# MEMORANDUM

To: Dave Christensen
Kelsey Collins
Water Resources Program, Department of Ecology

From: Sarah Mack

Date: September 19, 2021

Re: Draft Policy and Interpretive Statement: Administration of the Statewide Trust Water Rights Program

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Thank you for the opportunity to comment on Ecology's draft policy and interpretive statement on trust water rights and water banking. My primary concern is that the draft policy would alter the framework of the Trust Water Rights Program established by the Legislature and avoid giving full effect to some of the statutory language – which is an inappropriate use of an interpretive or policy statement.

If changes to the statute are deemed necessary or desirable, Ecology should propose legislative amendments. To the extent Ecology is attempting to "fill in the gaps" in the statutory framework by imposing requirements and constraints that will apply generally to applicants for water banks, new water rights, and water right changes, Ecology should initiate rulemaking to do so.

The Legislature expected and explicitly authorized Ecology to promulgate rules to implement RCW chapter 90.42. *See* RCW 90.42.160 ("The department may adopt rules as necessary to implement this chapter"). The Legislature also required Ecology to develop guidelines "governing the acquisition, administration, and management of trust water rights" that must be submitted to the joint select committee on water resource policy before adoption. RCW 90.42.050. The transparency, public input, and judicial review enabled by APA rulemaking are essential safeguards here to ensure that any rules or guidelines are consistent with all applicable provisions of RCW chapter 90.42 and with legislative intent.

Under the APA, the proper use of a policy and interpretive statement is to advise the public of the agency's "current opinions, approaches, and likely courses of action." RCW 34.05.230(1). Moreover, "[t]o better inform and involve the public, an agency is encouraged to convert long-standing interpretive and policy statements into rules." *Id*. An interpretive or policy statement should not be used to evade the requirements of the APA rulemaking process.

A true policy and interpretive statement should engage meaningfully with the legislative language and with explicit statements of legislative intent. For the TWRP, that would include, at a minimum, Laws 1991, chapter 347, Sec. 2; RCW 90.42.005(2)(d); RCW 90.42.010; and Laws 2009, chapter 283, Sec. 1. However, the draft policy does not address these expressions of legislative intent, and it is frequently unclear what specific statutory

provisions Ecology is interpreting here. Many of the requirements, prohibitions, and exclusions in the draft policy are untethered to – or appear to actually ignore – the Legislature's specific language. These include, for example:

- Non-applicability to trust water rights created under RCW chapter 90.38[1]
- Non-applicability to municipal water rights[2]
- Characterizing as "water banking" all uses of the TWRP for mitigation[3]
- Defining a "water bank" as limited to mitigation use[4]
- Requiring "mitigation" as a purpose of use[5]
- Prohibiting donation of water right permits and permit-exempt groundwater rights to the TWRP[6]

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[1] The Legislature intended RCW 90.42.100 to apply in the Yakima basin. *See* RCW 90.42.100(2)(a), (3)(d), and (6).

[2] Ecology correctly notes that municipal water rights have unique attributes under the Water Code. But the draft policy doesn't articulate any basis in the TWR statutes for saying that the policy does not cover municipal rights. I can't comment on Ecology's interpretation because I don't understand what it's based on.

[3] "Water banking" is one mechanism for using trust water rights for mitigation. It is not the **exclusive** mechanism. The Legislature encouraged the use of trust water rights for mitigation long before the water banking provisions were added. *See, e.g.*, RCW 90.42.040(1) ("Trust water rights acquired by the state shall be held in trust and authorized for use by the department for instream flows, irrigation, municipal, or other beneficial uses consistent with applicable regional plans for pilot planning areas, or to resolve critical water supply problems"). The water banking amendments did not alter this existing authority. *See* RCW 90.42.100(5). A water bank is an appropriate mechanism to enable third parties to appropriate water in reliance on "mitigation credits" – for example, as in the Dungeness basin rule. But it is completely unnecessary and burdensome to require a "water bank" arrangement to enable a single water right holder to establish a trust water right to offset impacts from its own proposed water appropriation or water right change.

[4] The draft policy's concept of "water bank" is both too broad (see n.3 above) and too narrow. Defining a water bank exclusively with reference to mitigation use is inconsistent with the statute, which recognizes that water banking is also appropriate to "provide water for presently unmet and future needs" or to "reserve[e] water supply for future uses." RCW 90.42.005(2)(d). For example, a trust water right could be banked to enable partial water right transfers to new water users. Or multiple trust water rights could be banked to enable seasonal transfers for irrigation or drought relief.

[5] The draft policy appears to require changing the purpose of use to "mitigation" before a water right can be relied upon to offset impacts. What is the legal basis for treating "mitigation" as a distinct category of beneficial use (separate from, *e.g.*, instream resource protection)? *See, e.g.*, RCW 90.54.020(1); RCW 90.14.031(2); RCW 90.03.550. One of the Legislature's innovations in the TWRP is to enable a water right (regardless of its original or specified purpose) to be designated as a trust water right and exercised to protect instream flows, preserve groundwater, or preserve surface water resources. *See* RCW 90.42.080. There is no basis in the TWR statute or elsewhere in the water code for an outright prohibition on use of a donated trust water right to offset impacts identified during Ecology's review of a proposed new water right or water right change. When Ecology reviews an application, doesn't Ecology have inherent authority to evaluate the suitability of proffered mitigation? A change in purpose of use to "mitigation" is unnecessary.

[6] The statute does not distinguish between certificates, claims, permits, and permit-exempt rights. *See* RCW 90.42.080(1)(a) ("The state may acquire all or portions of existing **surface water or groundwater rights**, by purchase, gift, or other appropriate means other than by condemnation, from any person or entity . . ."); RCW 90.42.080(1)(b) ("If the holder of a **right to surface water or groundwater** chooses to donate all or a portion of the person's water right . . .") (emphasis added). It is arbitrary to exclude permits and permit-exempt

As these examples illustrate, the draft policy goes far beyond "filling in the gaps" to effectuate the Legislature's intent (*see Hama Hama v. Shorelines Hearings Bd.*, 85 Wn.2d 441 (1975)).

It would be a public service for Ecology to issue an interpretive and policy statement dedicated to explaining applicable statutory requirements. During the 2020 discussions on water banking and trust water rights convened by Ecology, it was clear that some participants are simply opposed to existing law and water resource policy. For example, they don't believe rights claimed for municipal water supply purposes should be exempt from relinquishment; they believe establishing trust water rights to enable future uses is illegal "speculation"; they don't support allowing water right holders to park their water rights in the TWRP to avoid relinquishment; and they don't want any trust water rights to be quantified based on historic beneficial use. Yet the trust water right and relinquishment statutes explicitly authorize all these things.

Ecology could use a policy/interpretive statement to educate the public about what the law allows, what the law does not allow, and what the Legislature is attempting to encourage. For example, Ecology could explain what factors it will consider in evaluating impairment claims based on removal of return flows – a particular concern of the Legislature (*see* RCW 90.42.010). Or Ecology could articulate constraints on its authority to rely on a "public interest" test to get around parts of the statutory scheme that may be unpopular with some stakeholders.

I hope Ecology will reconsider its approach here and take advantage of this opportunity to correct misconceptions and truly clarify the law.

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groundwater rights from the TWRP if they meet applicable requirements under RCW 90.42.080(4). It would needlessly foreclose opportunities to protect streamflows or groundwater by assembling multiple valid small water rights in the TWRP.