



CLEAN, FLOWING WATERS FOR WASHINGTON

The Center for  
**Environmental Law & Policy**

February 19, 2008

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Via e-mail to: lesc461@ecy.wa.gov

Re: Comments on Columbia River Management Program CSRIA VRA

Dear Ms. Purtzer,

This letter pertains to the Columbia River Management Program's draft VRA, as posted on Ecology's web site on January 17, 2008. These comments are submitted on behalf of the Center for Environmental Law & Policy (CELP), a public interest membership organization dedicated to the protection and restoration of freshwater resources of the Columbia River Basin and the Pacific Northwest. CELP is the only environmental organization that has appealed Washington State water right decisions granting surface water rights to the Columbia River mainstem, and CELP is party to a settlement agreement in CELP vs. Ecology and the Quad Cities, PCHB 02-216, which, among other things, sets mitigation standards for future water right diversions for the cities of Kennewick, Richland, West Richland, and Pasco. These comments apply generally to the deficiencies and concerns set forth in the draft VRA.

**1. The draft VRA ignores the requirements of the ESA to protect instream resources necessary to the recovery of Columbia and Snake River endangered salmon.**

The Department of Ecology is required to follow and abide by both federal and state laws. The Washington state legislature does not have authority to supercede fish recovery flow standards recommended by the federal agency charged with recovering the twelve listed Columbia River fish species. The draft VRA should acknowledge and provide for the implementation of the Department of Ecology's obligations under federal Endangered Species Act requirements.

Low flows and associated higher water temperatures have been identified by the National Academy of Sciences (2004 Report) and NOAA Fisheries as limiting the recovery of endangered Columbia River fish stocks. NOAA Fisheries' "no net loss" standard for new water withdrawals from the Columbia has been in place since 1997 (see BiOp re: Oregon's potential issuance of new water rights near Boardman, OR), and was communicated to Washington in reference to a

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dozen or more water right applications pending in the late 1990's – including a proposed water right for the Quad Cities, Kennewick Irrigation District, and Mercer Ranches.

In 1994, NOAA fisheries set year-around flow ESA-related targets in connection with the relicensing and operation of the federal Columbia River power system dams; yet these flow targets consistently go unmet. A mitigation standard that calls only for “no negative impact” to Columbia river flows in July and August, and to Snake River flows from April to August, does not measure up to the state's obligations under the ESA. Regardless of legislative directive, it is unwise and illegal for the Department of Ecology to issue water rights that will lead to violations of the federal ESA.

**2. The text of the draft VRA differs substantially from the description in Ecology's summary SEPA addendum. The SEPA addendum is therefore unreliable for purposes of SEPA review.**

Among the variations between the draft VRA and the SEPA addendum summary:

The SEPA summary states that the proposed VRA will cover two groups of water users or potential water users: those with existing interruptible certificated water rights, and new applicants. However, the VRA clearly applies to an additional, and large, class of water right holders: holders of unperfected water right permits. See p. 3, draft VRA, definitions 4(c) “[A VRA participant is one who] has an interruptible water right on the ‘Columbia River Mainstem...’”; and (7) “Interruptible water right” means “an existing certificate or *permit*...” (emphasis added). This is made all the more significant due to the large number of outstanding permits authorizing diversions from the Columbia River, the VRA's reliance upon “recalibration” as a means of “water savings,” and the legal and practical inability to “recalibrate” rights that are not yet fully developed.

The SEPA addendum states on p. 2, paragraph 2 that CSRIA applicants under the VRA would receive “new interruptible water rights”. This condition is not described in the draft VRA.

**3. The consultation period and the public comment period for the draft VRA are defective because too many vital details are lacking to allow for meaningful analysis. Ecology should first “fill in the blanks,” and then submit the agreement for the statutory consultation period.**

The full extent of the state's liabilities under this agreement is impossible to calculate at this stage, because vital facts are unknown. As WDFW pointed out in its initial consultation comments on this VRA, “[t]here is a disappointing lack of specificity on which to base comments.” Without key information on the geographic range of projects, the total quantity of water involved, and to what uses the new water will be directed, it is impossible to assess potential costs and benefits to the taxpayers who must subsidize the new water uses.

Quantifiable parameters of state financial obligations should be known “up front” in order to meaningfully assess whether an agreement makes fiscal sense or is in the public interest. Here, essential facts are lacking. The proposed VRA requires the state to provide mitigation water at a

cost of \$10 per acre foot for every new water right issued under the agreement; however, it fails to specifically identify (or cumulatively describe, for that matter) the persons or entities to receive the water, where and for what purpose the water will be put to use, or how much “new water” in the form of new water rights or drought permits will likely be given away. The recipients of the public’s water will be able to control their costs according to how much water they request or use; however, the state’s total obligations are uncertain and open-ended.

**4. “Water savings” as described under the draft VRA do not equate to “new water” sufficient to support the issuance of new water rights.**

The draft VRA relies heavily on the notion of adherence to best management practices, conservation, and “recalibration” as creating “new water” to mitigate for new out of stream water uses. Recalibration and BMPs will not result in “new water”.

- A. “Recalibration” appears to be another way to characterize a practice now referred to as a “tentative determination” of the validity of a right. In this sense, a “recalibration” cannot equate to a reduction in water use because it would only serve to conform the resulting (“recalibrated”) paper water right with the holder’s true interest in it. See *RD Merrill v. PCHB*. If a holder never beneficially used the full paper quantity of his/her water right, that holder never gained a legal entitlement to that full measure; hence a “recalibration” does not put water back into the river.
- B. A large number of the interruptible right holders who are eligible to participate in this VRA hold interruptible PERMITS rather than CERTIFICATES. A permit, by definition, is a right to future use of water. It is impossible to “recalibrate” what one has not yet fully developed; thus the recalibration exercise (and the illusory “water savings” therefrom) is meaningless for this category of potential participants.
- C. BMP’s as set forth in the VRA merely duplicate conservation standards that VRA participants are already required to meet. Assuming that VRA participants are already meeting their obligations under the law and conditions of their existing permits, the BMP’s will generate no “new water”. Water users in general are already expected to adhere to the equivalent of BMP’S under caselaw proscriptions against waste (*Grimes*), and interruptible water right holders are already required under the specific provisions of WAC 173-563-100(3)(b) to use up-to-date efficient water delivery systems (for example “use of water under this authorization shall be contingent upon the water right holder’s utilization of up to date water conservation practices and maintenance of efficient water delivery systems consistent with established regulation requirements and facility capabilities.”)

## **5. Mitigation must accrue when impacts occur.**

The draft VRA is inappropriate in that it would allow for mitigation of water use impacts “before” the water use occurs. (§ D.6) This term is vague, and would appear to allow for mitigation out of season with the impacts associated with water use. This action would violate Endangered Species Act flow requirements and the public interest requirements of the state water code, and could potentially impair existing water rights.

## **6. First in time, last in line.**

The proposed VRA would move proposed new water users to the front of the line, in derogation of existing water right applications. This would violate the requirement that water rights be processed in order of priority. Except pursuant to “Hillis Rule” provisions, the Department of Ecology does not have authority to offer and provide mitigation for a special class of water users, allowing those users to jump out of the priority processing requirements of the state water code. The cost-reimbursement provision of the draft VRA does not resolve this problem, because of the irrevocable commitment of finite state resources (both financial and involving water) to process and approve these applications.

## **7. The proposed CSRIA VRA encourages speculation in scarce resources.**

According to CELP’s research, nearly half (163 of 334 in 2004) of all the interruptible rights eligible for new drought permits under this VRA are still under development and not yet certificated. Many of these permits date back to the 1980’s, with Ecology granting multiple extension requests. Yet, despite this lack of due diligence in water right development, the proposed VRA nonetheless will apply to permit holders as well as holders of certificated interruptible water rights.

## **8. A few special interests will disproportionately benefit from this lopsided VRA at taxpayers’ expense.**

Independent research into the holders of interruptible water rights reveals the following: Nine corporations or entities account for over 30% (by water volume) of the 334 interruptible water rights. These entities, including John Hancock Mutual Life, Boise Cascade, J.R. Simplot, Stemilt Irrigation District, and the various Mercer holdings (Mercer Ranch, Mercer Vineyards) hold multiple water rights – many of which are not interruptible. When their junior water rights become “drought proof” under the CSRIA VRA, there is nothing to stop them from marketing their more senior rights and pocketing a handsome profit at public expense. To discourage speculation and unjust enrichment at public expense, a participant under this VRA should be required to agree not to market other water rights held under the same ownership or appurtenant to the same place of use.

**9. The \$10 per acre foot annual fee for water does not even remotely approximate the market value of water in the Columbia Basin.**

The mitigation fee of \$10/acre foot set forth in the draft VRA represents a continuing public subsidy to select eastern Washington water users. (¶ E.2) In fact, CSRIA originally proposed a \$10/AF fee for water rights in 2001. Since that time, water markets have developed in Washington, making it apparent that the purchase of water rights can be extremely difficult (see, e.g., Yakima “reverse auction”). Yet, Ecology clings to the \$10/AF fee, a gross under-representation of market price. Inflation indices do not resolve this problem given that the starting point for consideration is not representative of market values. The draft VRA should utilize a mitigation fee that represents fair market value for water rights as established by recent transactions in the Columbia basin region.

**10. CSRIA conflicts of interest.**

It appears that the Columbia Snake River Irrigator Association has several roles in the implementation of the VRA that equate to conflicts of interest. These include participation in the “recalibration” of water rights by the Benton County Water Conservancy Board (where CSRIA signatory Darryl Olsen serves as board member (¶ C.11) and participation by CSRIA to “find, fund and acquire mitigation water.” (¶ E.8) The draft VRA should eliminate any provisions that would create a conflict or appearance of conflict of interest.

**11. Special privileges for CSRIA.**

The draft VRA appears to award several privileges to the project proponent that should be available to the public at large, including “consultation” over “recalibration” decisions, and the sharing of water right information. (¶ E.10) All such information should be made available to the public no later than the public notice period for water right applications.

**12. Municipal water use efficiency standards are too vague and inconsistent to serve as a basis for water conservation practices.**

The draft VRA reliance on “municipal and utility water use efficiency standards,” referring to standards developed by municipal water systems pursuant to Department of Health regulations (as authorized under the Municipal Water Law). (¶ E.11) These standards allow the municipal supplier to choose its own conservation goals and rate of conservation – that is, a municipal supplier may choose to save 0.5% or 20% -- any number that it self-selects. Hence, there is likely to be substantial inconsistency among and between municipal water suppliers that benefit from the draft VRA. Moreover, for those municipal supplier who “low-ball” their efficiency goals, these standards will not equate to best management practices. The draft VRA should not defer to DOH water use efficiency “standards,” but should instead impose specific and consistent water efficiency standards and requirements on all municipal water suppliers.

### **13. CELP-Ecology-Quad Cities Settlement Agreement.**

Absent information about the recipients of CSRIA VRA water rights and mitigation, it is impossible for CELP to evaluate whether in fact the draft VRA is consistent with the terms of the CELP-Ecology-Quad Cities settlement agreement. (¶ E.11) By submitting these comments CELP does not agree or concede that the draft VRA is in compliance with the terms of said settlement agreement.

### **14. Termination for Cause.**

The Department of Ecology cannot agree to pay costs for failure to fulfill the terms of the VRA if the VRA or superseding water rights are held invalid. (¶ J) Nor can Ecology guarantee that the terms of a permit remain in effect if such permit is held invalid. While ¶ L (Governance) appears to acknowledge this legal truism, ambiguity in the agreement does not serve the public interest and could result in further litigation.

Thank you for consideration of our comments. We look forward to your response.

Yours very truly,



Rachael Paschal Osborn, Executive Director  
Shirley Waters Nixon, Senior Attorney

Cc: Bonneville Power Authority  
NOAA Fisheries  
Columbia River Intertribal Fisheries Commission  
Yakama Nation  
Confederated Tribes of the Umatilla Reservation  
Confederated Colville Tribes  
Spokane Tribe  
Nez Perce Tribe