

Testimony of Thomas O'Keefe  
On behalf of American Whitewater  
Before the Senate Committee on Natural Resources and Marine Waters  
On Senate Bill 5388  
January 31, 2011

Chairman Ranker and members of the Committee, my name is Thomas O'Keefe, and I am the Pacific Northwest Stewardship Director for American Whitewater.

American Whitewater is a national non-profit 501(c)(3) river conservation organization founded in 1954. American Whitewater's mission is to conserve and restore America's whitewater resources and to enhance opportunities to enjoy them safely. As a conservation-oriented paddling organization, We have over 5000 members and 100 local-based affiliate clubs, representing whitewater paddlers across the nation. American Whitewater's affiliate clubs in Washington State include BEWET (Boeing Recreation Club), EPIC Adventures (Eastern Washington University Outdoor Program), Paddle Trails Canoe Club, Spokane Kayak and Canoe Club, University Kayak Club (University of Washington), Washington Kayak Club, and Washington Recreational River Runners. Through our clubs and individual members we directly represent a population of approximately 3000 paddling enthusiasts in the state.

American Whitewater is here to support Senate Bill 5388 however we believe certain modifications to the bill language are necessary so the needs of recreational users are fully addressed. The State Recreational Use Statute is important to our membership as it protects the interests of landowners along our region's public waterways and encourages them to make access available to waterways for recreational purposes. In many places across the state our members are allowed to use private land to access rivers, and landowners are willing to provide that access because they will not be held liable for accidents or injuries.

In the case of dams that regulate flow, Chelan PUD raised a concern with a request from our organization to provide recreational opportunities in Chelan Gorge and their assessment that they were not protected by the recreational use statute. In response to this concern we signed a settlement agreement with the utility where we agreed to "work collaboratively to seek an amendment" to the State Recreational Use Statute that "expressly extends the immunity protections of such statute to recreational whitewater releases".<sup>1</sup>

The bill as proposed would provide that releasing water and making water areas available for kayaking, canoeing, or rafting pursuant to a federal hydroelectric license, and allowing the viewing of these activities, does not create a "known dangerous artificial latent condition" that would remove a landowner from protection under the statute.

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<sup>1</sup> Lake Chelan Settlement Agreement, Lake Chelan Hydroelectric Project, FERC Project No. 637. October 8, 2003. Public Utility Number No. 1 of Chelan County, Wenatchee, Washington.

We have the following concerns with the language as currently proposed:

1) By limiting the statute to whitewater recreation “pursuant to and in substantial compliance with a federal hydroelectric license” we have concerns that other dam owners, not under a federal license, who provide access for recreation will limit those opportunities. Our members currently enjoy whitewater recreational opportunities on rivers like the Cle Elum, Green, Tieton, and others where flows are dam-controlled but the projects are not under a federal hydroelectric license. We do not want to see any future limits placed on these activities due to liability concerns that may be raised when dam owners see they are only protected if they have a federal hydroelectric license.

2) For those projects under federal license, some project operators have opened their lands and facilities to whitewater recreation before the license conditions took effect. An example of this is on the Mystic Lake Project in Montana. Similarly we have enjoyed recreational opportunities on the Sultan River in Washington State, currently awaiting a new federal license. We do not want to see further restrictions or delays in providing public access to waterways as obtaining final agreement on license terms and conditions can often take several years and if parties can collaboratively develop an approach to providing recreation prior to license issuance, we would not want this statute to be amended to preclude those opportunities.

3) The actions we take and the language we develop will likely set a model for other states. No other state in the country has a recreational use statute that specifically calls out whitewater recreation on dam-controlled rivers. In revising our state statute it is likely that this will become a model that other utilities across the country will point to. We seek language that serves the needs of both utilities and recreational users for the reasons cited above.

To address these concerns we propose the following alternative language:

“Releasing water or flows and making waterways or channels available by the owner or operator of a hydroelectric facility or dam for kayaking, canoeing, rafting or other recreational purposes and making adjacent lands available for purposes of allowing the viewing of such activities does not create a known dangerous artificial latent condition and hydroelectric project or dam owners under subsection (1) of this section shall not be liable for unintentional injuries resulting from such releases and activities.”

In summary, we support the concept of SB 5388, but seek broader immunity protections to include other facilities that are not subject to a federal license. We look forward to working with the sponsors of this bill, utilities in the state who provide recreation at their projects, and other stakeholders in developing a collaborative solution that addresses the needs of all parties without placing further burdens or restrictions on the public’s ability to enjoy the state’s waterways.