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**SUPREME COURT OF THE STATE OF WASHINGTON**

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STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,

Appellant,

v.

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

Respondents.

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**STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY'S  
ANSWER TO AMICUS CURIAE BRIEF OF WASHINGTON  
KAYAK CLUB AND PADDLE TRAILS CANOE CLUB**

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## I. INTRODUCTION

Amici Washington Kayak Club and Paddle Trails Canoe Club illustrate the fundamental flaws of the challenge to Ecology's minimum instream flow rule for the lower Spokane River. Amici argue that the Spokane Rule violates RCW 90.54.020(3)(a) because Ecology did not consider flows for recreation when it established the rule. This position is mistaken and unsupported by the record compiled in support of the rule. Further, it is the challengers' burden to show that Ecology's chosen minimum flow levels don't support "base flows" for the values listed in that statute. They have failed to do so in this case.

As explained below, amici misconstrue Ecology's interpretation of its rulemaking authorities, ignore RCW 90.22.010, and disregard the record that Ecology compiled in support of the rule. Furthermore, amici ignore the complexities of instream flow rulemaking and the delicate balance Ecology must strike between competing instream and out-of-stream interests when it adopts minimum flow rules.

## II. ARGUMENT

### A. **The Public Trust Doctrine Does Not Apply to Ecology's Instream Flow Rulemaking Activity**

Amici's discussion of the Public Trust Doctrine is irrelevant. Below, the Court of Appeals rejected the challengers' argument that the Public

Trust Doctrine served as an independent basis for invalidating the rule. *Ctr. for Env'tl. Law & Policy v. Dep't of Ecology*, 9 Wn. App. 2d 746, 770–71, 444 P.3d 622 (2019) (citing *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 99, 11 P.3d 726 (2000); *Rettkowski v. Dep't of Ecology*, 122 Wn.2d 219, 232, 858 P.2d 232 (1993)). The challengers elected not to cross petition for review of the Public Trust Doctrine issue and do not advance the argument in their supplemental brief. *See* Answer to Pet. for Review; Suppl. Br. of Resp'ts; *see also* RAP 13.7(b). This Court should decline to address this issue, which is addressed only by amici. *Harris v. Dep't of Labor & Indus.*, 120 Wn.2d 461, 467–68, 843 P.2d 1056 (1993).

**B. Amici Misconstrue Ecology's Interpretation of Its Authorities, Which Actually Harmonizes *All* Relevant Authorities**

Amici attack a straw man, repeating the challengers' erroneous characterization of Ecology's position. Contrary to their mischaracterization, Ecology does *not* contend that it need only consider fisheries when establishing minimum flows by rule. Ecology agrees that it should consider the values listed in RCW 90.54.020(3)(a) when setting minimum flows. Consistent with the express language of RCW 90.22.010, Ecology does this by first establishing minimum flows using fish as a baseline and then considering all other instream values through the notice-and-comment rulemaking process. Amici are simply incorrect in their

contention that Ecology must “independently study, evaluate and quantify” all beneficial uses of water when setting minimum flows. Amicus Br. at 7. This illustrates the error that the Court of Appeals made. Such an interpretation is contrary to law and would cripple Ecology’s ability to protect minimum instream flows by subjecting rules to challenges that Ecology did not adequately study each and every instream value listed in RCW 90.54.020(3)(a). This is particularly true, where, as here, the agency relied on studies produced by the challengers, and then they assert that even more studies are needed. There is simply no requirement for Ecology to affirmatively study each and every value listed in RCW 90.54.020(3)(a).

**1. RCW 90.22.010 is just a starting point in setting minimum flows by rule, and Ecology does not adopt minimum flows in a vacuum**

Amici’s argument misconstrues Ecology’s interpretation of its statutory rulemaking authorities, and perhaps most importantly ignores the plain language of RCW 90.22.010, which is Ecology’s primary rulemaking authority for establishing minimum flows by rule. This statute is simply a starting point in a complicated and public process that requires Ecology to balance multiple competing demands and uses for a water resource.

When, as here, watershed planning groups cannot reach consensus on what minimum flows should be adopted for a water body,<sup>1</sup> the task of setting minimum flows defaults to Ecology. RCW 90.82.080(1)(c). This makes sense, as Ecology is the agency that the Legislature has tasked with implementing its expertise to manage the state’s water resources. RCW 43.21A.064.

The Legislature specifically authorized 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.” RCW 90.22.010. RCW 90.22.020 then provides in relevant part, “[f]lows or levels authorized for establishment under RCW 90.22.010 . . . shall be provided for through the adoption of rules.”

The express language of this statute, through the Legislature’s use of the word “or,” provides Ecology the authority to choose the purpose for which the agency establishes minimum instream flows—in this case the “purpose[] of protecting fish,” utilizing their scientifically determined

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<sup>1</sup> The record here reflects that even after years of effort, the watershed planning group, which included municipal and environmental and recreational interests, could not reach consensus on flows for the summer period of June 16 to September 30, with flow recommendations ranging from 565 cubic feet per second (cfs) (City of Spokane) to 1,350 cfs (environmental and recreational interests). AR 3703.

needs. RCW 90.22.010. Both amici and the challengers give short shrift to this statute because they have no argument to counter that statute's plain language. Instead, in an argument that requires them and the Court to ignore RCW 90.22.010, they argue that RCW 90.54.020(3)(a) *mandates* that Ecology set flows based on the values listed in *that* statute, and that Ecology must "independently study, evaluate and quantify recreation[al] flow needs." Amicus Br. at. 7.

RCW 90.54.020(3)(a) is found in a long list of many competing fundamentals for water resources management found in the Water Resources Act of 1971. The statute states, "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." RCW 90.54.020(3)(a) (emphasis added).

RCW 90.54.020(3)(a) merely requires that Ecology's water management activities ensure the retention of base flows to support the values listed in that statute. And here, as demonstrated below, Ecology's water management decision to set flows based on the scientific needs of fish consistent with RCW 90.22.010 also complies with RCW 90.54.020(3)(a)

because the minimum flows also provide base flows to preserve the values listed in RCW 90.54.020(3)(a), including recreation and navigation.

In a case such as this it is perfectly appropriate for Ecology to choose needs for fish as a baseline to set the minimum flows under RCW 90.22.010, and then use the rulemaking process to *consider* studies and comments pertinent to the values listed in RCW 90.54.020(3)(a), as the agency did here, to ensure that the flows are adequate as “base flows” to preserve other non-fish related values. If a party asserts that chosen flow levels in a proposed rule are insufficient, then that party can come forth with evidence during rulemaking and attempt to persuade the agency to change the chosen flow level when it adopts the rule.

Amici’s argument takes the “base flows” language in RCW 90.54.020(3)(a) beyond that simple requirement and ignores what occurred here, which is a public rulemaking process where parties like amici and the challengers had the opportunity to provide information that Ecology’s minimum flows would not also provide base flows for recreational boating. They simply failed in this endeavor, a failure that carries over to this case, as it remains their burden to show that Ecology’s chosen flows do not also provide base flows for recreational boating in violation of RCW 90.54.020(3)(a).

**2. The public rulemaking process allows Ecology to ensure that the agency's minimum flows also provide base flows for the values listed in RCW 90.54.020(3)(a)**

RCW 90.54.020(3)(a) does not mandate, as amici argue, that Ecology “independently study, evaluate and quantify recreation flow needs.” Amicus Br. at 7. If that were the case, then RCW 90.22.010 would be superfluous as an authority for Ecology’s rulemaking, essentially turning the “ors” in that statute into “ands.” This is because Ecology would effectively have to independently analyze, quantify, and study all of the listed values in RCW 90.54.020(3)(a), rather than choosing a value to establish a minimum flow, consistent with RCW 90.22.010, and then using the public rulemaking process, as the agency did here, to evaluate and ensure that the proposed minimum flow will also preserve and protect base flows for the listed values. *See* RCW 34.05.320, .325 (Notice, Public Participation).

And here, far from adopting minimum flows in a vacuum, the rulemaking process and record reflect that Ecology carefully considered evidence pertinent to recreational boating. Members of the environmental and recreational community were highly engaged throughout the rulemaking process, but failed to provide Ecology with objective data showing that the summer flow was insufficiently protective of recreational and navigational values. During public comment, members of the

environmental and whitewater rafting communities submitted more than 1,700 comments expressing a desire for a significant range of higher flows. AR 2987, 3025–50, 3291. In particular, challengers provided Ecology with the results from two whitewater instream flow surveys and several photographs purporting to show that the summer flows are insufficiently protective of recreation and navigation. *See, e.g.*, AR 560–61, 11590–606. By the time it adopted the Spokane Rule, Ecology had thoroughly considered recreational and navigational values throughout a process spanning nearly two decades, which included Avista’s FERC relicensing, the watershed planning process, the comment period on the preliminary rule draft, and the comment period before final rule adoption. AR 2985.

Ecology reviewed these materials and reasonably decided to adopt flows based upon the scientific needs of fish in the absence of objective studies showing that flows of 850 cubic feet per second (cfs) were insufficient or otherwise did not preserve and protect other instream values. *See, e.g.*, AR 2982, 2985, 3003, 3031. In light of its repeated consideration of recreational and navigational values for the Spokane River, Ecology declined to engage in further study of recreational and navigational flow needs out of a sensible concern that such study could result in significant delay and, potentially, even permanently preclude adoption of important instream flow protections for the river. AR 2984. *See also* AR 3 (explaining

“Why Now” for rule adoption). Just because Ecology decided not to base minimum flows solely upon the subjective preferences of the paddling community does not mean it ignored recreational and navigational values or that base flows for these values are not preserved. *See, e.g.*, AR 2985, 3003.

**3. Amici and the challengers fail to meet their burden of showing that the rule fails to retain base flows for navigation**

Amici and the challengers do not meet their burden of showing that the Spokane Rule fails to retain base flows necessary to provide for preservation of recreational and navigational values. RCW 34.05.570(2)(c). The factual evidence cited in support of the challenge to this rule shows that whitewater paddlers have a wide range of subjective flow preferences and that many find the river to be navigable at flows of 800 cfs or less. AR 2246, 2262, 2291, 2329, 2390, 2485, 2507, 11590–606.

To illustrate, during the public comment period for the proposed rule, CELP and Sierra Club submitted two whitewater flow studies showing that survey respondents had a wide range of subjective flow preferences. One such survey was a whitewater paddling instream flow assessment study that was prepared for Avista’s FERC relicensing. AR 560–61; *see also* AR 2225–89 (2004 Berger whitewater paddling survey). Although the study report concluded that a minimum flow of 1,350 cfs was appropriate

for the Lower Spokane River, survey participants indicated the lowest flow that they could boat ranged from 0 cfs to 4,000 cfs. AR 2246, 2262. Out of just 21 survey participants who reported their minimum flow preferences for the Lower Spokane, nearly a quarter indicated flows of 800 cfs or lower were adequate. *Id.* CELP also submitted the responses to a 2014 web survey conducted by American Whitewater. AR 560–561; *see also* AR 2290–2494 (survey responses). Like the 2004 whitewater paddling survey, the responses to the 2014 American Whitewater web survey indicated that respondents had a wide range of subjective flow preferences. Out of 71 total survey respondents, 52 provided their opinions about the lowest flow required to navigate the Lower Spokane River, with responses ranging between 500 cfs for kayakers and 5,000 cfs for oar boats. AR 2291, 2329, 2390, 2485, 2507. Respondents also indicated the lowest flow that provides an acceptable experience on their preferred craft ranged from 700 cfs to 8,000 cfs. AR 2381, 2390. The summer flows for the Spokane River are 850 cfs, so it is hard to fathom how amici or the challengers can assert that the rules don't provide "base flows" for recreational boating in violation of RCW 90.54.020(3)(a). Far from it; and the record includes the pictures to prove it.

Photos in the record show various watercraft navigating the Spokane River at a flow of just 770 cfs. AR 11590–606. Challengers purport that

these photos show that the summer flow is too low to support recreation and navigation, but the photos actually show hard and softshell kayaks, pontoon boats, and inflatable tubes floating on the river at flows that are lower than the minimum summer flow that the Court of Appeals invalidated. AR 11590, 11594, 11595, 11597–603. At most, these photos show that some larger watercraft may encounter natural obstacles at a few points along the river. However, nearly three quarters of those who responded to the 2014 American Whitewater web survey indicated they preferred to recreate or navigate in smaller craft like kayaks or canoes. AR 2513. Thus, CELP’s photographs actually show that the summer flows support *base flows* consistent with RCW 90.54.020(3)(a) for recreational paddling. In light of this evidence, Ecology is perplexed why amici or the challengers would argue that Ecology must also independently study, evaluate and quantify recreation flow needs when that information is already in the record.

Flows that serve the recreational paddling community occur throughout the year, although the timing and duration of those flows vary. AR 2985. Flows that provide whitewater boating opportunities occur throughout much of the year. *See* AR 2235 (2004 whitewater instream flow survey); 3460 (WRIA 55/57 watershed management plan). During public comment, one commenter from a rafting group noted that their main rafting season runs from April to the first week of June (AR 3034, 3036), at which

time the Spokane River's minimum instream flow is set to 6,500 cfs. WAC 173-557-050. *See also* AR 3195 (comments from Peak Adventures, "Our ideal rafting water flow is 10,000 to 18,000 cfs, and normally we raft between April and May because that's the only time the river is high enough.").

Ecology fully understands that many members of the paddling community prefer a higher summer flow. But Ecology is tasked with setting *minimum flows* under the law, and the agency would surely be challenged if it based summer flows only on the subjectively higher flow preferences of just one user community for the entire Spokane River. This is particularly evident when one considers that during the watershed planning process, the City of Spokane and other entities expressed preferences for flows even lower than the flows the agency ultimately adopted and that are now before this Court.<sup>2</sup> Ecology thus reached the reasonable conclusion that these subjective preferences do not offer a sufficient basis to reject scientifically determined flows based on the needs of fish. AR 2985, 3031–33. Throughout rule adoption, no scientific information was provided to Ecology showing that proposed summer flows did not also preserve and

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<sup>2</sup> To illustrate, the City of Spokane Environmental Programs initially recommended a flow of 425 cfs, revised to 565 cfs, in an attempt to "maintain flexibility in meeting water demand for people while protecting instream flow needs of fish." AR 4528, 4530.

protect other instream values. Information submitted by the paddling community only showed that it subjectively preferred higher flows. AR 3031–33. Thus, amici and the challengers do not meet their burden of showing the rule fails to retain base flows that provide for the preservation of recreation and navigation.

**4. Amici’s argument dangerously undermines Ecology’s ability to protect minimum instream flows**

Lastly, it should be noted that amici’s position that Ecology must thoroughly study, evaluate and quantify the values listed in RCW 90.54.020(3)(a) would dangerously undermine the ability of Ecology to establish minimum instream flows by rule and further hamstring the agency’s ability to preserve and protect instream interests while also managing water for consumptive uses. *See, e.g.*, RCW 90.54.005 (“The legislature recognizes the critical importance of providing and securing sufficient water to meet the needs of people, farms, and fish.”).

The Minimum Flows and Levels Act, RCW 90.22, was adopted by our Legislature in 1969. In turn, in 1971 the Legislature adopted the Water Resources Act. These Acts represent a bold effort by our Legislature to balance instream and out-of-stream resources, by authorizing the agency to adopt minimum flows by rule (RCW 90.22.010, .020), while also directing that the agency balance the multiple competing demands for our water

resources as our state's population grew. RCW 90.54.020. In 1979, the Legislature then granted minimum instream flows the status of water rights under our water code. RCW 90.03.345. This means that new water rights cannot impair them once they are established by rule, and that changes and transfers of existing water rights cannot impair them either. RCW 90.03.290(3), .380.

This case illustrates the challenges that Ecology faces when it establishes instream flows by rule under these important statutes. As the record reflects, Ecology has been working with watershed planning groups *since 1998* to develop instream flow protection for the Spokane River. AR 2984. By 2008, those groups could not reach consensus on flows (AR 3648–49, 3698, 3703), and so rulemaking defaulted to Ecology to set minimum flows by rule. RCW 90.82.080(1)(c). Even with two recreational flow studies, challengers CELP and Sierra Club asked for more studies. AR 556–57. They didn't come forward with information during rulemaking showing that boating was unavailable under the proposed flow. Instead, they commented that boating under such flows would not be ideal, and that it should therefore be studied more, which could have needlessly delayed this important rule. *Id.*; AR 3.

This Court has also recently seen a challenge to Ecology's amendment to an instream flow rule for the Skagit River. *Swinomish Indian*

*Tribal Cmty. v. Dep't of Ecology*, 178 Wn.2d 571, 584–85, 311 P.3d 6 (2013). And quite recently, the Court of Appeals, Division II, rejected a multi-pronged challenge to Ecology's minimum instream flow rule for the Dungeness River, where, like here, the challengers attempted to find unfulfilled mandates in RCW 90.54.020. *Bassett v. Dep't of Ecology*, 8 Wn. App. 2d 284, 438 P.3d 563 (2019).<sup>3</sup>

In a very real sense, RCW 90.54.020 has become a “one stop shop” for parties to sue the agency when they disagree with the agency's water management decisions. It is easy to see why. As the *Bassett* court noted, “The word ‘shall’ appears 22 times in RCW 90.54.020 . . . [and] [i]f the legislature's use of the word ‘shall’ imposed a formal test on DOE before it allocated any amount of water, DOE would be overwhelmed with countless conflicting tests and unable to perform its water management duties. We reject this argument because it would lead to an absurd result.” *Bassett*, 8 Wn. App. 2d at 305.

Ecology offers these cases to demonstrate that amici and the challengers are ignoring, or at least oversimplifying, the complexities of water resources management and the many competing values the agency must attempt to satisfy when it makes any water resources management

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<sup>3</sup> In *Bassett*, challenger CELP intervened on behalf of Ecology in support of that rule and never argued that RCW 90.54.020(3)(a) created additional mandates for how Ecology is to set minimum flows by rule.

decision, including the establishment of minimum instream flow rules. Ecology never focuses on fish as one solitary value any more than it failed to consider other values like recreational boating here. It is simply trying to balance multiple competing interests in a critically important resource. Fish science, as explained herein, is just a starting point. The record shows that what flows from that initial decision is careful and thoughtful consideration of everything else that matters to the public.

Ecology thus concurs with amici when they state that “this appeal has import beyond resolution of the Spokane River instream flow controversy.” Amicus Br. at 7. Indeed, if the Court adopts the rule proposed by amici and the challengers, that Ecology must independently evaluate, study and quantify all of the values in RCW 90.54.020, it would be much more difficult for Ecology to adopt needed minimum flow rules in critically important basins throughout the state. The Spokane River, where even after a decade planning groups couldn’t reach consensus on what the flows should be, is but one example.

Further, if the Court adopts the rule proposed by amici and the challengers, the basins where Ecology has already adopted rules will be open to challenge. Prospective challengers could argue that the rules don’t provide base flows for a listed value in RCW 90.54.020(3)(a), or that the agency did not independently evaluate, study or quantify certain listed

values. Challengers and amici thus propose a rule to strip important protections for the Spokane River, and potentially many other important water bodies statewide, all because Ecology's minimum flows here, rooted in science, do meet their subjective desires for their one preferred use—recreational boating. In short, if successful, industry and interest groups can use this case as a roadmap to eviscerate the protections afforded by minimum flow rules, or to prevent new rules from being adopted.

An instream flow rule simply protects a minimum flow level in a river against future appropriations—it does nothing to diminish streamflows. RCW 90.03.345. The issuance of new consumptive water rights can diminish streamflows, but instream flow rules *prevent* new water rights from reducing streamflows below the minimum flow level. *See Postema*, 142 Wn.2d at 92–94; *Swinomish Indian Tribal Cmty.*, 178 Wn.2d at 584–85. Invalidating the Spokane Rule does not protect higher flows for recreation and navigation; instead, it removes a critically important protection from the river for everyone—not just the challengers here; and the Court should be under no illusions. Removal of this protection is the precise remedy for which amici and the challengers advocate; but Ecology is the only party to offer the Court an interpretation of relevant authorities that harmonize them.

### III. CONCLUSION

In conclusion, the Spokane Rule is expressly consistent with *all* of Ecology's statutory rulemaking authorities, and the challengers have failed to meet their burden of showing how the summer flows do not preserve and protect base flows for recreational boating.

RESPECTFULLY SUBMITTED this 29th day of April 2020.

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