is known as the Instream Flow Incremental Methodology, or “IFIM,” to determine what flows were minimally necessary for resident fish at different life stages during different times of the year. AR 1144–68. Ecology has used the IFIM throughout the state to establish minimum instream flows by rule for other rivers and streams. *Id.*

On January 27, 2015, Ecology adopted WAC 173-557, the Spokane Rule, including setting minimum “summer flows” for the lower reach of the Spokane River from June 16th to September 30th at 850 cfs. WAC 173-557-050.

C. Procedural History

The Center for Environmental Law and Policy (CELP), American Whitewater, and the Sierra Club (the “challengers”) filed a petition for judicial review in Thurston County Superior Court under the Administrative Procedure Act to challenge the Rule’s summer flows. The superior court

denied the petition. The challengers unsuccessfully sought direct review in this Court, which transferred the case back to the Court of Appeals.

The Court of Appeals issued a published decision invalidating the Rule. It concluded that Ecology exceeded its authority and violated RCW 90.54.020(3)(a) by focusing too narrowly on fish in setting the flows, and failing to consider the values listed in this statute “to the fullest extent possible.” *Ctr. for Envtl. Policy v. Dep’t of Ecology*, 9 Wn. App. 2d 746, 774, 444 P.3d 622 (2019). The court later clarified that its opinion applies only to invalidate the part of WAC 173-557-050 that establishes summer flows for the lower reach of the Spokane River.

This Court granted Ecology’s Petition for Review.

IV. ARGUMENT

Ecology complied with its express statutory rulemaking authority under RCW 90.22.010 when the agency exercised its discretion to choose the primary purpose for which the agency established minimum flows at issue here, in this case the protection of fish. The agency also complied with RCW 90.54.020(3)(a) because the agency fully considered the instream values listed in the statute and because the minimum flow levels also preserve and protect *base flows* for those values.

During the rulemaking process, the challengers had ample opportunity to provide Ecology with information showing that summer

flows of 850 cfs would not preserve and protect base flows for their preferred values. They did not do so, instead submitting subjective commentary expressing preference for higher flows, but never showing to Ecology's satisfaction that recreation could not occur on the River at the levels set based on fish science. Consequently, the challengers cannot meet their burden of demonstrating that the rule exceeds Ecology's authority or is arbitrary and capricious.

A. Standard of Review

Judicial review of agency rules is de novo under the Administrative Procedure Act. *Wash. Pub. Ports Ass'n v. Dep't of Rev.*, 148 Wn.2d 637, 645, 62 P.3d 462 (2003). The challengers bear the burden to prove that the Rule is invalid. RCW 34.05.570(1)(a). The Court may declare a rule invalid if the rule exceeds the statutory authority of the agency or the rule is arbitrary and capricious. RCW 34.05.570(2)(c). “[S]o long as the rule is ‘reasonably consistent with the controlling statute[s],’ an agency does not exceed its statutory authority.” *Swinomish Indian Tribal Cmty. v. Dep't of Ecology*, 178 Wn.2d 571, 580, 311 P.3d 6 (2013) (quoting *Wash. Pub. Ports Ass'n*, 148 Wn.2d at 646). Additionally, agency action is “arbitrary and capricious if it is willful and unreasoning and taken without regard to the attending facts or circumstances.” *Wash. Indep. Tel. Ass'n v. Wash. Util. & Transp. Comm'n*, 148 Wn.2d 887, 904, 64 P.3d 606 (2003). The validity of

a rule is determined as of the time the agency adopted it. RCW 34.05.562(1), .570(1)(b); *Wash. Indep. Tel. Ass'n*, 148 Wn.2d at 906 n.16.

B. The Summer Flows are Expressly Consistent With RCW 90.22.010 and Ensure the Retention of Base Flows for Other Instream Values under RCW 90.54.020

RCW 90.22.010 and .020 empower Ecology to determine the primary purpose for which the agency sets minimum water flows by rule. Here, and throughout the state of Washington, Ecology has long exercised this discretion by focusing on the protection of fish, a value the Legislature has repeatedly stressed. *See, e.g.*, (1) RCW 90.54.005, wherein the Legislature recognizes that productive fish populations are one of three critically important water resource objectives; (2) RCW 77.57.020, which 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”; (3) RCW 90.22.060, which calls for establishing a statewide list of priorities for evaluation of instream flows: (“[i]n establishing these priorities, the department shall consider the achievement of wild salmonid production as its primary goal”); and (4) RCW 90.82.070, part of the Watershed Planning Act, which 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.”

Ecology seeks to achieve the objective of protecting fish by using the scientifically and judicially approved IFIM to determine their biological minimum flow needs. *See Dep't of Ecology v. Pub. Util. Dist. No. 1 of Jefferson Cty.*, 121 Wn.2d 179, 202–03, 849 P.2d 646 (1993), *aff'd*, 511 U.S. 700, 114 S. Ct. 1900, 128 L. Ed. 2d 716 (1994) (*Elkhorn*) (affirming streamflow conditions establishing minimum flows based upon the needs of fish). When setting minimum flows by rule, prioritizing the needs of fish does not conflict with the preservation of other instream values where, as here, the flow levels established also preserve, at a minimum, base flows for those values.

1. The plain language of RCW 90.22.010 allows Ecology to choose the purposes for which it adopts minimum flows

The Legislature expressly delegated to Ecology the discretion to engage in rulemaking to set minimum flows to protect fish. RCW 90.22.010 provides:

The department of ecology may 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.

(Emphasis added.) Such flows must be established through rulemaking. RCW 90.22.020. Minimum flows do not actually “put” water into a river at a certain level, nor do they give Ecology any additional authority to issue

new water rights. Instead, they simply establish a legal water right in the river that can be protected from future appropriations of water and changes and transfers of existing water rights. RCW 90.03.345; *see also* RCW 90.03.290(3) (new water rights cannot impair existing rights); RCW 90.03.380 (changes and transfers of water rights cannot injure existing rights). Here, the challengers are seeking to remove these important protections from the Spokane River during the summer months because the set flow levels do not rise to their preferred levels for rafting and aesthetics.

That said, in RCW 90.22.010, the Legislature has used the word “or” and thus, through the plain language of the statute, provided Ecology with discretion to determine what water bodies for which it may establish minimum water flows, the purposes for which the agency may establish those flows, and when the agency may establish them. *See Tesoro Ref. & Mktg. Co. v. Dep’t of Rev.*, 164 Wn.2d 310, 319, 190 P.3d 28 (2008) (citing *HJS Dev., Inc. v. Pierce Cty. ex rel. Dep’t of Planning & Land Servs.*, 148 Wn.2d 451, 472 n.95, 61 P.3d 1141 (2003) (“As a default rule, the word ‘or’ does not mean ‘and’ unless legislative intent clearly indicates to the contrary.”)).

Recommendations for higher flows for rafting were based on the subjective interests of that user community, and that community failed to provide Ecology with anything to show that the agency’s chosen flow level

would not also preserve and protect their interests. *See, e.g.*, AR 3033 (“The whitewater community is one of many users of the Spokane River. Among its members, a significant range of needs and desires are expressed While the instream flow levels are based on fish studies, they also ensure flow in the river for preservation of other instream values.”).

Here, Ecology made a reasoned decision to rely on science, and it exercised the discretion the Legislature had provided it in RCW 90.22.010 to set flows based primarily on the needs of fish, a decision rooted in the plain language of that statute. As explained below, the chosen flow levels also preserve and protect base flows for other instream values. Nevertheless, at the outset, when a statute’s meaning is plain on its face, effect must be given to that plain meaning. *Id.* RCW 90.22.010 is unambiguous. Under this statute, Ecology may exercise its discretion to establish flows based on the scientifically determined needs of fish.

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2. The Rule also provides base flows for the listed values in 90.54.020(3)(a)

The Water Resources Act of 1971¹ includes a general declaration of several, often conflicting fundamentals, intended to guide Ecology’s management of water resources. Included in this statute is RCW 90.54.020(3)(a). This statute provides that: “[t]he quality of the natural environment shall be protected and, where possible, enhanced as follows: (a) [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) (emphasis added).

Below, the Court of Appeals gave short shrift to the plain language of RCW 90.22.010, and instead invalidated the summer flows for non-compliance with RCW 90.54.020(3)(a). Specifically, the Court of Appeals held that Ecology must attempt to preserve and protect the values listed in RCW 90.54.020(3)(a) “to the fullest extent possible.” *Ctr. for Env’tl. Policy*, 9 Wn. App. 2d at 774. This holding is wrong because it strays from the

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¹ The Act provides Ecology the authority to adopt rules to provide, *inter alia*, a “comprehensive state water resources program which will provide a process for making decisions on future water resource allocation and use.” *See* RCW 90.54.040.

plain language of the statute, which instead requires that Ecology preserve and protect “base flows” for the listed values.²

Here, the challengers cannot meet their burden of demonstrating rule invalidity because the record in fact reflects that the summer flow level of 850 cfs preserves and protects, *at a minimum*, base flows for recreation. By way of simple illustration, the record includes photographic evidence of people recreating on the river at flow levels of 770 cfs, which is below the 850 cfs in the rule, during the summer months in tubes (AR 11594), hard and softshell kayaks (AR 11590), and a pontoon boat (AR 11590, 11595). In response to comments from whitewater enthusiasts, Ecology expressly considered instream values like recreation:

Ecology considered the recreational, aesthetic, and navigational values arguments for protecting the Spokane River at multiple stages throughout the process which culminates in establishing these instream flows for the river. The subject was addressed in detail during Avista’s FERC relicensing process for their Spokane hydroelectric facilities. . . . [Ecology] has read the Whitewater Paddling Study conducted under the FERC process, listened to many river users. Ecology has reviewed the anecdotal observations, opinions, and photos submitted by whitewater enthusiasts and others.

² Ecology uses the term “instream flow” and “base flow” interchangeably in the Spokane Water Management Rule. *See* WAC 173-557-030 (“**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.”).

AR 2984–85. Ecology fully understands that the challengers would *prefer* higher flows for recreation, but this preference is not backed by any information in the record showing that recreation cannot occur at levels of 850 cfs, or that flows of 850 cfs do not preserve the aesthetics of the River.

The Court of Appeals misread and misapplied the plain language of RCW 90.54.020(3)(a) to effectively mandate that Ecology must attempt to preserve and protect the values listed in RCW 90.54.020(3)(a) “to the fullest extent possible,” a conclusion that is troublesome for two reasons. First, it flips the burden in this rule challenge to Ecology to show rule validity, when the burden is supposed to be on the challengers to show rule invalidity. *See* RCW 34.05.570(1)(a). Second, RCW 90.54.020(3)(a) requires only that Ecology preserve and protect “base flows” for the values listed in that statute. Nowhere in the law is Ecology required to attempt to preserve those values “to the fullest extent possible,” a new standard that conflicts with that statute’s plain “base flows” language.

As the parties asserting Ecology failed to comply with RCW 90.54.020(3)(a), the challengers must show that a flow level of 850 cfs during the summer months does not preserve the values in that statute. They had the entire rulemaking process to make this showing, and instead provided only subjective commentary expressing desire for higher flows, along with photographs showing people actually recreating on the river at

flows less than that established by the Rule. *See* AR 11590; 11594; 11595.³ That is not sufficient to fulfill their burden of showing the rule violates RCW 90.54.020(3)(a).

As the agency responsible for managing the state's water resources, Ecology must balance competing demands for an increasingly scarce resource, including both instream and out-of-stream uses. RCW 43.21A.020. The Legislature recognized this in declaring: "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 90.03.005. In particular, instream flow rulemaking is a complex undertaking that requires Ecology to balance multiple competing demands and needs for water. *See, e.g.*, WAC 173-557-010. Whitewater rafting and aesthetics are but two of many competing interests on the Spokane River. As Ecology explained in the record, it approaches instream flow rules differently in each watershed because each rule area has unique needs. AR 100. *See also*, WAC 173-557-010 (Authority and

³ The photographs of people recreating on the River at flows of 770 cfs were submitted by the challengers, ostensibly to demonstrate that flows of 850 cfs do not support recreation. Instead, they show that a variety of recreation can in fact occur at flows below the 850 cfs level set in the rule.

Purpose). But when the agency settles on a primary value to establish flows, as the agency is expressly authorized to do under RCW 90.22.010, that does not necessarily mean that the flow level does not also preserve and protect listed values in RCW 90.54.020(3)(a).

Here, it was, and is, incumbent upon the rule challengers to show that Ecology's chosen flow levels do not preserve and protect other instream values like recreation and aesthetics. They could not make this showing during the rule adoption process, and they continue to fail to meet their required burden here. The summer flows are consistent with Ecology's statutory rulemaking authorities, RCW 90.22.010 and RCW 90.54.020(3)(a).

C. The Summer Flows Are Well Reasoned and Supported by the Record

The Court of Appeals erred by ruling that Ecology's summer flows are arbitrary and capricious. The court based this conclusion, again, on what it considered to be Ecology's failure to meaningfully consider other instream values listed in RCW 90.54.020(3). *Ctr. for Envtl. Policy*, 9 Wn. App. 2d at 774. This conclusion is not supported by the record that Ecology compiled in support of the Rule.

That record shows that watershed planning groups and stakeholders proposed different flows during the process. AR 3703. Recreational and

aesthetic values have been thoroughly studied as well, and are provided for in Avista's federal license, part of the record here. In 2009, Ecology issued what is known as a 401 Certificate under the Clean Water Act to Avista that expressly addressed aesthetic issues. AR 8177, 81–82. Here, the agency ultimately made the reasonable decision to set flows based upon objective, science-based fish needs, rather than the subjective preferences of one small subset of the river user community. *See supra*, Section IV.B.2. This decision is particularly reasonable when one considers the many legislative mandates to preserve fish populations in this state, and the fact no party came forth during the rulemaking process with information that demonstrated that the flow levels that Ecology ultimately chose conflicted with other instream values. AR 3031.

Ecology's rationale is well-explained *throughout* the record, but perhaps best summarized as follows:

[c]hoosing to not use sole recreational flow criteria to establish flows in an instream flow rule is different than not considering them. . . . Ecology chose to use science-based fish studies to develop the instream flow values for the rule when the Watershed Planning unit failed to reach consensus about instream flow values Since the Legislature adopted RCW 90.22 in 1969, Ecology has adopted numerous instream flow rules throughout the state. Fish studies serve as the backbone of minimum instream flow rule values that have been adopted in the respective rules.

AR 2985.

The Court of Appeals was wrong that Ecology focused “too narrowly” on fish when it set the summer flows here. To the contrary, Ecology focused on and considered a wide range of needs during rulemaking and made the reasoned decision to set flows based upon the scientific needs of fish because no one came forth during rulemaking with persuasive information that the recommended flow levels wouldn’t also preserve and protect other values.

Arbitrary or capricious agency action is action that is willful, unreasoned, and taken without regard to the attending facts or circumstances. *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 589, 90 P.3d 659 (2004). Neither the existence of contradictory evidence, nor the possibility of deriving a separate conclusion from the available evidence, renders an agency’s action arbitrary and capricious. *Rios v. Dep’t of Labor & Indus.*, 145 Wn.2d 483, 504, 39 P.3d 961 (2000). Similarly, “[w]here there is room for two opinions, and the agency acted honestly and upon due consideration, [the] court should not find that an action was arbitrary and capricious, even though [the] court may have reached the opposite conclusion.” *Port of Seattle*, 151 Wn.2d at 589. In light of a record that shows that Ecology’s decision to set flows based on the needs of fish also preserves and protects other instream values,

including those of interest to the challengers, the summer flows are not arbitrary and capricious.

V. CONCLUSION

In a challenge brought seeking higher flows for one subset of river users on one river in Washington State, the present result is that the Spokane River is no longer protected during the summer months, and other instream flow rules not even a part of this case are now open to challenge. For the reasons stated, Ecology respectfully requests that the Court reverse the decision of the Court of Appeals below and fully affirm the Spokane Rule.

RESPECTFULLY SUBMITTED this 21st day of February 2020.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the state of Washington that on February 21, 2020, I caused to be served the Department of Ecology's Supplemental Brief in the above-captioned matter upon the parties herein via the Appellate Court Portal Filing system, which will send electronic notifications of such filing to all parties of record.

DATED this 21st day of February 2020 at Olympia, Washington.



MEAGHAN KOHLER, Legal Assistant

ATTORNEY GENERAL'S OFFICE - ECOLOGY DIVISION

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