



CLEAN, FLOWING WATERS FOR WASHINGTON

The Center for  
**Environmental Law & Policy**



November 22, 2006

Derek L. Sandison, Regional Director  
Washington Department of Ecology  
Central Regional Office  
15 W. Yakima Ave., Suite 200  
Yakima, WA 98902-3452

Re: Comments on Draft Programmatic EIS – Columbia River Water Management Program<sup>1</sup>

Dear Mr. Sandison:

The Center for Environmental Law & Policy (“CELPA”) is a non-profit membership organization working to defend and develop ecologically and socially responsible water laws and policies. CELPA believes that informed, responsible water management is the only way to ensure a legacy of clean, flowing waters for Washington. CELPA has been involved with the Columbia River Management Plan since its inception and our research into and involvement with Columbia River issues dates back even further. CELPA is the only environmental organization that has appealed Columbia River water right permitting decisions, and CELPA is currently a party to a continuing settlement agreement governing future allocations of river water to the Quad Cities of Kennewick, Richland, West Richland, and Pasco. (PCHB 02-216)

The State of Washington is at a crossroad in terms of water management. Faced with climate change and population increases it is crucial that the state engage in deliberate, informed, and thoughtful water management planning now, in order to prevent water conflicts and disastrous impacts later. Policy decisions based on incomplete or erroneous information will place Washington’s waters in further jeopardy and shift the burden to future generations. CELPA has previously expressed concerns about the quality and reliability of the 2006 Water Supply Inventory and Long-Term Water Supply and Demand Report (Inventory) in a letter dated 11/1/2006 (incorporated here by reference), and we have similar concerns about the accuracy and adequacy of the draft EIS.

**I. GENERAL COMMENTS:**

- ✓ Critical terms such as “conservation”, “no negative impact”, and “Voluntary Regional Agreement” must first be defined by rule-making, and then applied consistently before any analysis in the draft EIS or Inventory report can be meaningful.

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<sup>1</sup> The Center for Water Advocacy, [www.wateradvocacy.org](http://www.wateradvocacy.org), P.O. Box 583, Clifton, Colorado, 81520 joins in the submission of these comments. The Center for Water Advocacy (CWA) is a non-profit public interest entity dedicated to protecting water resources in the Northwest. CWA conducts legal and scientific research, analysis, policy and litigation in its efforts to protect and restore water quantity, water quality and water rights for the health of the watershed ecosystem, preservation of cultural identity, and the benefit of the public.

- ✓ The draft EIS fails to adequately address the statute's dual purpose of benefiting both instream and out of stream uses.
- ✓ The consideration of the CSRIA Voluntary Regional Agreement is premature and inappropriate within this draft EIS.
- ✓ Adoption of the Final EIS for Watershed Planning under Chapter 90.82 RCW, 2003 does not compensate for the deficiencies in this draft EIS.
- ✓ The historical and background information listed in Chapter 1.3 contains numerous inaccuracies and omissions as to the background of litigation surrounding Ecology's issuance of water rights from 2000 to 2003, and should be corrected.<sup>2</sup>

## II. COMMENTS SPECIFIC TO CHAPTER 6.0 – POLICY DISCUSSION

### Section 6.1: Description and analysis of policy alternatives for implementing the management program

This section admits that the impacts of policy alternatives on each element of the environment are not being evaluated here. This statement sums up a major flaw of the entire EIS: insufficient identification and analysis of various potential alternatives and the environmental impacts of those alternatives. Conspicuously absent, for example, are discussions of the impacts to endangered species, and the ESA ramifications of various policy alternatives. ESA implications are especially crucial factors in analyzing how to apply the arbitrary “no negative impact in July and August” standard, and the environmental impacts of diverting water from instream flows in order to fill off-channel storage reservoirs.

### Section 6.2 – Selecting storage projects

The section (and, indeed, the entire EIS) improperly presupposes that storage creates “new water” that will serve the dual purposes of the statute: that is, for instream and out of stream benefits. This is a major flaw, in that the EIS fails to examine whether there is any conceivable storage management regime that could result in benefits to instream aquatic values. The EIS offers two alternatives under this section: Review projects only as proposed by applicants, or Aggressively pursue storage options. Given that the EIS does not analyze how or whether “new” water supplies can be obtained through storage, the only alternative in the public interest at this time is the first: Review projects only as proposed by applicants. Ecology should not pursue projects itself without first developing data and evidence that storage can indeed equate to a “new water supply”. The initial burden of providing this evidence should be on the proponent, not the public and taxpayers.

### Section 6.2.1 Calculating net water savings

There is a serious legal flaw here in stating that Ecology will consider any conservation project implemented before July 1, 2006 (the date the CRWMP law became effective). If water was conserved before 7/1/2006, it should be viewed as already “in stream” and as part of the baseline from which to prospectively calculate benefits. The preferable alternative: Develop a rule for calculating net water savings.

<sup>2</sup> Among other things, this section falsely implies that the \$10 an acre foot scheme resulting from a settlement between the CSRIA and Ecology resulted in the issuance of water right permits. However, five such water right decisions were appealed by Tribes, and in 2005 the Washington State Court of Appeals ultimately ruled against Ecology and the water right applicants. The applications were remanded to Ecology. The permits have never been issued. This section also fails to list the PCHB decision in *CELP vs. Ecology and the Quad Cities*, PCHB 02-216, which resulted in the cities receiving a very large water right (178 cfs & 96,619 acre feet/year) in return for their agreement to, among other things, exercise water conservation measures and provide mitigation for 168 cfs of the allotted amount.

Section 6.2.2 – Funding criteria for conservation projects. Here, the second listed alternative is the best one. Funding projects to benefit only instream flows and water quality is the only choice that meets the intent of the statute, especially given the amount of water to be diverted out of the mainstem into the Odessa subarea, and the arbitrary and unbalanced requirement to allocate 2/3 of “new” water from new storage facilities to out of stream uses. Rule-making is advised to develop criteria for funding conservation projects.

#### 6.2.3 Defining Acquisition and Transfer

Acquisition can only be interpreted to mean direct, permanent purchase of water rights. Anything less, such as leases, temporary contracts for drawing down reservoirs, and conservation savings are indefinite in duration and scope. Issuing permanent out-of-stream consumptive water rights based upon time-limited “mitigation” does not meet the test of adequate mitigation. Transfers of ownership can already occur under existing statutes without Ecology intervention or involvement as part of the CRWMP; these provisions should not be modified as a result of the CRWMP.

#### Section 6.2.4 Conditioning Water Rights on Instream Flows

All of the analyses and alternatives under this section are flawed, and point out the greater deficiencies throughout the EIS. The 1980 instream flow rules must be upheld and not waived; nor should interruptibility or individual permit mitigation conditioned upon the FCRPS Bi-Op Target Flows (as in the 2003 Quad Cities permit S4-30976, giving them access to 178 cfs and 96,619 acre feet/year) be waived or changed as a result of the CRWMP. There are absolutely no facts or circumstances shown in the EIS or the Water Supply and Demand Inventory Report to justify a consideration of OCPI --- particularly given the dearth of evidence that there is likely to be any appreciable increased demand for municipal water supplies in the foreseeable future.

#### Section 6.2.5 – Initiating Voluntary Regional Agreements

Ecology does not have a legislative mandate to solicit VRA's. The first policy alternative is the only one that is reasonable. Why would Ecology even consider “aggressively pursuing” VRA's? This presupposes that VRA's are more beneficial to the public interest than normal processing of water right applications under existing laws. It also improperly presupposes that VRA's will result in “new water supplies”. There is no showing anywhere in the EIS or elsewhere that this might be true.

#### Section 6.2.6 Processing VRA's

The section inaccurately implies that Policy 1021 re: processing water right applications for “nonconsumptive” projects is legally supportable and an accurate interpretation of Hillis and WAC 173-152-020. Another questionable and unsubstantiated statement is that “New water can be obtained from a new water right or change of an existing right.” Nowhere does the EIS discuss or analyze how this feat can be accomplished. CELP can see no reason to amend the Hillis Rule for purposes of processing water right applications pursuant to VRA's. The first alternative listed (Process applications according to the Hillis Rule) should be the only one seriously pursued.

#### Section 6.2.7 – Defining “No Negative Impact”

The entire discussion of defining “no negative impact” should await rule-making. This is an extremely controversial and complex concept, and will likely be the subject of litigation. Alternative 4C-4, “Same Pool, but only downstream of the point of net water savings” is the only alternative that could be seriously considered as adequate.

### Section 6.2.8 Defining the Main Channel and One-Mile Zone

The way Ecology has always defined this (as outlined in the second alternative) is the most appropriate way to approach this. Question: If the river course shifts over time, or shrinks or expands in width, does the one-mile boundary also change? CELP recommends that Ecology immediately assemble aerial photos and other data showing the parameters of the river on 7/1/2006 (the effective date of the statute) and use this information as the perpetual mapping baseline. If there were backwater areas on 7/1/2006, these should be considered as part of the mainstem "pools".

### Section 6.2.9 Coordinating VRA Mitigation and Processing New Water Rights

CELP lacks sufficient comprehension of the discussion or alternatives suggested to make a recommendation at this time. Further, CELP has no knowledge of the 1993 Quad Cities permit as mentioned on p. 6-18. Could this somehow be intending to refer to the 2003 Quad Cities permit S4-30976, based upon a 1991 water right application?

### Section 6.2.10 and 6.2.11 – Coordinating VRA & Non-VRA processing, and Funding Projects Associated with a VRA

See below for additional discussion of why CELP believes that this EIS has inappropriately handled issues related to VRA's. As for funding issues and VRA's: Ecology should spend NO conservation or storage money to assist in providing mitigation water for VRA's that intend to cover out of stream water uses. The proponents of VRA's should provide their own mitigation water. Ecology's expenditures should be solely for providing water to improve instream flows for fish – the otherwise forgotten-in-this-EIS dual beneficiary of the supposedly balanced CRWMP.

### Section 6.2.12 Inclusion of Exempt Wells in Water Use Inventory

YES! Metering and reporting of water use from exempt wells MUST be included in the information system in order to meet the intent of RCW 90.90.050(1).

## III. COMMENTS TARGETED TOWARD SPECIFIC ISSUES

1. THE CONSIDERATION OF THE CSRIA'S APPLICATION FOR A VRA IS IMPROPERLY CONSIDERED WITHIN THE DRAFT EIS BECAUSE: (A) THERE IS NO MEANS FOR MEASURING A VRA'S INSTREAM FLOW IMPACTS, MAKING THE DATA UNACCEPTABLY INCOMPLETE UNDER SEPA; (B) PROCEEDING WITH THE EVALUATION OF A SPECIFIC PLAN FOR A VRA UNDER THIS GENERAL EIS IS IN VIOLATION OF THE GENERAL REQUIREMENTS OF AN EIS; (C) ECOLOGY'S ANSWER TO CELP'S ORIGINAL SCOPING COMMENTS REGARDING THIS EXACT CONCERN IS INAPPROPRIATE BECAUSE IT IS AN INCOMPLETE READING OF THE APPLICABLE WAC.

**(a) There is no set means for measuring a VRA's impacts to instream flows making the "no negative impact" pre-requisite for approval of a specific plan impossible to determine.**

In order for a VRA to be approved, it must have "no negative impact" on the Columbia River mainstem instream flows during July and August as a result of the new appropriations issued under the agreement. (April through August for the Snake River; pg. 2-13). A VRA also "may not impair or diminish a valid water right or a habitat conservation plan approved for purposes of compliance with the federal Endangered Species Act (ESA). (pg. 2-13). The EIS fails to demonstrate how the "no negative impact" requirement shall be met by VRA's in general because it does not propose a meaningful means for measuring water conserved through mitigation measures. The EIS states: "There is no existing policy on how or where to measure whether a withdrawal of water

pursuant to a VRA would result in a net reduction in stream flow.” (pg. 2-18). How then can a specific proposal by the Columbia and Snake River Irrigators Association (CSRIA) for a VRA be evaluated when there is no existing policy in place for measuring the primary prerequisite for its approval—that it (1) have “no negative impact” on instream flows and (2) not impair or diminish other water rights or ESA habitat plans? The answer is that it cannot. A specific plan cannot be properly evaluated if no means are in place to measure whether the primary prerequisites for approval can actually be met.

Under SEPA WAC 197-11-080, this gap in data is unacceptably incomplete for consideration of a specific proposal such as the CSRIA VRA. Under this section, Ecology may only proceed without such vital information if the costs of obtaining it are exorbitant (WAC 197-11-080(3)(a)) or the means of gathering it are speculative or unknown (b). This is not the case here. Ecology has not proven that the costs would be exorbitant to find out how the impacts of VRA’s will be measured to know if they have an impact on stream flows. Ecology has also not proven that the means of obtaining such information are speculative or unknown. There is actually evidence to the contrary on this point. Ecology does know how to obtain such information, it actually suggests four alternative means for acquiring it. (See pg. 6-14 to 6-16). Each of these alternatives has its flaws, but if Ecology has the capability to obtain the information needed to determine how and where to measure instream flow for VRA’s, they should certainly do so before considering a specific request like that from the CSRIA. WAC 197-11-080(3)(b) actually mandates that they do so. This WAC section goes on to state that if Ecology does choose to proceed without the vital information, the agency “shall weigh the need for the action with the severity of possible adverse impacts which would occur if the agency were to decide to proceed in the face of uncertainty.” Yet in this case if Ecology proceeds in the face of uncertainty - without an adequate or set means of measuring the impact to instream flows from the CSRIA VRA - it will most likely do so in violation of the statutory mandate of “no negative impact.” The agency cannot know whether the entire concept of VRA’s actually meets its requirements without first having a functioning measuring mechanism in place to meet the conditions for approval.

**(b) Proceeding without the necessary information on how to measure the impact on instream flows from VRA’s in general yet agreeing to evaluate a specific plan for a VRA is in violation of WAC 197-11-402(10).**

Proceeding at this point in the planning process without having a set policy for how to measure whether VRA’s would result in a net reduction of instream flow would violate WAC 197-11-402(10). This section of the regulation states the general requirements of an EIS and requires that “EIS’s shall serve as the means of assessing the environmental impact of proposed agency action, rather than justifying decisions already made.” Ecology has no means of measuring the effect of VRA’s on instream flow, therefore it cannot assess the environmental impact on either instream flows, habitat for ESA species, or other vested water rights. By proceeding with the specific plan outlined in the early action CSRIA VRA without a means to know whether the conditions of (1) no negative impact and (2) no impairment to ESA habitat or vested water rights are met for the use of VRA’s in general, suggests that Ecology has already decided to implement VRA’s in any manner it chooses at the time, and that the inadequate “lip service” treatment given in the EIS will simply be used as an excuse to justify any future deal or decision that Ecology chooses to make on a VRA – regardless of how broad or how potentially damaging the environmental or policy ramifications may be. Critical data and critical definitions of terms are missing to meaningfully assess the environmental impact of VRA’s. Proceeding without this information is a violation of both WAC 197-11-080 and WAC 197-11-402.

(c) Ecology's response to CELP's scoping comments on the VRA issue is an incomplete reading of WAC 197-11-055 because when read in its entirety the section supports CELP's argument that the consideration of the CSRIA VRA is inappropriate within this EIS.

Ecology's answer to CELP's earlier comment regarding the inappropriateness of considering the CSRIA VRA early action within this EIS is an incomplete reading of the WAC 197-11-055. Ecology justified its consideration of the specific plan CSRIA VRA by citing to WAC 197-11-055(1): "**Integrating SEPA and agency activities.** The SEPA process shall be integrated with agency activities at the earliest possible time to ensure that planning and decisions reflect environmental values, to avoid delays later in the process, and to seek to resolve potential problems." (*See Appendix C; SEPA Comments*). Ecology responded to CELP's concerns that the specific VRA for the Irrigators was premature by stating that this is an allowable integration of SEPA and agency activities. However, Ecology is failing to read the quoted regulatory section in its entirety. Section (2) of the regulation in question states:

**Timing of review of proposals.** The lead agency shall prepare its threshold determination and environmental impact statement (EIS), if required, at the earliest possible point in the planning and decision-making process, **when the principal features of a proposal and its environmental impacts can be reasonably identified.** (Emphasis added).

(a) A proposal exists when an agency is presented with an application or has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal *and* the environmental effects can be meaningfully evaluated. (Emphasis in the original)

CELP's scoping comment about the inappropriateness of considering the early action VRA for the irrigators was a concern about timing in the review of proposals, so the entire regulatory section should be read to address CELP's concerns. These sections require that the "environmental impacts be reasonably identified" and "meaningfully evaluated" in order for a determination to be made. With the acknowledged gaps in data by Ecology as to the means for measuring the impacts of VRA's on instream flows, these regulatory sections are not satisfied. Ecology cannot cite to section (1) of the WAC and neglect section (2) when it clearly relates to CELP's concern. Proceeding with a specific proposal for the CSRIA VRA when the general pre-requisites for a VRA's approval cannot be measured in order to know its impact violates the regulatory section as a whole. **Early incorporation does not mean that the impacts have been reasonably identified or meaningfully evaluated.**

## 2 THE CONSIDERATION WITHIN THE EIS OF THE CSRIA EARLY ACTION VRA IS AN IMPROPER APPLICATION OF THE SEPA PHASING REQUIREMENT UNDER WAC 197-11-060(5).

The EIS seems to present itself as a phased review. (See pg. S 4 "Project Phasing and Schedule of Future Environmental Review") This section states that "[p]rojects will be evaluated as they are developed and ready for environmental review..." (pg. S-10). (*See definition of "phased review" under SEPA WAC 197-11-060(5)*). This WAC section also mandates under subpart (e) that "[w]hen a lead agency knows it is using phased review, it shall so state in its environmental document." Section S.4 of the EIS seems to suggest it is attempting to be characterized as a phased review. Assuming it is a phased review, this particular EIS does not satisfy the necessary components of the selected review process, because it is considering the specific project proposals (early actions) along side the broad and preliminary components of the plan. This is not the correct order of consideration for a phased review. A phased review is meant to "assist agencies and the public to focus on issues that are ready for decision and exclude from consideration issues already decided or

not yet ready. Broader environmental documents may be followed by narrow documents . . .” WAC 197-11-060(5)(b). Phased review is appropriate when: “the sequence is from a nonproject document to document of narrower scope such as site specific analysis (see, for example WAC 197-11-443)” WAC 197-11-060(5)(c)(i). WAC 197-11-443(2)’s example of this states: “

(2) A nonproject proposal may be approved based on an EIS assessing its broad impacts.

**When a project is then proposed that is consistent with the approved nonproject action, the EIS on such a project shall focus on the impacts and alternatives including mitigation measures specific to the subsequent project and not analyzed in the nonproject EIS.”**

(emphasis added).

By proposing the specific early actions in this EIS, Ecology is not following the order for consideration of a phased review EIS. The purpose of the phased review is to consider the broad aspects of the projects first and **then** the specific projects within the findings of the broad, preliminary findings. In the case of the Columbia River EIS, Ecology is considering both the broad and specific proposals in the EIS simultaneously in violation of SEPA’s phased review regulations.

### 3. THE INSTREAM FLOW REQUIREMENT OF THE DUAL GOALS OF PROVIDING IN-STREAM AND OUT-OF-STREAM USES FOR WATER IN THE COLUMBIA BASIN IS NOT MET BY THIS EIS.

The purpose of the Columbia River Water Management Act is to direct the Washington State Department of Ecology to “aggressively pursue the development of water supplies to benefit **both** instream and out-of-stream uses”. (emphasis added). Despite the dual purpose of the plan, the Columbia River EIS does not provide a meaningful effort in meeting the instream flow component. While the means used to achieve benefits to out-of-stream uses such as irrigation are more clear, these means fail to simultaneously meet the goal of benefiting in-stream uses. The goal of providing for instream flow is not met for the following reasons:

1. Storage projects harm instream flows and this EIS only considers storage projects versus no storage projects. The means of satisfying the goal of supplying water to out-of-stream uses is being satisfied by the storage projects while at the same time failing to meet the goal of providing water for instream uses. It is not merely failing to meet the goal for instream use, it is actively working against it by the very nature of the means suggested: dams and reservoirs.
2. There is no showing that water collected in storage units can be of sufficient quality or managed in a manner to facilitate healthy fish populations; yet the EIS proceeds as if there is no doubt or disagreement that stored water later released in any quality or quantity will meet the statute’s mandate of improving instream conditions for aquatic life.
3. Water allocated by Ecology from the Water Trust Fund is not earmarked toward instream flows but instead toward irrigation and other out of stream beneficial uses. This allocation scheme fails to address the goal for providing water for improved instream flow.
4. It only serves an out-of-stream goal to exempt from the Trust Program any water savings achieved via conservation in the Columbia Basin Project, so long as that water is used in the Odessa Subarea as a replacement source for ground water. Furthermore, alternatives for achieving instream flow benefits that are at least comparable to the amount of mainstem water loss diverted to the Odessa subarea must be examined and evaluated. The omission of such a discussion is yet another glaring example highlighting the insufficiency of the EIS and the need for substantial supplementation.

#### IV. CONCLUSION & RECOMMENDATIONS

The SEPA process is an important venue for examining the potential alternatives for implementing the Columbia River legislation. We therefore urge Ecology to delay further SEPA action including the development of a final EIS until definitions of crucial terms are agreed-upon, weak or missing portions of the EIS can be filled-out, inaccuracies corrected, and sufficient data can be gathered to form a proper foundation for implementing the Columbia River law.

- ✓ As we addressed in our SEPA scoping comments, CELP urges Ecology to immediately engage in rule-making designed to establish operative definitions for terms such as "conservation", "water use efficiency" and to set definitions and minimum guidelines for consideration of Voluntary Regional Agreements.
- ✓ We urge Ecology to spend no more taxpayer money on developing storage projects, negotiating or implementing voluntary regional agreements, or issuing water rights for new out of stream uses until such time as Ecology can fill in the many glaring data gaps and deficiencies in the Water Supply Inventory report and this draft EIS, and can compile the basic information necessary for effective water resource planning and management.

Thank you for considering these comments.

Sincerely,



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