Center for Water Advocacy

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LeAnn Purtzer
Columbia River Unit
Department of Ecology, Central Region Office
15 W Yakima Ave, Suite 200
Yakima, WA 98902-3452

RE: Comments on the Voluntary Regional Agreement (VRA) between the Columbia-Snake River Irrigators Association (CSRIA) and the Washington State Department of Ecology (Ecology)

Dear Ms. Purtzer,

The Center for Water Advocacy (CWA) public interest advocacy organization dedicated to protecting the water resources of the western United States. CWA works to protect and restore water resources including water quantity, water quality and water rights for the health of watershed ecosystems, preservation of cultural identity and the benefit of the public. In addition, at their request, CWA works with individual tribes on water issue by conducting legal research and analysis; representing tribes in administrative and legal proceedings; and by facilitating communication with state and federal agencies, communities and the legal system.

This letter is to ask you address specific issues regarding the implementation of the Voluntary Regional Agreement (VRA), and to consider its impacts on aquatic resources, native fish habitat and the overall health of the Columbia River. We also urge Ecology to balance decisions to permit water withdrawals associated with this VRA with its obligation to protect and enhance the quality of the natural environment.

Consider VRAs purposes of "Protecting instream flows"
Protecting instream flows is one of the main purposes allowing Ecology to enter into VRAs under RCW 90.90.030 and Columbia River Bill, sec. (1) & (4). Instream flows are critical for migrating salmon and steelhead populations and vital for long-term watershed health. Moreover, the existing instream flow targets set out to protect salmon and steelhead are often not met under the current system, yet the demand will only increase in the future.

A critical balancing is required to assure the VRA benefits both out-of-stream and instream uses. However, the VRA seems only to serve out-of-stream uses, focusing on cost-effectiveness and mitigation feasibility, without adequate consideration of instream flows. Under the "Terms and Conditions for Drought Permits Section", for example, the VRA provides, that "RCW 90.90.020(3)(c)

directs Ecology to develop "a new uninterruptible supply of water for the holders of interruptible water rights on the Columbia River main stem that are subject to instream flows or other mitigation conditions to protect stream flows." Based on the fact that the such interruptible water rights were developed based on the requirements of the federal Endangered Species Act, the RCW 90.90.020(3)(c) and now the VRA, are simply a means if insuring that irrigation interests will get water at the expense of salmon and other habitat. §D(5). Moreover, nothing in the VRA indicates how Ecology plans to measure a reduction of instream flows. The VRA must account for this important purpose set out in the Columbia River Basin Bill and integrate this balance into the VRA.

The VRA is not mandated by the CRWMP Legislation and would not be supported in Court
Neither the CRWMP nor any other legislation mandates that Ecology use VRAs. With this in mind, why is Ecology aggressively pursuing the VRA? Is the VRA process actually more beneficial to water users and the Columbia Basin? Or is the VRA simply a mechanism that allows CSRIA to receive priority for water rights with the promise it will undertake "conservation measures," which are not clearly defined within the agreement?

In addition, although it appears that the VRA is intended to act as a contract, of some sort, enforceable by state law, *See*, §§ H-P, it would not be enforceable in a court of law as illustrated by the fact that it benefits only the Columbia Snake River Irrigation Association River (CSRIA). The only deliverable under the Drought Permits section, for example, is that "Ecology commits to issue drought permits effective during the periods in which Interruptible Water Rights would be curtailed…. In advance of a declared drought" §D(8)&(9)(a). On the other hand, CSRIA has little to no obligation to providing mitigation water needed for fishery habitat in the VRA. Indeed, most of the responsibility for mitigation falls on Ecology who is obligated only to make a "good faith effort to provide the mitigation water necessary to ensure that drought permits will meet the Columbia River and Snake River Mitigation Standards." §D(5).

As a result, not only does the VRA not contain the necessary "bargained for exchange" of standard contract law but, it does not implement the Columbia River Water Management Project (CRWMP) legislation and does nothing to protect the public interest when issuing water rights under RCW 90.03.290(3). Instead, water permits are more specific about the location of use and timing of impacts than the VRA, providing more transparency for the public to assess whether the use is within the public interest.

In addition, because the agreement does not address the individual permits issued, it does not address the specific timing or location of impacts. The VRA fails to address important details such as, places of use and amount of water that is returned to the river. It is impossible for us to fully comment on or measure the impacts without specific details of these permits.

Moreover, the VRA does not address who can join the CSRIA as a party to the VRA. Does it allow any user in the basin to subsequently join the VRA and receive priority for a water permit? How will this impact other VRAs in the basin in the future?

Further, the lack of specificity in the VRA fails to guarantee that water delivered to irrigators will be mitigated. In this regard, the VRA merely states that "[m]itigation through water savings must be secured by Ecology either before or at the same time that water use under a drought permit occurs."

§D(6). Due to the fact, however, that the very same section of the VRA, commits Ecology to deliver water during the period in which interruptible water rights would be curtailed, subsection (6) of section D is in direct conflict with subsection (5). In fact, it is clear that Ecology is not required under the VRA to provide sufficient mitigation to offset impacts to fishery resources, at any time, based on §10 which states: "In the event that sufficient mitigation water for a given drought year is unavailable, then the quantity of mitigation water available *shall be assigned proportionately* to all CSRIA VRA participants." (emphasis added).

Further, Ecology should first define and set specific guidelines for new VRAs before finalizing this agreement. Additionally, Ecology should provide information on all permits issued in the future under the VRA before the public can make fully informed comments and specifically, state what happens to the water under such permits if Ecology is unable to secure mitigation water.

The failure of the VRA to provide specificity in relation to new permits and formally interruptible water rights is contrary to a comprehensive and scientifically based study that Ecology, itself, commissioned for the CWRMP which states ""[regarding prospective additional diversions should be considered with an understanding of existing and potential future diversions across the entire basin, and should be subjected to professional and public scrutiny, a consideration of risk factors, and system-wide equities…*The State of Washington and other basin jurisdictions should convene a joint forum for documenting and discussing the environmental and other consequences of proposed water diversions that exceed a specified threshold*." *Id* at 7 (emphasis in original)." National Academy of Scientist – MANAGING THE COLUMBIA RIVER, INSTREAM FLOWS, WATER WITHDRAWALS, AND SALMON SURVIVAL - commissioned by Washington State and published by the NAS in March, 2004 (NAS Report).

No Negative Impact

The VRA specifically states that it is intended to result in the approval of new water use on the Columbia and Lower Snake Rivers, however new water use permits under the VRA "shall not reduce stream flows… during critical periods established by the legislature" (See A. Preamble). As required by RCW 90.90.030 (2)(1) and the Columbia River Basin Bill sec. (4)(a) VRAs shall ensure "no negative impact" on mainstream instream flows during July and August for any new water rights issued. To meet this requirement, in relation to new water rights permits, the VRA states that "CSRIA VRA Participants agree to pay a mitigation fee for mitigation water funded and acquired by Ecology in advance of issuance of new permits. The first payment will be calculated based on $10 per acre foot of water, times the full quantity of the issued permit, times the first 3 years of authorized use of water."§E(2). According to the VRA, with these payments "Ecology will identify the most cost effective and feasible projects that can be funded to provide mitigation water for new water rights." .§E(12). In addition, "Ecology will enter into agreements with water right holders to fund mitigation water projects utilizing funds provided by the State and/or CSRIA VRA Participants." §E(13).

Experts in the field have specifically refuted ecology's theory, however, that this process will effectively mitigate for the amount of water promised to irrigation interests by the VRA. In reference to the CWRMP, for example, the NAS Report provides "[c]harges for water rights appear to be arbitrarily chosen and out of proportion to the probable costs of mitigation and the value of water…a charge of $10 per acre-foot per year to be used (among other things) to acquire mitigation water in low water

years" is well below the "economic value of out-of-stream water…[e]ven in high-water years…." "*This scenario seemingly poses selling water rights for $10 per acre-foot per year, when water may later have to be purchased for several times that amount*." NAS Report Exec. Summary at 8 (emphasis added).

In addition, the VRA provides that Ecology and CSRIA will pursue water conservation and other measure "in a quantity sufficient to fully offset any new water uses" during these months. However, the VRA does not sufficiently explain these water conservation efforts, the methods, or means to measure whether or not the conservation efforts actually result in "no negative impact." What process will Ecology use to determine whether a new water permit results in "no negative impact?" Are new permits conditioned on mitigation water being present instream? In addition to explaining the methods and measurements, both parties should fully disclose all impacts to instream flows during these months and more specifically, how they will pursue these conservation measures to "fully offset" any and all new uses during summer months.

Further, as in the case of the Terms and Conditions for Drought Permits, the Terms and Conditions for New Water Right Permits section benefits only on party to the VRA by virtually guarantying that applicants will get what ever water they apply for with their only obligation being to perform best management practices and basically not get in the way of Ecologies efforts to find mitigation water. *See* §E(1)-(8). In fact, once again, Ecology not CSRIA is the only entity obligated to do anything towards mitigation of the use of the water by CSRIA. Finally, there is no guarantee that the public interest will be protected as illustrated by the fact that under the VRA Ecology is obligated only to "make a good faith effort to provide the mitigation water necessary to ensure new permits meet the Columbia River and Snake River Mitigation Standards." §E(10).

To help clarify this issue, Ecology should define the term "no negative impact' by rulemaking prior to issuing the final agreement. Without an adequate definition, how can Ecology ensure the standard is met under the VRA? This rule should set minimum standards and guidelines for determining "no negative impact" before CSRIA and Ecology proceed with the VRA.

Furthermore, because there is not a method to measure "no negative impact" prior to pre- approving of a specific plan, it is impossible to determine this impact. Under SEPA WAC 197-11-080, this lack of data is unacceptable 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). However, 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 yet plans to proceed with the VRA. In addition, because 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. Ecology has also not shown that the means of obtaining such information are speculative or unknown. Ecology should make efforts to measure these impacts prior to proceeding with the implementation of the VRA.

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 as required under WAC 197-11-080(3)(b). Moreover, WAC 197-11-080(3)(b) states

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." By proceeding with the VRA without a means of measuring the impact to instream it will likely violate "no negative impact" requirement.

Cumulative Impacts

The VRA does not address the impact of multiple permits issued using the VRA. As mentioned earlier, the VRA is not specific regarding the number of permits (or volume of water within those permits) that Ecology will issue under the VRA. How is it possible to consider the impact on the river —including whether or not it is meeting the "no negative impact" standard—without knowing this information beforehand? Without this, the VRA does not adequately consider the cumulative impacts of permits under this VRA, not to mention the impact of the VRA coupled with the many water withdrawal permits currently pending with Ecology.

Related to this issue, we urge you to consider the cumulative impacts of this VRA (along with other pending permits) on the survival of salmon and other native species within the Columbia Basin. The survival of these rare species is directly dependent on adequate river flows. Even though the VRA requires "no negative impact" during critical periods of the summer, Ecology has a duty to protect native salmon runs equally with goal of issuing new water rights permits.

Consideration of the VRA within the Columbia River Water Management Plan EIS

Proceeding with this process without having a set policy for how to measure whether VRA's impacts and whether or not it would result in a net reduction of instream flow would violate WAC 197-11-402(10). This regulation 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 CSRIA VRA without a means to know the impact on these conditions suggests that it has already decided to proceed with the VRA implementation regardless of the outcome for instream flows.

Consideration of the VRA within the context of the Columbia River Water Management Plan EIS is inappropriate under WAS 197-11-055. This sections requires 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). 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**.**

Moreover, by incorporating the concept of specific early actions of the EIS, into the VRA, 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.

DOE has not offered to enter into similar VRA's with Other Effected Interests in the basin
DOE had never approached the conservation community about doing similar agreements that DOE would insure that a specified amount of water remained in the River or that certain data would be made available as part of the CRWMP. Nor is it likely that DOE has approached any of the Tribes located in Washington or the Columbia River Treaty Tribes about entering onto such agreements. This oversight not only illustrates that the VRAs and, therefore, the entire CWRMP is intended to benefit one special interest entity at the expense of public and tribal interests but it violates recent precedent which requires Ecology to consult with Columbia River Treaty tribes prior to issuing any water right permits on the River. *See, Yakama Nation, Et al v. DOE* (PCHB 2003).

Conclusion
We urge you to adequately consider the impacts of the VRA on aquatic resources and the purpose of protecting instream flows in the Columbia River. Moreover, we ask you to fully define "no negative impact," as well as minimum standards and guidelines for measuring "no negative impact" prior to proceeding with this agreement. Finally, we ask you to balance water withdrawals associated with this VRA with your obligation to protect and enhance the quality of the natural environment.

Thank you for your consideration.

Sincerely,

Kelly O'Brien, Water Policy Coordinator
Center for Water Advocacy