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SUPREME COURT NO. 97684-8

COURT OF APPEALS NO. 51439-7-II

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

REPLY BRIEF OF APPELLANTS CENTER FOR ENVIRONMENTAL LAW AND POLICY, AMERICAN WHITEWATER, AND SIERRA CLUB

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I. Introduction

Appellants Center for Environmental Law & Policy, American Whitewater, and Sierra Club (collectively, "CELP") offer this Reply to Respondent Washington Department of Ecology's Response Brief, pursuant to RAP 10.1(b). Unable to refute the arguments actually made by CELP, Ecology persists in addressing straw persons rather than the actual issues in this case, and again fails to acknowledge the Water Resource Act's clear mandate that it must protect all of the instream values enumerated in the statute. Ecology's Rule fails to "protect and preserve" several of these instream values in the Spokane River, and violates the State's Public Trust Doctrine obligations to protect recreational and navigational uses. Finally, an incomplete administrative record hampers effective judicial review of Ecology's rulemaking process, controverting the Administrative Procedure Act's purpose of increased openness in decision-making.

II. CELP does not ask that water be somehow "added" to the River, or that flows be "enhanced."

Just as it did in the proceedings below, Ecology relies on the straw person argument that CELP seeks increased "enhancement" streamflows. Department of Ecology's Response Brief, filed November 13, 2017

("Resp. Br.") at 20-22. Ecology then claims that summer flows in excess of 850 cfs could be attained only by "seek[ing] changes in Avista's [FERC] license." Resp. Br. at 6-7. Because Ecology's premise is incorrect, its argument regarding Avista's license is irrelevant.

The licenses for Avista's dams are part of the pre-Rule status quo. Flow in the river is ultimately controlled by the amount of water passing through the Post Falls Dam, at the upper end of the River. Under present conditions, sufficient water is released from Post Falls Dam so that the flow at the Spokane gage exceeds 850 cfs for much of the summer in most years (the hydrograph is reproduced below).[1]

The 850 cfs flow proviso in the FERC license refers not to discharges from Post Falls Dam, but to flow over two smaller dams downstream, the Monroe Street and Upper Falls Dams. This proviso does not actually require Avista to maintain flow in the river, but to simply consult with Ecology if flows fall below 850 cfs. AR008163. Because the pools behind the Upper Falls and Monroe Street dams are very small, as a practical matter, these have virtually no impact on the actual flows at the Spokane gage.

[1] The hydrograph for the Spokane gage shows that flow exceeds 850 cfs for part of the summer even in very dry years (the 90% exceedance hydrograph) and for the entire summer period in many years (the 10%-50% exceedance curves). AR003840.

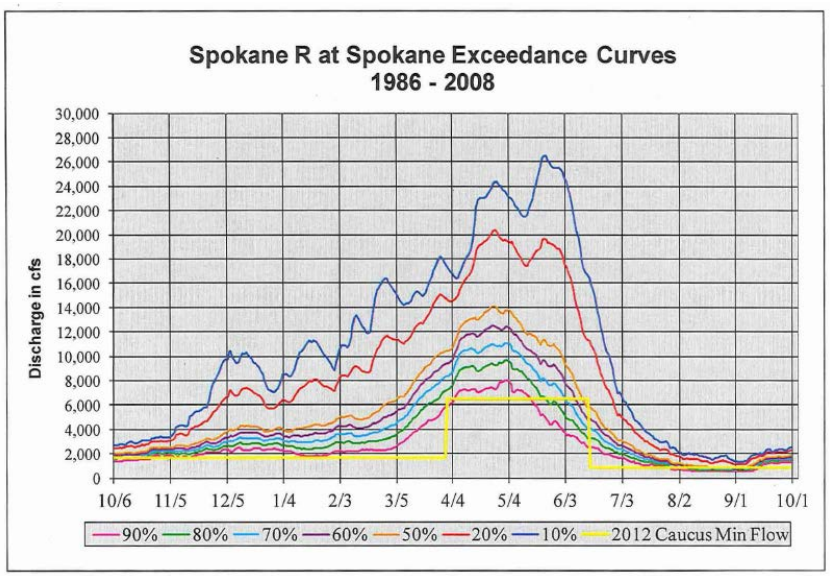

Figure 4. Exceedence hydrographs and recommended instream flows at USGS gauge 12422500 (Spokane River at Spokane).

AR003840.

Protecting the water that flows past these dams would not require any changes in Avista's license conditions or operations. Put another way, flows exceed 850 cfs for part or all of most summers, regardless of what Avista's license requires; it is this flow that CELP seeks to protect. AR3840.

It is hard to imagine how CELP could have been any clearer on this point. The very first paragraph of CELP's Opening Brief filed in the court below explicitly states that "neither the Petition to Amend nor this lawsuit seek additional water 'added to' the River or that natural flows be artificially 'enhanced.'" CP 188. The point is restated in both CELP's

Reply brief below[2] and the Opening Brief filed in this Court.[3] CELP does not request larger releases of water from Avista's Post Falls Dam. The relief that CELP seeks in no way implicates Avista's FERC licenses. And CELP does not ask that Ecology find more water from any source whatsoever; rather, water that is already in the river should be protected.

Ecology further argues that RCW 90.54.020(3)'s use of the words "where possible" gives it "discretion" as to whether to "enhance" streamflows. Resp. Br. at 21. But this too is based on the false premise that CELP seeks "enhancement." The arguments regarding "enhanced" flows are irrelevant[4], and serve only to distract from Ecology's failure to meet its statutory duty to *protect* the instream values that the River now supports.

Ecology's arguments rest on mischaracterizing the relief requested by CELP as "enhancement." As such they are wholly irrelevant and should be given no weight by this Court.

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[2] "CELP in no way suggested that Ecology should 'control flows or put more water into the river,' and stated that this was not the case in their opening brief. . . . CELP did petition Ecology to protect more of the *existing* natural flow to avoid having the river be regularly reduced to drought levels (i.e. 850 cfs), the predictable result of the current Rule." CP1211.

[3] "Appellants' position is that a larger portion of the streamflow that *currently exists* in the River should be protected from new appropriations." CELP's Opening Brief, filed October 13, 2017 ("Open. Br.") at 1.

[4] Even if this argument were relevant, it would be incorrect. RCW 90.54.020(3)(a) requires that instream values "shall" be enhanced "where possible," not "where Ecology chooses to enhance them."

III. Ecology repeats its incorrect argument regarding statutory construction and agency deference.

Ecology also misstates CELP's argument regarding deference ("Appellants incorrectly assert that Ecology's Rule is afforded no deference on judicial review.") Resp. Br. at 15. CELP has not argued that the Rule itself is not entitled to deference.[5] CELP *does* argue that Ecology's interpretation of the instream flow statutes (the stated basis for adoption of the Rule) is not entitled to deference. An agency's statutory interpretation is entitled to deference where the statute is ambiguous. *Postema v. Pollution Cont. Hearings Board,* 142 Wn.2d 68, 77, 11 P.3d 726 (2000); *Dept. of Ecology v. Theodoratus*, 135 Wn.2d 582, 590, 957 P.2d 1241 (1998). But neither RCW 90.22.010 nor RCW 90.54.020(3)(a) is ambiguous, and Ecology has not argued to this Court or to the court below that they are. This alone is dispositive of Ecology's argument[6], and there is no deference owed to Ecology's interpretation.[7]

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[5] Ecology has cited nothing to show that the Rule itself is entitled to deference. There are circumstances under which courts will giver deference to agency interpretations of law. However, CELP is aware of no precedent for extending such deference to agency rules themselves, and the case (*Cornelius v. Ecology*, 182 Wn.2d 574, 585, 344 P.3d 199 (2015)) cited by Ecology on this point says no such thing.

[6] Where a statute's meaning is plain, a court gives effect to that plain meaning. *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 708, 153 P.3d 846 (2007).

[7] A reviewing court does not owe blanket deference to Ecology's interpretation of water law. In *Swinomish Indian Tribal Community v. Department of Ecology*, 178 Wn.2d 571, 602, 311 P.3d 6 (2013), this Court held that Ecology's interpretation of another part

Ecology's interpretation is also owed no deference because it is contrary to the statutes' plain meaning, fails to give meaning to all of the statutory language, and conflicts with their purposes. Open. Br. at 19-24.

On the other hand, CELP's interpretation of these statutes as requiring protection of *all* of the listed instream values gives meaning to all of the statutory language, supports the statutes' purpose of protecting instream resources, and is in full agreement with this Court's prior decisions on this point. "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." *Swinomish*, 178 Wn.2d at 602. *See also Postema*, 142 Wn.2d at 81 ("establishment of base flows in rivers and streams was mandated by RCW 90.54.020(3)(a)"); "Ecology is required to protect surface waters in order to preserve the natural environment, in particular '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)." *Id.* at 94-5.

Attempting to avoid both the clear language of the instream flow statutes and this Court's prior decisions, Ecology doubles down on its

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of the very statute at issue here, RCW 90.54.020(3)(a), was "inconsistent with [the statute's] plain language" and therefore invalid.

position that RCW 90.22.010's use of "or" allows it to pick and choose which instream values to protect, regardless of anything that other statutes (such as RCW 90.54.020(3)(a)) might say, and that RCW 90.54.020(3)(a) is merely a list of optional "fundamentals" to be considered at the agency's discretion. Resp. Br. at 16-19. CELP does not argue that the "or" in RCW 90.22.010 should be read as an "and" (Resp. Br. at 18); rather, CELP argues that the "*and*" in RCW 90.54.020(3)(a) means exactly what it says. As shown in CELP's Opening Brief, RCW 90.22.010 is properly read in concert with RCW 90.54.020(3)(a), which very clearly states that all of the instream values listed "shall" be protected.[8] Open. Br. at 13-14.

IV. Nothing in the record demonstrates that an instream flow based on fish habitat would protect other instream uses, and Ecology's 850 cfs fails to protect navigation and recreation.

Ecology correctly notes that its instream flow "cannot undermine the values listed in RCW 90.54.020(3)(a)." [9] Resp. Br. at 25.But the summer low flow established by the Rule will do precisely that. Open. Br.

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[8] Ecology cites no authority or support for the conclusory statement that RCW 90.22.010 is the "primary" authority for setting instream flows, or for its position that RCW 90.54.020 is somehow secondary. This argument also conflicts with the principle that meaning is discerned from "all that the Legislature has said in the statute and related statutes. . . " *Ecology v. Campbell & Gwinn*, 146 Wn.2d 1, 12, 43 P.3d 4 (2002).

[9] *See also* Resp. Br. at 21-22 ("What the statute means, in effect, is that through its water management activities, Ecology *must maintain base flows for the listed values*, and do its best to enhance those values if possible.") (emphasis added).

at 26-7. This is not surprising, as the 850 cfs number was chosen based only on considerations of fish habitat[10].

The claim that *Ecology v. PUD No. 1 of Jefferson County*, 121 Wn.2d 179, 849 P.2d 646 (1993) ("*Elkhorn*") supports use of the Instream Flow Incremental Method (IFIM) as the sole method for establishing an instream flow is unavailing. Resp. Br. at 22. *Elkhorn* deals only with protection of fish habitat, and says nothing about any of the other instream values listed in RCW 90.54.020(3)(a). It stands to reason that a decision that deals only with fish habitat can properly be made using a method (IFIM) that provides data only on fish habitat. However, IFIM alone is clearly not adequate when other instream values must be considered, and nothing in *Elkhorn* (or any other authority cited) suggests that it is.

Here, the 850 cfs figure was inappropriately derived from only the IFIM study. Ecology is incorrect to claim that "the record fully supports Ecology's reasonable decision to set flows at 850 cfs based on the scientific needs of fish, while knowing that flows at that level would also preserve and protect base flows for other instream values, including recreation, aesthetics, and navigation." Resp. Br. at 22. There is nothing in

[10] The WDFW memo recommending the 850 cfs figure is based on the IFIM results, and makes no reference to any other instream value. AR003831-41. The record contains no document or other evidence showing that Ecology made qualitative or quantitative estimates of flows needed to support any other instream values.

the record to indicate "knowledge" that protecting fish habitat would protect other uses, that the effects of an 850 cfs flow on navigational or recreational use of the river was ever considered, or that Ecology even made any effort to determine how the summer low flow would affect these uses. Ecology can point to no agency study examining streamflow effects on other instream values. The record reflects that Ecology "reviewed" certain documents and other information regarding navigational and recreational uses of the River, but there is no analysis of how recreational and navigational values would be affected. Resp. Br. at 24.

The facts that "boating occurs year-round on the river," and that "[f]lows that serve the recreational community occur each year," do not show that these recreational and navigational values have been "protected and preserved." Resp. Br. at 25. At most, these statements would show that those instream values were not completely abolished. "Protected and preserved" requires more than retaining a bare minimum remnant of an instream value.[11] And the comments submitted by the public, which form a large part of the record in this case, overwhelmingly show that recreation

[11] Apparently as evidence that navigation and recreation would not be destroyed by the Rule, Ecology cites to a provision in Avista's license that requires flows of 3300 to 5500 cfs be released to provide recreational opportunities. Resp. Br. at 6. However, this does not speak to the issue of recreation or navigation in summer, as flows exceeding 3000 cfs occur only in spring. AR003840.

and navigation on the Spokane River would be adversely affected by an 850 cfs instream flow. *See, e.g.,* AR016352-018096.

It should be noted here that Ecology's reference to photographs taken by CELP counsel and whitewater recreation experts is incomplete and misleading. Ecology cherry-picks several photos showing that it was technically possible to float down the lower River at a low streamflow (770 cfs). Resp. Br. at 31 (*citing* AR011590, AR011595, AR011594). What Ecology does not point out to this Court are several other photographs taken the same day, showing the same raft barely passing through a narrow channel due to low water, being portaged over bare rocks, and finally "[getting] stuck and [having] to be lifted over the rocks." AR011600; AR011601; AR1011602. Comparing these photographs to those taken in the same stretch of the River (Devil's Toenail rapids) at periods of higher flow readily demonstrates the effect of the summer low flow. AR000430.

Ecology also incorrectly states that "no entity has emerged with scientific information to indicate [the 850 cfs flows] are not appropriate." Resp. Br. at 11. But a recreational flow study published in 2004 by the Louis Berger Group, and the 2014 survey conducted by American

Whitewater, provided exactly that type of information.[12] Participants in the 2004 study considered the "lowest navigable flow" to be "approximately 1350 cfs."[13] AR016258. In the 2014 survey respondents felt that "acceptable flows ranged from 1,500 to 15,000 cfs." *Id.* The scientific basis for this type of study, along with references to Ecology's own citations to such studies, is discussed in a report by Drs. Shelby and Whittaker. AR011567.

In summary, the record fails to demonstrate that summer navigational and recreational values are "protected and preserved" by Ecology's Rule, and in fact the available information shows quite the opposite. Importantly, Ecology provides no evidence, because there is none, to demonstrate that the 850 cfs flow is in any way superior to higher summer flows with respect to navigation or recreation.

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[12] The 2004 American Whitewater/Louis Berger study and the 2014 American Whitewater survey are summarized in a comment letter submitted by American Whitewater during rulemaking, at AR016257-9; the reference in CELP's Opening Brief was to this document for clarity. The full survey documents are at 002225-89 (2004 study) and 002290-002514; 002519-002545 (2014 survey).

[13] Ecology notes that CELP's Opening Brief incorrectly cited to a minimum navigable flow of 1000 cfs. Resp. Br. at 21, note 15. This was an editing error. The reference was to American Whitewater's summary of the 2004 study, and the actual minimum navigable flow cited there was "approximately 1350 cfs." AR016258.

V. Ecology's attempt to avoid application of the Public Trust Doctrine fails.

Ecology's argument regarding the Public Trust Doctrine is also based on incorrect premises. CELP neither argues that Ecology must "assume the public trust duties of the state" nor challenges the validity of RCW 90.22.010 and RCW 90.54.020(3)(a). Resp. Br. at 29. Rather, CELP's position is that, if possible, these statutes must be interpreted so as not to violate the constitutionally-based public trust doctrine. *See Caminiti v. Boyle*, 107 Wn.2d 662, 670, 732 P.2d 989 (1987) (examining whether "an exercise of legislative power" violates the PTD).[14]

Ecology argues that this court's *Postema* decision bars any consideration of the Public Trust Doctrine in "Ecology's water management activities." Resp. Br. at 29. Ecology attempts to support this argument by claiming that in *Postema*, this Court "has plainly held that Ecology *cannot consider the public trust*" in implementing its statutory authority. *Id.* *Postema* says no such thing. The sum total of *Postema's* statement on the public trust doctrine is:

> Ecology's enabling statute does not permit it to assume the public trust duties of the state; the doctrine does not serve as an independent source of authority for Ecology to use in

s not[14] CELP notes that this Court's opinion in *Chelan Basin Conservancy v. GBI Holding Co.*, 2017 WL2876140, which CELP also cited on the PTD issue, was recently ordered withdrawn. This doe change *Caminiti's* holding or rationale, however.

> its decision-making apart from code provisions intended to protect the public interest.
>
> *Postema,*142 Wn.2d at 99.

The fundamental problem with Ecology's argument is that *Postema's* statement that the doctrine does not provide an "independent source of authority" is not equivalent to saying it has no application at all. Rather than an "independent source of authority," the doctrine acts as a limit on the state's ability to impair navigation and recreation on navigable waters. *Caminiti*, 107 Wn.2d at 672. If the applicable statutes authorized impermissible impairment of the public trust (in this case they do not), they would be invalid, by the test applied to the private dock statute at issue in *Caminiti*. *Id.* at 670.

Here, it is not RCW 90.22.010 and RCW 90.54.020(3)(a) themselves, but Ecology's interpretation of them that impermissibly violates the public trust doctrine. *Caminiti*, 107 Wn.2d at 670; *Seattle v. Drew*, 70 Wn.2d 405, 408, 403 P.3d 522 (1967) (statutes to be interpreted so as to be constitutional). An agency may only act within the authority granted it by statute. A statute that is unconstitutional or otherwise impermissible does not provide a valid basis for agency action nor does an unconstitutional or improper interpretation of the statute. *Cornelius*, 182 Wn.2d at 585 (court will grant relief from an agency order if based on

unconstitutional statute or erroneous interpretation of the law). In this case Ecology not only improperly interpreted the statutory scheme in a way that conflicts with the Public Trust Doctrine, it based its rulemaking on that incorrect interpretation. As a result the Rule allows the public trust to be impermissibly harmed. This is not permissible, and neither *Postema* nor any other authority says that it is. In this light, Ecology's claim that the Rule would somehow be invalid if it *had* considered the public trust is absurd.[15] Resp. Br. at 30.

Ecology also makes the somewhat puzzling argument that whether the Rule conflicts with common-law or "quasi-constitutional" principles is not a proper inquiry under the APA. Resp. Br. at 28. This is not only incorrect but nonsensical. While the Public Trust Doctrine is rooted in English common law, its application in Washington is constitutionally based. *Caminiti*, 207 Wn.2d at 666. The APA specifically provides that a rule will be invalidated if it "violates constitutional provisions." RCW 34.05.570(2)(c). Ecology also provides no authority for the proposition that an agency may ignore common-law principles in rulemaking.

[15] If the public trust does not serve as a limit on the state's disposition of the *jus publicum*, it would serve no purpose at all in protecting the public's rights.

VI. Ecology mischaracterizes the issue of its exclusion of documents from the record

Ecology based the 850 cfs summer instream flow solely on considerations of habitat for fish (redband trout and mountain whitefish). Resp. Br. at 9, note 4.The Washington Department of Fish and Wildlife made numerous recommendations for summer instream flows to protect fish habitat. Several of these, most of which specified flows higher than the 850 cfs ultimately adopted by Ecology (and including one that was apparently generated by Ecology itself) were not included in the administrative rulemaking file. CP60-61. Ecology does not dispute that it was aware of these documents (*see* CP161-166), but they were not included in the administrative record and were apparently not provided to Ecology's rulemaking staff. CP163.

Ecology attempts to dismiss this issue as a simple discretionary decision made by the court below, rather than one of Ecology's obligations under the APA. Resp. Br. at 33-4. Ecology is incorrect. The reason that these documents were not in the record is not because of anything the Superior Court did or did not do, but because Ecology chose not to include them.[16] The issue before this Court is properly stated as

[16] CELP's motion was brought precisely because Ecology failed to include these documents, and refused to add them to the rulemaking file when CELP requested that it do so.

whether Ecology improperly omitted these documents from the administrative record, or failed to consider them in its rulemaking.

Ecology is required by statute to consider WDFW instream flow recommendations "during all stages of development . . . of minimum flow proposals." RCW 90.03.247. And indeed WDFW biologists partnered with Ecology to evaluate and make recommendations regarding flows. All documents generated by these activities by WDFW are therefore part of the "attending facts and circumstances" relating to Ecology's rulemaking, and should properly have been included. *Wash. Indep. Tel. Ass'n v. Wash. Utils. & Trans.Comm'n*, 148 Wn2d 887, 905, 64 P.3d 606 (2003); *Theodoratus*, 135 Wn.2d at 598; *Hillis v. Ecology*, 131 Wn.2d 373, 383, 932 P.2d 139 (1997). Ecology also refers to "the agency"[17] "vigorously debating what summer flow levels should be," which would make the full spectrum of WDFW's recommendations all the more relevant. Resp. Br. at 34. But the incomplete record provided by Ecology, which omits most recommendations for higher streamflows, provides a skewed view of the parameters of that debate,[18] and prevents a thorough review of the decision-making process. Without knowing what recommendations were

[17] It is unclear whether "the agency" refers to Ecology or to WDFW.

[18] Nothing cited by Ecology documents this "vigorous debate." The two documents cited on this point are simply two of the instream flow recommendations produced by WDFW. AR003831-41; AR007749-51 (this document actually recommends a summer flow of 900 cfs).

made, it is impossible for a reviewing court to know whether they were given the consideration that the statute requires.[19] And by including recommendations for lower flows in the record, while excluding many of those that called for higher flows, Ecology presents a misleading picture of the WDFW experts' overall viewpoint.

CELP believes that this is an issue of first impression in Washington, and that its import extends far beyond this case. If an agency may unilaterally withhold part of the available information from its rulemakers and therefore from the administrative record, then it is free to reach essentially any conclusion it wishes, regardless of the actual circumstances or the information actually available. CELP submits that such distortion of the rulemaking process, by agency personnel who are unelected and unaccountable, is the very definition of "arbitrary and capricious." The incomplete record would then frustrate judicial review and prevent the transparency in governance that the APA is designed in part to provide.

[19] Ecology's reliance on *Lewis County v. PERC*, 31 Wn. App. 853, 861, 644 P.2d 1241 (1982) is misplaced. In that case, Lewis County sought to introduce the record of a wholly different proceeding in its appeal. In contrast, the documents that CELP moved to introduce were directly relevant to the agency proceeding at issue here (Ecology's adoption of the 850 cfs summer instream flow), related to precisely the same issue as several documents from the same source that Ecology *did* include in the record, and are of a type that Ecology is statutorily required to consider. RCW 90.03.247.

VII. CONCLUSION

Ecology has failed to show that adoption of the 850 cfs summer low flow comports with its statutory duties to protect instream resources or that it was not arbitrary and capricious. For the reasons stated above and in CELP's Opening Brief, CELP respectfully requests that the Water Resources Management Program for the Spokane River and Spokane Valley Rathdrum Prairie (SVRP) Aquifer, WAC 173-557-050, be remanded to Ecology for supplementation of the administrative record and reconsideration of the 850 cfs summer low flow provision.

RESPECTFULLY SUBMITTED this 13th day of December, 2017,

s/ Dan J. Von Seggern

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CERTIFICATE OF SERVICE

I hereby certify that on the _13th__ day of December, 2017, I caused the foregoing Appellants' Brief to be served on the parties herein as indicated below:

	[ ] US Mail [ ] Hand Delivered [X] email:
Attorneys for Respondent Washington Department of Ecology Office of Attorney General Ecology Division Stephen H. North	[ ] US Mail [ ] Hand Delivered [X] email: stephen.north@atg.wa.gov ecyolyef@atg.wa.gov

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

Dated this 13th day of December, 2017, in Seattle, Washington.

___*s/ Dan J. Von Seggern* ___ _____
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CENTER FOR ENVIRONMENTAL LAW AND POLICY

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