SPOKANE RIVER INSTREAM FLOW RULE LITIGATION

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Introduction

- This matter involves the Washington Department of Ecology's adoption of an instream flow rule for the Spokane River, WAC Ch. 173-557. In adopting the rule, was Ecology required to consider not just fisheries needs, but all beneficial uses of the River, including navigation, recreation and aesthetics?
- In July 2019, the Washington Court of Appeals, Div. 2, said yes, finding Ecology exceeded statutory authority and was arbitrary and capricious in adopting the rule based solely on information about fisheries. *Ctr. for Env'l Law & Policy v. Dept. of Ecology*, 9 Wn.App.2d 746 (Div. 2 2019) (amended Aug. 20, 2019).
- The Washington Supreme Court accepted the Department of Ecology's petition for review, and the matter is now scheduled for oral argument on May 14, 2020 (in Seattle).

Antecedents

- 1999-2013 Spokane WRIA Watershed Planning Process
    - RCW Ch. 90.82 governs the watershed planning process.
    - Spokane County convened a watershed planning group in 1999, and opted to attempt to formulate instream flow recommendations for the Spokane River. Although the Spokane Watershed Planning Unit adopted a plan, it was unable to unanimously decide on instream flows for the Spokane River. Per RCW 90.82.080(5), the responsibility to adopt instream flows then transferred to the Department of Ecology, which partnered with the WA Department of Fish & Wildlife (WDFW).
    - Meanwhile, from 2001-2009, Avista Corp. underwent re-licensing of the five dams comprising its Spokane River Project. Via negotiation, regulatory processes, litigation and settlement, aesthetic flow "bypasses" were established for Avista's Post Falls and Spokane Falls facilities, and some Avista-specific flow duties were imposed downstream of those waterfalls. See Spokane River Project, FERC Project No. 2545, License, Summary of Requirements at 17-18, 22-25 (2009), and Settlement Agreement between Avista Corp., Sierra Club, and Center for Environmental Law & Policy (April 30, 2009).
    - Instream flow studies for fisheries and recreation were prepared to support the Avista relicensing and watershed planning.

Spokane River Instream Flow Rulemaking

- 2013-2015 Ecology Rulemaking
    - The Departments of Ecology & DFW worked together to propose instream flows for several reaches of the Spokane River in Washington. These flows focused solely on fisheries protection (redband trout and mountain whitefish).
    - In 2015, Ecology adopted the Spokane River instream flow rule, establishing flow targets for the Spokane Valley reach near Barker Rd. during summer months, and the reach between Monroe Street and Ninemile dams during three different periods of the year. WAC 173-557-040, -050.

- Environmental Group Advocacy
    - American Whitewater, the Center for Environmental Law & Policy (CELP), and Sierra Club (the Environmental Groups) were concerned about the low 850 CFS flow Ecology proposed for the below-Monroe reach of the Spokane River during the June 16-Sept. 30 period. It is rare for Spokane River flows to fall to this level. As a practical and legal matter, this flow would allow continued issuance of water rights from the Spokane River and the Spokane-Rathdrum Aquifer (which is hydraulically connected to the River).
    - The Environmental Groups engaged in substantial research and advocacy, with the goal to persuade Ecology to adopt a higher flow. Their submittals to the agency included a boater survey, a photographic inventory taken from 37 key observation points over a 4-month low-flow period, reports prepared by fisheries expert Prof. Al Scholz of Eastern Washington University and national recreation flow experts Confluence Consulting, declarations from three small recreation businesses that depend on the Spokane River, and approximately 2,000 public comments.
    - In 2015, Ecology adopted the rule, including the 850 CFS flow. See WAC Ch. 173-557.
    - In February 2016, pursuant to RCW 34.05.330(1), the Environmental Groups petitioned for an amendment to the rule, and Ecology denied the petition.
    - In May 2016, pursuant to RCW 34.05.330(3), the Environmental Groups petitioned Gov. Inslee to review the rule, and that petition was declined.

Spokane River Instream Flow Litigation

- Pursuant to RCW 34.05.514, the Environmental Groups filed a petition for rule challenge in Thurston County Superior Court pursuant to the Washington Administrative Procedures Act. The groups were represented by Dan Von Seggern of CELP and Andrea K. Rodgers of the Western Environmental Law Center (WELC). Andrew Hawley later substituted for Ms. Rodgers, and Ted Howard of CELP joined the Washington Supreme Court briefing. Ecology is represented by Assistant AG Stephen North.
- The judicial petition alleged that Ecology's rule failed to protect all beneficial uses of the Spokane River, specifically recreation, navigation, and aesthetics, as required by statute. Other claims have since dropped from the appeal (but see note on Administrative Record issue below).
    - RCW 90.54.020(3)(a): "Perennial rivers and streams of the state shall be retained with base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values."

- Ecology responded, *inter alia*, that
    - the Minimum Flows Act, RCW 90.22.010, grants discretion to the agency to focus solely on fisheries flows;
    - the use of a particular flow-setting method (known as Instream Flow Incremental Method or IFIM) was appropriate and even required, citing *Dept. of Ecology v. PUD No. 1 of Jefferson County*, 121 Wn.2d 179 (1993); and
    - the word "shall" in RCW 90.54.020 does not impose mandatory duties, citing *Bassett v. Dept. of Ecology*, 8 Wn.App.2d 284 (2019).
    - Ecology also argued that it actually had considered all uses, that the flows imposed on the Avista license controlled the outcome of the rule, and that a ruling against the agency would lead to a reopening of other instream flow rules in Washington.

- In June 2017, Thurston County Superior Court upheld the rule. The Environmental Groups appealed to Division 2 of the Court of Appeals.

Court of Appeals Decision

- In July 2019, Division 2 of the Court of Appeals ruled in favor of the Environmental Groups. *Ctr. for Env'l Law & Policy v. Dept. of Ecology*, 9 Wn.App.2d 746 (Div. 2 2019) (amended Aug. 20, 2019).
- The Div. 2 Court, ACJ Linda Lee, held that:
    - Ecology exceeded its rulemaking authority by not following the statutory requirements of RCW 90.54.020(3)(a), i.e., "[Ecology's] narrow focus on preserving one instream value is not reasonably consistent with the WRA's purpose of ensuring 'that waters of the state are protected and fully utilized for the greatest benefit to the people of the state of Washington.'"
    - Ecology's decision to adopt the rule was arbitrary and capricious. "Instead of considering how the 850 cfs would affect other instream values, Ecology summarily concluded that a flow protective of fish also protected other uses of the river. Nothing in the record supports this conclusion. And the evidence before Ecology showed that the proposed flow would not be adequate to support rafting, kayaking, and other recreational uses of the river."
    - The Court rejected Ecology's claim that it had considered recreational uses, finding that "merely collecting public comments and studies that showed 850 cfs was not sufficient to preserve the recreational and aesthetic values of the river, and then summarily "reject[ing]" these higher instream values" was insufficient review.
    - The Court rejected the argument that Avista's flows were controlling, finding that "Cursory review of certain studies Avista conducted as part of its relicensing process does not constitute meaningful review of the instream values enumerated in RCW 90.54.020(3)(a). And this argument ignores Ecology's own statement that it 'chose[ ] not to establish instream flow values based on those recreational needs expressed during the FERC process.'"
    - Upon request by Ecology (unopposed by the Environmental Groups), the Court amended the relief awarded in its original order (invaliding the entire rule), to invalidate

only that portion of the rule governing the 850 CFS summer season flow in the reach below Monroe St. dam.

Petition for Review by the Washington Supreme Court

- Ecology petitioned for review by the Washington Supreme Court. In January 2020, the Court accepted review of the case.
- Supplemental briefing is complete and argument is set for May 14, 2020 at 9 AM at the Museum of History and Industry in Seattle.

Practitioner Alert: A Note about the Administrative Record

- In preparing for the rule challenge, the Environmental Groups made a public records request to the WA Dept. of Fish & Wildlife, and discovered that several instream flow studies that had been prepared as part of the Avista dam relicensing were not part of the formal record for the instream flow rulemaking. The Environmental Groups petitioned Thurston County Superior Court to supplement the record, which the Court denied.
- The Environmental Groups pursued a claim that Ecology violated the APA by not including these scientific studies. See RCW 34.05.370. The concern is in part that WDFW partnered with Ecology to come up with the flow recommendations, but the WDFW Spokane River files were not part of the instream flow rulemaking record.
- Ecology responded that its rule writing staff (which is a different team than those who worked on the substantive elements of the rule for 15 years prior to rule-writing), did not have possession of the records at the time they drafted the rule, and that they did not rely on the studies. Therefore, the studies were not part of the administrative record.
- The Court of Appeals agreed with Ecology. "RCW 34.05.370(2)(f) only requires Ecology to include in its rulemaking file the data, factual information, studies, or reports it relied upon in adopting the Rule. Thus, contrary to CELP's assertion, Ecology was not required to include these documents in its rule-making file."
- The Washington Supreme Court declined to accept review of this issue.
- Of concern, under Ecology and the Court's reasoning, if the agency does not provide records to its rule-writing staff, they don't have to consider them. Ecology can therefore "pick and choose" the records that it transmits to its rule-writing staff and keep important information out of the formal administrative record.