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Comments on Draft Policy and Interpretive Statement – Administration of the Statewide Trust Water Rights Program

Page 1 – "Application"

Ecology has stated that this policy and interpretive statement will not apply to municipal water rights. The section labelled "application" is unclear in this regard – it should state "this policy and interpretive statement does not apply to municipal water rights."

Page 2 – Definitions

The proposed definitions of "water bank" and "water banking purposes" are inconsistent (much narrower than) the term "water banking" as used in RCW 90.42.100. The proposed definitions focus only on mitigation, whereas the water banking statute in RCW 90.42 includes a variety of water right transfers as within the water banking statute. For example, RCW 90.42.100(2)(b) includes as a purpose of water banking "to document transfers of water rights to and from the trust water right program." RCW 90.42.100(2)(c) includes making water rights available for any beneficial use of water.

A number of operating water banks in Washington State do not involve mitigation (Snoqualmie) and other water banks under consideration may not involve mitigation, but rather, be used for ag to ag or municipal to ag water banks. (Nooksack, Methow).

Page 3 – Section 4: Water Banking

Same comment as to definition of water banking that is inconsistent with the statutory term. This section states "Ecology interprets water banking purposes to mean any use of the TWRP to mitigate water uses that could otherwise impair . . . " This singular focus on water banking as only a mitigation process is incorrect both in practice and in light of the water banking statutes.

Page 5 – Section 3. Agreements

This language contemplates "requirements" such as "leaving a portion of the water right instream" or "maintaining a portion of a water right for use in the basin of origin." While a water right holder or water banker may choose to take these actions, Ecology does not have the statutory authority to "require" a water right holder to give up a portion of his/her water right for these purposes. A water right holder/water banker may choose to take such actions as part of a proposal, but imposing such a requirement exceeds Ecology's authority.

Overall – proposed public interest authority exceeds statutory authority.

Chapter 90.42 RCW provides Ecology with authority to determine whether "the public interest will be impaired" only when the "exercise of a trust water right may be authorized." There is no other public interest test authority in Chapter 90.42 RCW, except to the extent that the Ecology decision involves a new water right decision under RCW 90.03.290, or a groundwater change under RCW 90.44.100 – but those decisions occur under those statutes, not Chapter 90.42 RCW. This is because both RCW

90.03.290 and RCW 90.44.100 include a public interest review, by statute. While Ecology has some public interest authority in Chapter 90.42, its authority is more limited than what is being proposing in the policy and interpretive statement.

The decision to "establish or modify a water bank" is different than the decision to "authorize the exercise of a trust water right." Ecology's proposal to expand its public interest review authority beyond what is provided in statute has the same legal flaws as its prior effort to impose public interest review authority as to surface water changes. The Supreme Court ruled against Ecology in the Sullivan Creek case – because Ecology (just as it is doing here) sought to impose public interest review beyond what the Legislature required in statute:

> Second, even if any question remained, principles of statutory construction reinforce our conclusion. As noted, the statute governing applications for new water rights, RCW 90.03.290, and the statute permitting extensions of time to complete projects and put beneficial water to use both provide for consideration of the public interest, as does the groundwater change statute, RCW 90.44.100. The presence of the "public interest" requirement in these other statutes and the omission of the requirement in RCW 90.03.380 indicate a difference in legislative intent. Clallam County Deputy Sheriff's Guild, 92 Wn.2d at 851, 601 P.2d 943; State ex rel. Bell, 196 Wn. at 433, 83 P.2d 246; Hubbard, 106 Wn.App. at 153, 22 P.3d 296. Because the Legislature omitted consideration of the public interest from RCW 90.03.380 where it included such a requirement in other closely related statutes, we conclude that Legislative intent is clear that a "public interest" test is not a proper consideration when Ecology acts on a change application under RCW 90.03.380.

PUD No. 1 of Pend Oreille County v. Ecology, 146 Wn.2d 778, 796–97 (2002).

Page 6 – 6. Water Right Changes to Create Mitigating Rights

This section contemplates issuance by Ecology of a "provisional approval" that could be cancelled after if a trust water right agreement is not executed within 6 months. This concept could complicate the transactional process often used for water right acquisitions for water banking, as the Ecology decision under RCW 90.03.380 is often used as the necessary contractual contingency for the closing of the purchase and sale agreement. A provisional approval, which could later be withdrawn by Ecology, or modified by the contents of a trust water right agreement, may complicate transactional requirements and therefore water banking efforts.

Comments on Draft Form – Request to Establish or Modify a Water Bank

Like the draft policy statement, Sections 2.2 and 2.3 describe water banking narrowly, as limited to serving mitigation or instream flow purposes. The form should reflect the broader purposes of water banking described in RCW 90.42.100 and seen in practice in Washington State.