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Submitted through Public Comment Form wr.ecology.commentinginput.com

Mary Verner
Water Resources Program
Washington Department of Ecology
300 Desmond Dr. SE
Lacey, WA 98503

RE: Comments to Draft Policy on the Administration of the Statewide
Trust Water Rights Program

Dear Mary:

Thank you for the opportunity to provide comments to Ecology's proposed draft Policy on the Administration of Statewide Trust Water Rights Program. Confluence Law, PLLC represents a variety of clients on matters relating to water resources. We provide these comments based on our own experiences and concerns and not on behalf of any client.

In general, we support Ecology's effort to clarify its policy on matters relating to the administration of the Trust Water Right Program. However, we are concerned that the existing draft exceeds Ecology's policy authority in certain instances, may be inconsistent with legislative and court decisions and creates uncertainty for appeal pathways. This letter will address our comments on Ecology's proposed definitions and Water Banking Agreements. We have also included an attachment with additional comments provided as in-line suggestions.

Section 1: Definitions

Donations: Presumably, the definition of donation means without expectation of monetary compensation *from Ecology or the State of Washington*, but that a gift of a water right is still a gift from Ecology's perspective if a third party provides monetary compensation to the water right hold to facilitate the "gift." This should be clarified in the definition.

Mitigation for out-of-stream uses: This definition should be revised to align with Ch. 90.42 RCW. The definition uses the term “adverse effects” but “adverse effects” is not a term defined in Ch. 90.42 RCW. Within Ch. 90.42 RCW, this term used in relation to contracts to finance water conservation projects (RCW 90.42.030) and deliver water within irrigation districts (RCW 90.03.380). RCW 90.42.100 states that the Trust Water Rights Program cannot be used to “[c]ause detriment or injury to existing rights” (RCW 90.42.100(3)(a)). The exercise of a trust water right cannot impair the public interest (RCW 90.42.040(4)(a)). As currently drafted the policy statement defines the standards inconsistently with Ch. 90.42 RCW.

Long-term mitigation: This implies that there is an option for mitigation which is less than five years in term. Should there also be a definition for “Short-term mitigation”?

Public Interest: The draft policy attempts to provide a definition of “Public Interest.” The definition is not otherwise found in either Title 90 RCW (Washington’s Water Code), or in regulations which have gone through any rulemaking process. The definition proposed is quite broad and implicates concepts far beyond the scope of Ch. 90.42 RCW (Statewide Trust Water Program). Further, this definition of Public Interest and its application to the surface water change process under RCW 90.03.380 is inconsistent with the caselaw found in PUD No. 1 of Pend Oreille Co. v. Ecology, 146 Wn.2d 778 (2002). This seems to be beyond what Ecology can pursue in the absence of legislation or a rule making process.

Water Bank and Water Banking Purposes: The draft policy limits the purposes for which water banking may be used by limiting water banks to “provid[ing] mitigation.” RCW 90.42.005 provides that water banks are available for multiple purposes “including drought response, improving streamflows on a voluntary basis, providing water mitigation, or reserving water supply for future uses.”

Implication of the Policy on Ch. 90.38 RCW: The Policy is silent on how to reconcile the provisions of Ch. 90.38 RCW with Ch. 90.42 RCW. The definition of “Trust water rights program” only refers to Chapter 90.42 RCW. Recognizing that the water banking provisions are all found in Ch. 90.42, it would nonetheless be helpful to clarify that the statewide provisions do in fact apply in the Yakima Basin.

Section 4: Water Banking Agreements

The draft policy provides that changed water rights for water banking purposes will be canceled if Ecology and the applicant fail to reach agreement on a Water Banking Agreement within six months of the Report of Examination changing the water right. This is a harsh result for a process in which Ecology plays a significant role. We recommend that if Ecology has an issue with the proposed change, then it should be dealt with within the RCW 90.03.380 timeline process. The change should not be “cancelled”, because the

applicant can continue to donate the right to the Trust Water Right Program to protect the water right from relinquishment during the continued negotiation period. Rather, the permit extension process should be applied while the applicant and Ecology continue to work through terms to a Water Banking Agreement.

Additionally, there appears to be no avenue for an appeal to the Pollution Control Hearings Board (PCHB) if Ecology fails to act. RCW 43.21B.110 provides the PCHB with jurisdiction for certain decisions of Ecology which include an "order" or "issuance, modification or termination" of a permit, certificate, or license by Ecology. It isn't clear that a "cancelation" of a "provisional approval" is appealable to the PCHB. The appeal may need to be made directly to a superior court. This ambiguity is problematic because it could lead to additional legal costs for applicants and Ecology as the court and PCHB are forced to clarify the nature of the action and appeal process.

Language Suggestions

Please find additional comments provided in-line on the draft policy attached.

Thank you for the opportunity to comment. We support the State's Trust Water Rights Program and the opportunities it affords our state for ways to meet its long-term water resource needs. We look forward to working with Ecology to find solutions to these complex issues.

CONFLUENCE LAW, PLLC

//Signed electronically

Jessica Kuchan, Attorney at Law

//Signed electronically

Jamie Morin, Attorney at Law

Policy and Interpretive Statement

Administration of the Statewide Trust Water Rights Program

Draft for Public Comment

- Contact:** Program Development and Operational Support Section
- References:** *Statute:* Chapters 90.38, 90.42, and 90.66 RCW; RCW 19.27.097, 90.03.290, 90.03.380, 90.14.140, 90.44.050, 90.44.110, 90.54.020, 90.80.055, 90.80.090
Administrative Rule: WAC 173-153-060
Policy: POL 2030, Municipal Water Law Interpretive and Policy Statement
Forms & Guidance: Request to Establish or Modify Water Bank; Application to Transfer a Water Right to the TWRP; Temporary Donation Form; Trust Water Rights Guidance (forthcoming Fall 2021)
- Purpose:** To provide transparency and consistency in the Water Resources Program’s administration of the Trust Water Rights Program (TWRP).
- Application:** The policy covers water rights held in the TWRP under chapter 90.42 RCW for the purpose of water banking and trust water right donations.
- This policy does not pertain to activities under chapter 90.38 RCW.
 - Municipal water rights have unique attributes and allowances under the Municipal Water Law that are not addressed in this policy. Specific provisions that apply to municipal water rights in regard to mitigation and water banking may be addressed in POL 2030, the Municipal Water Law Policy and Interpretive Statement.

SECTION 1: DEFINITIONS

Donation – A gift of a water right from a water right holder to Ecology without expectation of monetary compensation.

- **Permanent Donation** – A donated water right held in the TWRP that has been deeded to Ecology.
- **Temporary Donation** – A donated water right held in the TWRP for a specified non-permanent period of time.

Mitigation for out-of-stream uses – Measures that ~~offset adverse effects on a water source to prevent detriment or injury to~~ ~~impairment of~~ other water rights and eliminate impairment ~~and/or detriment to~~ the public interest. Referred to herein as “mitigation.”

- **Long-term mitigation** – Mitigation that is temporary in nature, but lasting for a period of five years or longer.

- **Mitigating rights** – Water rights held in the TWRP that are used to augment instream flows¹ for the purpose of offsetting adverse impacts and/or serve as mitigation to allow out-of-stream uses of water.
- **Permanent mitigation** – Mitigation that will be in place in perpetuity.

Public interest – The consideration of impacts to the public at large that would result from the creation and operation of a water bank. As applicable, considerations should include environmental impacts, with emphasis on the protection, restoration, and recovery of threatened and endangered species; environmental justice; implications for public health and safety; aesthetic, recreational, and economic effects; and impacts on publicly owned resources and facilities. General guidelines for consideration of the public interests are set forth in the water resources fundamentals in RCW 90.54.020. The public interest can also be presumed to be reflected in watershed plans, ground water area management programs, related water supply plans, water conservation plans, Ecology administrative rules, and local land use plans and development regulations.

Trust water rights program (TWRP) – A statewide program created under chapter 90.42 RCW authorizing Ecology to hold and manage trust water rights.

- **Trust water right** – “Any water right acquired by the state under [chapter 90.42 RCW] for management in the state’s trust water rights program” (RCW 90.42.020(5)).
- **Trust water right agreement** – An agreement [between a water right holder and](#) ~~with~~ Ecology for Ecology to hold and manage a water right in the TWRP.
- **Trust water right agreement for water banking purposes** – A specific type of trust water right agreement for the establishment and operation of water banks. These agreements are also referred to as a “water banking agreement.”

Water bank – A contractual arrangement to use the TWRP to provide mitigation to enable water uses that could otherwise impair existing water rights and/or be detrimental to the public interest, [and subject to the terms of a Trust water right agreement.](#)

Water banking purposes – Any use of the TWRP to mitigate water uses that could otherwise impair existing rights and/or be detrimental to the public interest.

SECTION 2: BACKGROUND

Chapter 90.42 RCW establishes and governs the statewide Trust Water Rights Program (TWRP). Through the TWRP, Ecology may acquire a water right through donation, lease, purchase, or other means (RCW 90.42.080). Water rights held in the TWRP are not subject to relinquishment (RCW 90.14.140(2)(h)), and retain their original priority date (RCW 90.42.040). Under this program, Ecology holds and manages water rights for specified purposes, including but not limited to instream flows and mitigation for out-of-stream uses.

¹ For purposes of this policy, reference to instream flows also incorporates groundwater preservation.

SECTION 3: ESTABLISHING A TRUST WATER RIGHT

A trust water right is established when Ecology agrees to hold a water right in the TWRP (see guidance for details on required documentation). A decision to approve a water right change under RCW 90.03.380 or RCW 90.44.100 by itself does not establish a trust water right.

SECTION 4: WATER BANKING

Per RCW 90.42.100, Ecology may use the TWRP for water banking purposes. Ecology interprets *water banking purposes* to mean any use of the TWRP to mitigate water uses that could otherwise impair existing rights and/or be detrimental to the public interest. Water banks may include simple arrangements that use a single trust water right to mitigate for another use. Water banks may also include complex arrangements whereby one or more water rights is used to mitigate for many new or existing uses.

Ecology has discretion whether to hold and manage a trust water right for water banking purposes (see RCW 90.42.110).

1. Requests to Establish or Modify a Water Bank

An entity seeking to use the TWRP for water banking purposes must submit a request to Ecology through the *Request to Establish or Modify Water Bank* form (“water banking request”). A prospective water banker should submit their water banking request either before or in conjunction with the filing of one or more corresponding water right change applications.²

Responses on the form should, at a minimum:

- Describe the proposed water bank, including bank purpose, objectives, and timelines;
- Identify the water right(s) intended for mitigation;³
- Describe the anticipated demand to be served by the bank, including:
 - The geographic area for which the intended mitigated uses will be located;
 - The purpose of use, period of use, quantity, and source of intended mitigated uses; and
 - Any other information Ecology will need to evaluate the impacts from the potential new uses.
- Provide any relevant information that will assist in Ecology’s evaluation of the public interest; and
- Describe the anticipated public benefits that will result from water bank development.

The level of detail provided in the form should be commensurate with the complexity of the water bank. Providing more thorough information about the water bank at the time of the request will help Ecology and the public better understand the project.

² Water banking requests submitted in conjunction with a change application(s) will help elucidate the project plan and could aid in Ecology’s evaluation of the request.

³ If the water banking request is submitted in conjunction with a water right change application(s), the water banking request should reference the specific change application.

Ecology will accept a water banking request for evaluation if it is complete and if Ecology determines that the proposed water bank merits consideration. Ecology will post accepted water banking requests on its website for public comment for a minimum period of 30 days.

2. Evaluation of a Water Banking Request

Upon acceptance of a water banking request, Ecology will evaluate whether to act upon the request. Ecology may choose to decline the request, defer a decision to a later date, or begin negotiating a *Trust Water Right Agreement for Water Banking Purposes* (water banking agreement). Ecology will consider all public comments received to inform our evaluation of the water banking request.

Ecology will consider the following criteria in evaluating a water banking request, along with any other relevant factors:

- *Administrative capacity within the Water Resources Program.* Creating and administering a water bank uses significant staff time and resources. Therefore, when determining whether to proceed with the water banking request, Ecology will evaluate whether adequate staff resources are available.
- *Alignment with Program priorities.* Ecology may prioritize water banking requests that align with program and agency goals and priorities. For example, this could include projects that:
 - Solve critical water supply problems by providing water for uses or users that would otherwise lack an available water supply;
 - Provide permanent augmentation of instream flows in critical stream reaches; and/or
 - Are supported by tribes and local communities.
- *Potential detriment or injury to existing rights* (see RCW 90.42.100(3) and RCW 90.42.040(4)). Evaluation of potential injury to existing rights will include, but is not limited to, an assessment of the extent and validity of the proposed mitigating right under RCW 90.03.380 and the water right's suitability to mitigate the proposed new or existing use(s).
- *Potential impairment of the public interest.* RCW 90.42.040(4) establishes that exercise of a trust water right may only be authorized if Ecology first determines that the public interest will not be impaired. Therefore, Ecology will assess whether exercise of the trust water rights (i.e., use of any mitigated water rights coming out of the water bank), is likely to impair the public interest.

If Ecology declines a water banking request, or decides to defer a decision to a later date, the applicant may choose to modify and resubmit their request form at any time.

3. Agreements

If Ecology agrees to proceed with the water banking request, Ecology and the prospective banker will [work in good faith to](#) negotiate ~~in attempt to enter into~~ a water banking agreement. The purpose of a water banking agreement is to establish mutually-agreed upon terms and conditions that:

- *Delineate roles and responsibilities of the water banking entity and Ecology.* For example, such terms could include but are not limited to establishing the process by which the water banking entity will allot mitigation to new or existing uses.

- *Protect against detriment or injury to existing water right holders.* For example, this could include quantitative or geographic limitations on the new uses that may be allotted for mitigation.
- *Protect against the impairment of the public interest.* For example, this could include requirements such as leaving a portion of a water right instream or maintaining a portion of a water right for use in the basin-of-origin.
- *Ensure that the proposed banking structure will not place an undue administrative burden on Ecology to oversee and assist in bank operations.* For example, this could include a limit on the number of applications for new mitigated permits Ecology will process during a given time period.
- *Outline the process and conditions for modifying or terminating the water banking agreement.*

Ecology will publish all final water banking agreements together with any associated final reports of examination for mitigating water rights on our website [for thirty days](#).

4. Consideration of Impairment

RCW 90.42.100 establishes that water banking cannot be used in ways that cause detriment or injury to existing water rights. Additionally, RCW 90.42.040(4)(a) establishes that exercise of a trust water right may only be authorized if Ecology first determines that existing rights will not be impaired. Therefore, Ecology will adhere to the following to ensure protection for existing water rights:

- Any mitigated new water use must rely on a mitigating water right that has undergone a tentative determination of extent and validity under RCW 90.03.380, and has been authorized for instream flow and mitigation as purposes of use;⁴ and
- Any new permanent mitigated water use must rely on a mitigated right that has been permanently transferred to the TWRP.⁵ Per RCW 90.42.100(3)(b), Ecology will not use water banking to “issue temporary water rights or portions thereof for new potable uses requiring an adequate and reliable water supply under RCW 19.27.097.”

Per RCW 90.42.040(4)(b), if impairment becomes apparent during the time the trust water right is being exercised, Ecology will renegotiate, amend, or terminate a water banking agreement.

5. Consideration of the Public Interest and Public Welfare

Ecology will evaluate the impact of a proposed water bank on the public interest and public welfare at the following junctures and per the following standards:

⁴ Per the application of this policy on page 1, municipal water rights have unique attributes and allowances under the Municipal Water Law and are not covered by this policy.

⁵ Ecology may exercise discretion to approve permanent mitigation based on long-term leases.

Document	Evaluation Standard and Statutory Citation
Request to establish or modify a water bank	Whether the proposed bank will lead to the exercise of a trust water right that impairs the public interest (RCW 90.42.040(4)(a)).
Water right change application Or Application to transfer a water right to the TWRP (see p.6)	Whether the proposed change or transfer will lead to the exercise of a trust water right that impairs the public interest (RCW 90.42.040(4)(a)). If the application is to change or transfer a groundwater right, Ecology will also evaluate whether the change is detrimental to the public interest (see R.D. Merrill Co. v. Pollution Control Hearings Bd., 137 Wn.2d 118, 969 P.2d 459 (1999)).
Application for a new mitigated water right	Whether the new appropriation will be detrimental to the public welfare (RCW 90.03.290). Whether the new mitigated right will lead to the exercise of a trust water right that impairs the public interest (RCW 90.42.040(4)(a)).

6. Water Right Changes to Create Mitigating Rights

To achieve the standards for mitigation in #4 above, most water rights intended as mitigating rights will have to undergo a change in purpose of use under RCW 90.03.380. The water right change application should include a description of the intended new uses to be served by the water bank (RCW 90.42.110(2)). This description should match that provided in the water banking request form submitted to Ecology.

A water right holder may not use, allocate, or exercise mitigation without a water banking agreement with Ecology. Therefore, if a water right holder applies to change the purpose of use of a water right to instream flow and mitigation and Ecology finds that the change meets the requirements under RCW 90.03.380, but the water right holder does not have a signed water banking agreement in place with Ecology,⁶ then Ecology will issue a provisional approval to change the purpose of use to instream flow and mitigation. If an agreement is not executed within 6 months of the change report of examination, the change will be cancelled and the water right will revert to the original purpose of use.⁷

In the rare circumstance that the prospective water banker does not need to change their water right,⁸ the prospective banker will need to submit an *Application to Transfer a Water Right to the TWRP* in conjunction with their water banking request. Per RCW 90.42.110, Ecology shall review the application under RCW 90.03.380.

Changes to water rights established as family farm permits under chapter 90.66 RCW shall comply with specific provisions in RCW 90.66.065.

Ecology’s decision on a water right change application under RCW 90.03.380, and the decision on an Application to Transfer a Water Right to the TWRP under RCW 90.42.110, are appealable decisions.

⁶ The signed water banking agreement must include the water right proposed for change.

⁷ Ecology may elect to extend the provisional approval for additional time if warranted.

⁸ For example, this could occur if the water right has already been changed to instream flow and mitigation.

7. Water Conservancy Boards

An application for a water right change may be submitted to Ecology or a Water Conservancy Board, in those areas where Water Conservancy Boards have been established. Per RCW 90.80.055, a Water Conservancy Board may act upon an application to establish a trust water right. However, it is still at Ecology's discretion whether to create and hold a trust water right (see *Crown West Realty, LLC v. Pollution Control Hearings Board*⁹).

For applications processed by Water Conservancy Boards, a trust water right with instream flow and mitigation as purposes of use will only be *established*, and therefore protected from relinquishment under RCW 90.14.140(2)(h), upon:

- (a) A Water Conservancy Board record of decision ("Board's decision") under RCW 90.03.380 and WAC 173-153-060 that is affirmed or modified by Ecology to approve a change of the water right; and
- (b) A corresponding trust water right agreement signed by the applicant and Ecology.

Therefore, when Ecology reviews a Board's decision, Ecology will determine if the applicant has a signed water banking agreement in place.¹⁰ If not, Ecology will modify the Board's decision to provision the approval of the change in purpose of use on execution of an agreement.¹¹ If an agreement is not executed within 6 months following completion of the appeal period under RCW 90.80.090, the change will be cancelled and the water right will revert to the original purpose of use.¹² Note that if the Board's decision already includes the provisional approval described herein, Ecology may affirm the decision.

8. Execution, Tracking, and Termination

A water bank will be officially created upon execution of a water banking agreement.

Depending on the nature of the new intended uses, Ecology may require that the mitigating right be conveyed to Ecology by recorded deed. If the new mitigated uses are permanent, Ecology will require that the water right conveyed to Ecology be recorded by deed.

Per RCW 90.42.170, Ecology will maintain information on its website on water banks that are allocating mitigation (i.e., banks that have assets available for mitigation).

If a water banking agreement is terminated, the water banker may only remove the portion of a water right(s) from the TWRP that is not yet obligated to a mitigated use. Any portion of a mitigation water right(s) that is serving as mitigation must remain in the TWRP for the duration of that mitigated use.

⁹ *Crown West Realty, LLC v. Pollution Control Hearings Board*, 7 Wn. App.2d 710, 721, 435 P.3d 288 (2019): "A conservancy board lacks final authority to authorize a transfer into the water trust program. RCW 90.80.055(1)(b). Instead a water conservancy board processes a transfer application and issues a record of decision for the review of the Department of Ecology. RCW 90.80.070(4), .080(1). Ecology then renders a final decision to affirm, reverse, or modify the conservancy board's decision. RCW 90.80.080(4)."

¹⁰ The water banking agreement must include the water right proposed for change.

¹¹ Provided that all other requirements under RCW 90.03.380 are met.

¹² Ecology may elect to extend the provisional approval for additional time if deemed warranted.

9. Changes to Water Bank Operations

An existing water bank that seeks to modify operations substantially from their existing water banking agreement will be required to submit a new water banking request form. Responses on the form should provide Ecology and the public with a thorough understanding of the proposed changes to water bank operation and administration. Upon acceptance of a new request, Ecology will follow the same procedure and evaluation as described in this section for new banking requests.

SECTION 5: DONATIONS INTO THE TRUST WATER RIGHTS PROGRAM

Under RCW 90.42.080, a water right holder may donate all or a portion of their water right certificate or claim to the TWRP for the purposes of instream flow or groundwater preservation. A water right holder may choose to donate their right permanently or temporarily, although the vast majority of water right donations are done on a temporary basis. Water rights are temporarily donated to Ecology through submittal of the *Temporary Donation Form*, available on Ecology's website.

Per RCW 90.42.080, Ecology shall accept temporary donation of a water right to hold in TWRP to assist in providing instream flows or to preserve surface water or groundwater resources on terms prescribed by the donor, provided that:

- The donated quantity of water will not exceed the highest quantity of water put to beneficial use over the most recent five-year period.¹³ Ecology may rely on attestation and information provided by the applicant to determine the quantity of water donated, or may conduct its own evaluation of water use for the previous five years to determine the quantity of water available for donation;
- Other applicable requirements of chapter 90.42 RCW are met; and
- The terms prescribed by the donor are relevant and material to protecting any interest in the water right retained by the donor.

Permit exempt uses under RCW 90.44.050 and water right permits are not eligible for donation to the TWRP.

Donations cannot be used for long-term or permanent mitigation because they have not undergone a tentative determination of extent and validity. A donation itself is not evidence of the extent or validity of the water right (RCW 90.42.080(4)).

Ecology will accept permanently donated water rights that meet the requirements in RCW 90.42.080(4) and are conveyed to Ecology in the form of a recorded deed.

¹³ See RCW 90.42.080(10) and (11) for qualifications.