



PUBLIC UTILITY DISTRICT NO. 1 of CHELAN COUNTY

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September 17, 2021

Submitted via Electronic Public Comment Portal

Department of Ecology
Water Resources Program

Re: Comments from Public Utility District No. 1 of Chelan County on Department of Ecology's Draft Policy and Interpretive Statement on the Administration of the Statewide Trust Water Rights Program (Ecology Publication #21-11-017)

To Whom it May Concern:

Public Utility District No. 1 of Chelan County (District) appreciates the opportunity to review and comment on the Washington State Department of Ecology's (Ecology) Draft Policy on Administration of the Statewide Trust Water Rights Program, and the Draft Request to Establish or Modify a Water Bank. Overall, we urge Ecology to abandon this draft "interpretive statement" approach. Instead, Ecology should propose legislative amendments to the applicable statutes, or to the extent consistent with its statutorily delegated authority, conduct rulemaking under the Administrative Procedure Act (APA).

- 1. General Comment on Purpose and Application of Draft Policy Statement:** This policy implements new criteria on public interest, requirements to require portions of valid water rights to be dedicated instream as a condition of water banking, and requirements to leave portions of a valid right "in-basin" as a condition of water banking. These are sweeping new criteria that should be legislatively determined. Water banking is one of the only ways new projects can succeed and the District is concerned that the policy, as written, does not reflect the full values of the regulated community, nor will it have sufficient public scrutiny and transparency through the APA rulemaking process for Ecology to thoughtfully consider the range of perspectives and priorities affected by the Trust Water Rights program.
- 2. Application, Draft Policy Page 1:** While there are notable differences between the statewide trust statute (Revised Code of Washington (RCW) 90.42) and the Yakima basin trust statute (RCW 90.38), the bulk of this policy actually addresses areas of commonality between the two statutes. The District does not have assets in the Yakima basin, but as a rule we favor consistency and simplicity in administration of the water code. We question whether continuing to perpetuate different standards in the trust program is consistent with legislative intent.

3. References, Draft Policy Page 1: Ecology’s existing trust water right program guidance (GUID) 1220, is not referenced explicitly in the document. Is this the “Trust Water Rights Guidance (forthcoming Fall 2021)” that Ecology references on page 1? Additionally, the Draft Policy (POL) explicitly includes as references RCW chapter 90.38 and POL 2030, but confusingly suggests in the “Application” section that the Draft Policy does not apply to Yakima basin trust water rights or municipal water suppliers’ trust water rights.

4. Section 1: Definitions, Draft Policy Page 1:

- a. **Donation:** This policy appears to subsume donations within the definition of a gift, which does not appear to be consistent with the current GUID 1220. This is perpetuated on page 2 where the statutory reference substitutes donation for the statutory language of “gift”. If Ecology believes gifts and donations are the same thing, it should create better clarity on why this is the case. If they are different, they should not be used interchangeably in the policy. Under the statutory framework, the term “gift” is used in the context of a permanent donation that may be deductible for federal income tax purposes. See RCW 90.42.080(7) and 90.38.020(5). To the extent any definition of “donation” is necessary, it seems more consistent with the statute to define it simply as “a water right contributed by the water right holder to Ecology without monetary compensation.” Additionally, the adjective “non-permanent” in the proposed definition of “temporary donation” is both superfluous and confusing (as in “a specified non-permanent period of time”). In the statutory context, the meanings of “temporary” and “permanent” donations are clear and can be derived by resort to standard dictionary definitions (see, e.g., RCW 90.42.080(9)); to the extent that a definition of “temporary donation” is necessary, it seems more consistent with the statute to define it simply as “a donated water right held in the TWRP for a specified period of time with an identified end date.”
- b. **Mitigation:** The definition of “Mitigating rights” contains a circular use of the word “mitigation” (“water rights . . . that . . . serve as mitigation to allow out-of-stream uses of water”). The defined terms relating to “mitigation” include “long-term mitigation” and “permanent mitigation” but do not include any definition of “temporary mitigation” – which is part of the definition of “long-term mitigation.” The concept of water right mitigation is too important to be defined in a “policy and interpretive statement.” (See, e.g., RCW 90.94.090.). The scope, framework, and appropriate uses of mitigation should be addressed either by the Legislature or by Ecology in a formal rulemaking under the APA.
- c. **Water bank and water banking purposes:** Ecology’s proposed definitions are not consistent with the statute. RCW 90.42.110(2) and 90.42.120 indicate the Legislature’s intent that “water banking” involves transfer and use of a water right (or portion thereof) by a third party. Ecology’s proposed definitions are far too broad, in that they would characterize as “water banking” any use of a water right for mitigation – for example, a water right acquired and/or held by an applicant and offered as mitigation for a new water right sought by that applicant. To the extent there is confusion about the appropriate scope of “water banking” under the Water Code, this is an excellent example of the need for legislative clarity.

5. **Section 3: Establishing a Trust Water Right, Draft Policy Page 3:** This description ignores the circumstance addressed in RCW 90.42.080(1)(b), under which Ecology “shall accept” a donation by a holder of a surface or groundwater right for instream flows or preservation of surface or groundwater resources. Ecology does not have discretion to withhold its “agreement” in those circumstances.
6. **Section 4: Water Banking, Draft Policy Pages 3-8:** See comments on the proposed definitions above. “Any use of the TWRP to mitigate water uses” is far too broad, because it would encompass use of the TWRP by a water right holder to mitigate its own water uses. The legislative intent is for “water banking” to provide opportunities for third parties to obtain rights to use water. Ecology suggests it has the authority to deny an applicant the right to create a water bank based on the word “may” in RCW 90.42.110(1), but does not set out any process by which an applicant denied such processing can be heard. Presumably, Ecology should issue an Administrative Order if it makes such a determination? Or would Ecology instead process the application to a denial? Or would Ecology simply refuse to allow the applicant access to the cost-reimbursement program? This persists in Subsection 2, where Ecology describes what it will do if a water bank application is accepted (following internet notice) but is silent on what will happen if Ecology “declines a water banking request” or “decides to defer a decision to a later date.” Would an applicant have a right to appeal? What would they appeal? How would they appeal a “deferral” to a later date? The only recourse in Ecology’s draft policy appears to be for the applicant to “modify and resubmit” their proposal. This does not appear consistent with Ecology’s statutory duties to process applications under the Water Code. See *Hillis v. Ecology*, 131 Wash.2d 373 (1997); WAC ch. 173-152.
7. **Subsection 4(2): Administrative Capacity, Draft Policy Page 4:** There is an implication that Ecology will regulate new water bank formation based on staff capacity. This is concerning as it could preclude establishment of new water banks that would clearly serve the public interest, simply because Ecology has inadequate staff resources. An analogy exists in water right application permitting where Ecology has chronically suffered from lack of staff to process new applications. The answer however is not to refuse to process an application; rather, applications must be processed in priority and can use cost-reimbursement to accelerate their processing when appropriate. This policy suggests that Ecology could simply refuse to review applications for new banks based on staff capacity. That is inconsistent with the agency’s authority and legislative intent as expressed in the cost-reimbursement statute.
8. **Subsection 4(2): Alignment with Program priorities, Draft Policy Page 4:** We agree that Ecology should recognize a set of priorities for water bank creation when it’s using Ecology staff as the primary processing route, similar to how Ecology processes priority applications according to the Hillis Rule (WAC ch. 173-152). However, water banks that are not the highest priority for use of Ecology staff processing should still have a permitting avenue (cost-reimbursement). Further, the criteria that Ecology cites in these 3 example bullets do not align with the range of priorities Ecology has already adopted in rule (WAC 173-152), and the draft policy fails to address inconsistencies with Ecology’s water right processing rule.
9. **Subsection 4(2): Potential impairment of the public interest, Draft Policy Page 4:** Ecology devotes only one bullet with no criteria to the “public interest” test required for creating a water bank. The Legislature has established a general declaration of fundamentals in RCW 90.54.020 that should be the starting point in evaluating whether exercise of a trust water right would impair the public interest. In light of Ecology’s draft decision on U.S. Golden Eagle/Darrington, it appears that legislation or rulemaking is necessary to address the full range of public interest

criteria that Ecology will rely on in making a “public interest” determination for a trust water right. Absent legislation or APA-compliant rulemaking, Ecology staff will not have appropriate guidance to make consistent decisions and the regulated community will have no predictability as to appropriate uses of water banking. This overall confusion will cause significant inefficiency in creating new water banks.

- 10. Subsection 3: Agreements, Protect against the impairment of the public interest, Draft Policy Page 5:** Ecology appears to suggest that it could require a portion of a valid water right to remain instream or be maintained for use by others in the basin-of-origin as a condition of creating a new water bank. This conflicts with the Legislature’s express direction to Ecology in RCW 90.03.380(6) that: “No applicant for a change, transfer, or amendment of a water right may be required to give up any part of the applicant’s valid water right or claim to a state agency, the trust water rights program, or to other persons as a condition of processing the application.” Any amendments to this prohibition or exceptions specific to trust water rights/water banking agreements must be enacted by the Legislature.
- 11. Section 4(6): Water Right Changes to Create Mitigating Rights, Draft Policy Page 6:** There is no statutory authority for Ecology to require a change in purpose of use or to require a water banking agreement in order for a water right holder to use an existing water right as instream flow mitigation to offset the impacts of a new appropriation. The trust water right statute allows a water right holder to donate all or a portion of its right to the TWRP to assist in providing instream flows. Ecology must accept such a donation, and RCW 90.03.380 does not apply. RCW 90.42.080(1)(b), (5). A water banking agreement is neither appropriate nor required in such a circumstance. Ecology’s draft policy is inconsistent with the applicable statutes. Additionally, the provisions in RCW 90.66.065 probably require legislative amendments to enable effective use in the TWRP of water rights established as family farm permits. Finally, the same opportunities for appeal identified in the draft policy for applications should be extended to water bank requests in order to afford applicants with certainty and due process.
- 12. Section 7: Water Conservancy Boards, Draft Policy Page 7:** Ecology’s discretion whether to establish and hold a trust water right is not unlimited. Ecology’s review of a Water Conservancy Board decision must be based on consistency with state water law. A water banking agreement is not required or appropriate for all trust water right transfers.
- 13. Water Bank Request Form, Page 2, Section 2.4:** Given the importance of the new public interest criteria by which water bank requests will be judged, we believe this section should elicit a much broader set of standard information from the applicant. Requests could include:
- a. Is the water bank consistent with an adopted watershed plan that is the expression of the public interest in the locality?
 - b. How many river mile reaches will benefit from the bank?
 - c. Will the bank benefit endangered species?
 - d. Will the bank benefit a declining groundwater area?
 - e. Will the bank create new jobs?
 - f. Will the bank increase local sales or property tax revenue?
 - g. Will the bank aid in developing storage facilities in keeping with RCW 90.54.020(4)?
 - h. Will the bank assist in providing safe and adequate potable domestic supply in keeping with RCW 90.54.020(5)?
 - i. Will the bank aid in creating public water systems in keeping with RCW 90.54.020(8)?
 - j. Will the bank assist in ensuring environmental justice?
 - k. Will the bank assist in preserving valid water rights?

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Ecology is placing great weight in this policy on negotiating trust water right agreements. Concurrent with this effort, the District is aware that Ecology is developing a new trust water right agreement template with terms that effectuate this policy. Given the inconsistencies with applicable statutes and the ambiguity in this policy, the District urges Ecology to utilize the rulemaking process to allow a full and thoughtful review of the agency's proposals and its new draft trust water right agreement.

Thank you for considering our comments.

Sincerely,

A handwritten signature in blue ink that reads "D. Marcie Clement". The signature is written in a cursive, flowing style.

D. Marcie Clement

Water Resources Program Manager

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