



CLEAN, FLOWING WATERS FOR WASHINGTON

The Center for
Environmental Law & Policy

June 2, 2006

Derek Sandison
Department of Ecology
15 West Yakima Ave. Suite 200
Yakima, WA 98902-3452

Re: Comments on Scope of EIS for Columbia River Basin Water Management Program

Dear Mr. Sandison:

The Center for Environmental Law & Policy (CELP) is a non-profit membership organization that works to defend and develop ecologically and socially responsible water laws and policies. CELP speaks for the overall public interest in the public's water; its mission is to leave a legacy of clean, flowing water for Washington. CELP's 10-year history of advocacy for the Columbia River has included petitioning (in the year 2000) for a moratorium on further withdrawals until higher, more protective instream flow rules could be developed. In 2002, CELP also appealed the issuance of a large water right to the Quad Cities of Pasco, Richland, Kennewick and West Richland. This litigation culminated in a 2003 settlement agreement that allowed the cities to receive – with certain mitigation conditions - a new water right for 178 cfs/96,619 acre/feet/year - to be developed through 2051. (Documents attached.) Therefore, CELP has a unique and ongoing interest in all matters related to the health and management of the Columbia River. In furtherance of this interest, CELP maintains a wealth of data on water use and water rights in the basin, scientific data and reports detailing historical river levels and river flows, and legal and policy materials pertinent to Columbia River management issues. In short, CELP and its members are knowledgeable, interested, and significant stakeholders in the outcome of this EIS, and possess a desire to be meaningfully involved in the management program's implementation and processes.

Thank you for considering CELP's comments on the scope of the EIS for the Columbia River Basin Water Management program. We would welcome the opportunity to further discuss our views with you, and to submit additional comments and suggestions as the EIS process develops.

PRELIMINARY OBSERVATIONS AND COMMENTS:

A. CELP urges the Department of Ecology to revise the scope of this EIS to focus more closely upon the directives in ESSHB 2860 to develop new water supplies to protect, benefit and improve the instream flow needs of fish. The EIS scoping documents focus too narrowly upon an array of pre-conceived "solutions" to deliver water mainly to out of stream users. Missing from the documents is a comprehensive exploration of a range of alternatives to satisfy the dual legislative purpose of developing new water supplies for instream as well as out of stream needs.

B. The DS and "Attachment A – Issues to be addressed in EIS" too often inappropriately attempt to use the EIS process as a substitute for rule-making and policy-making. CELP urges

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Ecology to instead adopt rules to implement portions of ESSHB 2860, particularly with regard to Section 4 – Voluntary Regional Agreements.

C. It is inappropriate to address in a programmatic EIS specific project activities such as developing “the means to deliver Columbia Basin Project Water to lands in the Odessa Ground Water Management Subarea”. This action requires a separate SEPA as well as NEPA analysis, and very likely consultation under ESA.

D. We question the appropriateness of this EIS evaluating “early activities” proposals such as those described on DS page 2 involving requests from the Bureau of Reclamation to divert additional water from Lake Roosevelt for various uses, and requests from the BOR to provide an alternate feed route to the Potholes Reservoir. Such project activities encompass federal actions that should be scrutinized by NEPA and are also subject to consultation under ESA. Any analysis of these activities in this EIS would be incomplete without the benefit of the results of environmental and ESA scrutiny required under federal law.

E. It is inappropriate, for several reasons, for this EIS to evaluate a specific proposal for a Voluntary Regional Agreement, as mentioned on page 2 of the DS.

1. If a VRA proposes to govern the allocation of more than 1 cfs of water for purposes other than irrigation, or more than 50 cfs for purposes of irrigation, it must undergo its own separate SEPA analysis.
2. A maximum net benefits analysis (see RCW 90.54.020(2)) should also be conducted in connection with a VRA, and no such individualized analysis is a feature of a programmatic EIS.
3. It is premature for Ecology to enter into any VRA until it has established the baseline data and criteria necessary to satisfy the statutory requirement in ESSHB 2860 Section 4(2)(a) and (b) that there will be “no negative impact” on Columbia River mainstem instream flows in July and August, and no negative impact on Snake River instream flows from April through August. The law does not take effect until July 1, 2006. Hence, data upon which to measure “no negative impact” must be measured from July 1, 2006 onward, and will not be complete until at least June 30, 2007. (The programmatic EIS should, however, examine whether one year of data is sufficient to form the necessary baseline measuring stick for any VRA.)

GENERAL ISSUES:

- I. **The EIS must examine the extent to which existing water infrastructure can be modified to ESSHB 2860 objectives.**
 - a. Conservation and reclaimed water programs already in existence should be evaluated prior to implementation of any additional storage projects, to determine whether and how much water is actually capable of being saved.
 - b. Any VRAs considered for approval must be conditioned on requiring best available technology of new water right recipients.
 - c. The EIS should examine the impacts of allocating to instream needs up to 100% of “new water” resulting from altering operations of existing storage facilities. (The formula for 2/3 to out of stream uses & 1/3 to instream uses applies only to new

storage facilities. See Section 3 (1)(a) and Section 1 regarding the intent to develop new water supplies to meet the instream flow needs of fish.)

- II. The EIS must examine how Ecology will relate storage and conservation projects on tributaries to the mainstem program.**
- a. Tributary storage and conservation should be required to meet the same monitoring and management requirements as mainstem projects; should be included in the water use database.
 - b. Ecology must collect data on actual beneficial use as of July 1, 2006 on the mainstem and the tributaries and use that as the baseline for measuring the amount and success of any conservation projects on tributaries and mainstem
 - c. Ecology must evaluate methods to protect conserved water “instream” so that it will not be put to use by other downstream users and maintained in perpetuity to enhance instream flows.
 - d. Ecology must evaluate the useful life of conservation projects, and weigh alternatives for substituting other conservation methods when original infrastructure or methods are obsolete.
- III. The EIS must examine how the state management program will relate to the biological opinion under the FRCPS, and avoid a “jeopardy” determination under ESA**
- a. The state must devise a method to work with federal agencies to ensure that its Columbia management program will not result in jeopardy to salmon.
 - b. The state must retain management flexibility to adjust its management program to comply with the upcoming revised BiOP for FRCPS.
 - c. Before any new water rights for out of stream consumptive uses can be issued, Ecology must determine both how much water is needed to protect fish and meet water quality standards, and how much water has already been allocated. Detriment to listed salmon or steelhead species or the destruction or adverse modification of critical habitat must be avoided.
 - d. The EIS should evaluate the alternative of conditioning Voluntary Regional Agreements or new water rights on the attainment of instream flow levels prescribed in the FCRPS BiOp.
- IV. The EIS must examine a range of mitigation issues.**
- a. Ecology should consider engaging in rule-making to fully explore, define, and weigh the costs, benefits, and environmental impacts of various mitigation approaches.
 - b. Mitigation from water conservation measures must be measured from the date July 1, 2006 onward, and must reflect an actual and permanent reduction in water use. Conservation cannot be calculated from observing the face value of a permit or water right if the entire water right has never been or is not being consistently put to beneficial use.
 - c. To preserve the legislative intent to protect and improve instream values, mitigation should be deemed adequate only if it meets a “no net loss” standard.
 - d. Net water savings should be calculated by subtracting the amount of water necessary to accomplish a beneficial use after the conservation measure has been implemented from the amount of water put to actual use to accomplish the same purpose at the same location prior to the implementation of the conservation measures.

- e. Mitigation water must be added to the river from the same pool as the diversion point for the new water right. Mitigation water cannot be assumed to pass downstream to the diversion point if it must pass through one or more dams.

COMMENTS RELATING TO ESSHB 2860 AND SCOPING DOCUMENTS:

Section 5: Development and Maintenance of a Columbia River water supply inventory and a long-term water supply and demand forecast to protect instream flow.

ESSHB 2860 Section 1 (1) evinces a dual legislative intent to meet the economic and community development needs of people and the instream flow needs of fish through water resource management in the Columbia River basin. ESSHB 2860 authorized Ecology to develop a Columbia River Basin Water Management Program (“Management Program”) to achieve this dual legislative intent, and Ecology indicated its intent to do so in initiating preparation of a non-project EIS for Management Program development. Thus, the issues addressed in Ecology’s non-project EIS for the Management Program must adhere to statutory directives and focus on achieving the twin goals of the legislature.

The options proposed in the scoping document “Attachment A” related to developing a Columbia River water supply inventory and a long-term water supply and demand forecast are insufficient for four reasons:

- 1) In Attachment A, Section 5(1), Ecology misinterprets the statutory directive found in ESSHB 2860 Section 5 (1) that Ecology “shall work with all interested parties” to develop the inventory and forecast. It fails to mention a number of interested parties such as the Center for Environmental Law and Policy (“CELP”), hydropower industry representatives, utility ratepayers, commercial and recreational river users, commercial and sport fishermen, academics, and federal dam operators. These parties must be included in any alternative inventory and forecast development methodology analyzed under the EIS, for these groups hold information essential to completing the lists that the inventory must include under ESSHB 2860 Section 5 (1) (a) and (b). Ecology’s failure to include information from these groups would violate the terms of ESSHB 2860, and would not protect instream flow as new water supplies are developed.
- 2) In Scoping Attachment A, Section 5(1), Ecology does not require that all data used to develop the inventory and forecast be data collected after July 1, 2006, as ESSHB 2860 clearly requires. ESSHB Section 5 (1) directs that, effective July 1, 2006, Ecology shall work with all interested parties to support the development of “new” Columbia River water supplies and to “protect” instream flow. Ecology cannot reasonably develop “new” water supplies or “protect” instream flow without first gathering baseline water inventory data and baseline instream flow level data measured from the date ESSHB 2860 becomes effective. Any alternative inventory and forecast development methodology analyzed under the EIS must specify that the inventory and measurements must date prospectively from July 1, 2006. Ecology’s failure to include such baseline data measured prospectively from July 1, 2006 would violate the terms of ESSHB 2860, and would not protect instream flow as new water supplies are developed
- 3) In Attachment A, Ecology fails to address alternatives for defining “conservation project” and “water conservation [the projects] have achieved”, though a list of each of these items must be included in the Columbia River water supply inventory under ESSHB 2860 Section 5 (1) (a). Any alternative inventory development methodology analyzed in the EIS must define “conservation project” and “water conservation... achieved” as water actually returned

to the Columbia to maintain and enhance July 1, 2006 instream flow levels, in step with ESSHB 2860's goal to protect instream flow while supporting the development of new water supplies in the Columbia River.

4) In Scoping Attachment A, Ecology fails to address alternative levels of precaution it will use in acting on the long-term water supply and demand forecast to protect instream flow, as required by ESSHB 2860 Section 5 (1). These alternatives must account for the varying degrees of uncertainty inherent in water demand and supply predictive modeling, and address how these degrees of uncertainty inherent in the modeling results will be used to discount or inflate estimates required by ESSHB Section 5 (1) (b) of cost per acre-foot, benefit to fish and other instream needs, benefit to out-of-stream needs, and environmental and cultural impacts. Erroneous estimates will be disastrous for instream flow protection and the development of new water supplies in the Columbia River.

Section 6: Establishment and Maintenance of a Columbia River mainstem water resources information system to better understand current water use and instream flows in the Columbia River mainstem.

ESSHB requires Ecology to establish and maintain a Columbia River mainstem water resources information system ("Information System") to better understand current water use and current instream flows in the Columbia river mainstem. Thus, any alternative for Information System establishment and maintenance analyzed in the EIS must be based on information generated after July 1, 2006, the effective date of ESSHB 2860. Predicting impacts of new out of stream uses on flow data generated prior to July 1, 2006 defeats the intent of the statute. Because information must be collected after July 1, 2006, Ecology's narrow focus on "existing sources" of information in Attachment A, Section 6 (3) is inappropriate, for no sources of information collected after July 1, 2006 currently exist. The legislative intent is clearly to consider "other available sources" in addition to those named. Hence, the impacts on effective water resource planning of alternative Information System data gathering and update procedures and schedules, and alternative data quality assurance mechanisms, must be addressed in the EIS.

Alternatives for the Odessa subarea (OSA)

This portion of the PEIS demonstrates many of the deficiencies seen in the scoping documents. The DS and scoping documents ask only for comments on ways to deliver CBP water to lands in the OSA. However, ESSHB Section 3 (3) (a) does not foreclose other options to rescue OSA irrigators. Other alternatives should be explored and carefully reviewed, and accompanied by appropriate SEPA, NEPA, and ESA consultations. Pursuant to WAC 197-11-442(2), CELP urges Ecology to consider all reasonable alternatives to the delivery of Columbia River water to the Subarea.

Ecology has historically mismanaged the finite resource of ground water in the Subarea by first over-appropriating it, and then permitting greater and greater annual reductions in the aquifer instead of enforcing against waste, demanding conservation and regulating junior users. The annual groundwater withdraws in the Subarea increased substantially between 1995 and 2000. Because Ecology decided to study in the same EIS the programmatic action of delivering water to the Subarea and the project actions of building an alternative feed route to Potholes Reservoir and diverting 30KAF of water to the Subarea, it must examine reasonable alternatives to providing Columbia Basin Project water to the Subarea. When "project and nonproject actions are

intertwined” and both are included in the same EIS, “SEPA requires an examination of reasonable alternatives to the nonproject action.” Citizens Alliance v. Auburn, 126 Wn.2d 356, 365 (1995). Ecology should “describe the proposal in terms of alternative means of accomplishing the stated objective.” WAC 197-11-442(2). Alternatives should be emphasized. *Id.* Therefore, CELP asks that the EIS & Ecology analyze the following alternatives.

1. Every attempt must be made to utilize aggressive conservation and efficiency measures, within the Subarea, in order to preserve the aquifer to a degree where it can continue to be utilized without the need to divert enormous amounts of the Columbia River.
2. Ecology must consider the alternative of not delivering CBP project water to the Subarea and what avenues would be available to continue limited or different farming. This study should include a cost/benefit analysis that includes the benefit of more water for instream flow values and hydroelectricity production as well as lower infrastructure and long-term maintenance costs associated with canal construction.
3. Ecology must consider emphasizing dry land or low consumptive use crops in the Subarea as well as the buy-out of irrigated farms - particularly those farms that are voluntarily quitting the farming business. One farm in the Subarea has already approached Ecology with such a proposition. This farm comprises 12,000 acres and holds senior water rights to 30,000 acre-feet per year. Taking this farm out of production would decrease water need in the Subarea by approximately 30,000 to 36,000 acre-feet per year. Interestingly this is the current number of acre-feet the Bureau is hoping to send to the Odessa as defined in a Memorandum of Understanding with the BOR. It will be analyzed as a project level action in the PEIS.

The water conservation measures outlined above must be based upon actual conservation of water. This means the difference in actual beneficial use as of July 1, 2006 and subsequent actual use. Additionally, “net water savings” must be calculated in the same manner.

The conservation projects, both generally and those utilized to provide water to the Subarea, must be evaluated with the protection of instream flows as their baseline. Therefore, if the result of “actual” conservation is a negative impact on instream flows then it is not a viable conservation project.

Moreover, an unbiased, scientifically defensible study of the hydrogeology in the Subarea must be conducted in order to apply and use the best conservation and efficiency practices. Even temporarily conceding that CBP water is used, this study should still be completed prior to water delivery to maximize water efficiency and benefits at minimum costs. While this study is taking place Ecology should study a range of short-term solutions including, crop rotation, irrigating fewer acres, dry land farming, and subsidization of pumping and well-casing costs.

Lands to receive Columbia River water should be either those closest to the East Low Canal (ELC) or those irrigators who can prove highly efficient irrigation practices. This would limit additional infrastructure costs and provide an incentive to cut down on waste. Metrics should be created for measuring efficiency including “highly efficient irrigation practices” or type of crop, technology used, historical usage, etc. Lands away from the ELC should be encouraged to switch to dry land farming.

The EIS should weigh alternatives for evaluating conservation projects using various methods for defining consumptive use. Modeling should be done to create greater accuracy in return flow estimations, based on crops, conveyances, irrigation type, soil type, geology, etc. Furthermore, actual

amounts of water diverted should be calculated starting on July 1, 2006 using a meter and not based on historical estimates.

Finally, Ecology must examine the cumulative impacts of these projects as they relate to future development of the Second Half of the Columbia Basin Project. The CBP is authorized to irrigate an additional 358,000 acres, nearly all of which fall within the Subarea. A cumulative impact analysis is required when “the project under review will facilitate future action that will result in additional impacts.” Tucker v. Columbia River Gorge Comm’n, 73 Wn. App. 74, 81-83 (1994). More importantly, this project is not “substantially independent of the subsequent...phases.” Boehm v. City of Vancouver, 111 Wn. App. 711, 720 (2002). The completion of the Second Half, which comprises almost half of the Subarea, cannot go forward without the development of means to deliver Columbia Basin Project water to the Subarea. There is little doubt that the creation of an alternative feed route and diversion of Columbia Basin Project water to the Subarea is simply the first step in the completion of the planned Second Half of the CBP. These initial steps of creating more infrastructure and capacity are part of the larger design for completion of the project. Therefore, the cumulative impacts of full Second Half development must be analyzed in this PEIS.

Administering a program for voluntary regional agreements (VRAs):

The programmatic section of the EIS mandates examination of a proposal for the creation and administration of voluntary regional agreements. The project level section of the EIS mandates the examination of a specific voluntary regional agreement submitted to Ecology by the Columbia Snake River Irrigators Association (CSRIA). It is premature and inappropriate for this EIS to encompass the latter. It is evident that the programmatic level analysis of VRAs will seek to create terms, definitions, procedures, standards, and complete data in order to administer the program. Prior to the creation of the program no VRA should be proposed much less analyzed. In the absence of a formalized program, an analysis of the CSRIA VRA would be improper and violate SEPA rules prohibiting the application of a narrow review to a broader issue. Therefore, CELP asks that the EIS not evaluate the CSRIA VRA until after Ecology has properly created a program to administer VRA.

Furthermore, CELP believes that the implementation of VRAs is more properly subject to rulemaking under the Washington Administrative Procedures Act and should therefore be removed from the PEIS on this basis. However, if Ecology chooses not to proceed via a rulemaking process, CELP submits the following comments relating to the creation and administration of VRAs.

As stated above, since Ecology has intertwined nonproject and project level actions regarding VRAs, it must examine all alternatives to the nonproject action. This includes the “no action alternative” – meaning, continuing to process only individual water right applications pursuant to the existing water code. Ecology and this EIS should take a long look at the status quo and the protections for instream flows that the existing process provides.

Under existing water application and consideration processes (which were not disturbed by ESSHB 2860) an applicant can gain Columbia River water rights through consultation with the tribes and other agencies, after which individualized mitigation measures are devised and applied. An example of this successful process is the water right obtained in 2005 by Berg Farms (see permit, attached). The Bergs received a right to divert 52 cfs from the river, and WDFW, the tribes, NOAA Fisheries, and others were satisfied with the mitigation offered - which included the Bergs paying for irrigation efficiencies in a tributary, surrendering unused water rights, paying for fish passage enhancements, and pledging to use state-of-the-art irrigation efficiencies. This shows that the current system works, and it must be viewed as a benchmark against which to measure other alternatives such as VRAs.

Importantly, in order to assure “no negative impacts” the evaluation of the program must be based on its success in maintaining instream flows. It is premature for Ecology to enter into any VRA before September 2007. It must first establish the baseline data and criteria necessary to satisfy the requirement in ESSHB 2860 Section 4(2)(a) and (b) that there will be “no negative impact” on Columbia mainstem flows in July and August, and Snake River flows from April through August. Because the law does not take effect until July 1, 2006, baseline data upon which to measure “no negative impact” will be unavailable until at least July 2007. The programmatic EIS should evaluate whether one year of baseline flow data is sufficient to form the necessary measuring stick for any VRA.

The EIS should also evaluate the appropriate length and expiration dates for potential VRAs. CELP recommends that such agreements be executed for no longer than 2-year periods, with the option for two-year renewals. The effective dates of VRAs should not extend beyond June 30, 2012.

CELP strongly recommends that VRAs be well-grounded in basic contract law, which mandates contract terms which can be enforced and will bind all benefited parties. VRAs should not be open-ended as to the amount of water to be allocated, the locations of the eligible water applicants, or the identities of the eligible water applicants. Furthermore, the VRAs should be limited in geographic scope to river segments between existing dams; otherwise circumstances beyond the control of parties to the agreement (dam operators) could adversely affect the availability of water to protect instream resources.

All proposed VRAs should undergo individualized SEPA analyses, as well as a maximum net benefits analysis under RCE 90.54.020(2).

Supply and demand issues:

In order for Ecology to develop a water supply inventory and long-term supply and demand forecast it must first quantify and document current water use as opposed to rights still being held in inchoate status. All other projects relating to release of new water rights should be put on hold until an accurate picture of actual water use in the Basin is obtained. The EIS and Ecology must also ground-truth archived information about projected water demand as reflected in backlogged permit applications. CELP strongly suspects that water demand estimates for Columbia River water are and have been vastly overestimated, based upon data that no one has as yet bothered to verify as to the validity and nature of long-pending applications. When all appropriate data is gathered, various predictive models should then be analyzed for their usefulness in forecasting supply and demand numbers. When examining supply forecasts Ecology must consider climate change as well as the possibility of Canada not revoking the Columbia River treaty in 2024. These are both very real and imminent issues that could drastically reduce supply of Columbia River water in the not-too-distant future.

IN CLOSING.....

In summary, CELP is concerned with the programmatic environmental impact statement in general and most of the issues listed for study specifically. In CELP’s opinion, the decision not to prepare an environmental checklist, while within the discretion of the agency, has deprived the public of a means to submit targeted and meaningful comments regarding the full range of alternatives and impacts of this legislation. The problems facing the survival of listed salmonid species and the need to curb the unrepentant desire for even greater water diversions from the Columbia River are not addressed in the scope of the PEIS as it currently exists. CELP’s comments reflect the common sense approach to managing a limited resource; namely, prior to making any

long-term and irreversible decisions the basic questions of how much, where, when, and why must be answered. While sections of the PEIS propose to quantify a supply and demand forecast any result would naturally be handicapped by the lack of information on current water use (both legal and illegal, permitted and exempt). Before proceeding with drastic measures to provide new water rights Ecology should do everything it can to document current water rights and prepare a comprehensive water budget for the river. Proceeding blindly to implement this legislation will only result in greater harm to endangered species and an inequitable use of the public's funds and precious water resources. Ecology must proceed with precaution or the legacy it leaves for the future residents of Washington State will be one of unmitigated consumptive abuse of the Northwest's most dominant river.

Sincerely,

Shirley Waters Nixon, Acting Executive Director

Patrick Williams, Staff Attorney

Enclosures: Berg Farms Water Permit
Quad Cities Water permit
Settlement agreement in CELP vs. Ecology & Quad Cities