



September 17, 2021

Water Resources Program  
Washington Department of Ecology  
300 Desmond Drive SE  
Lacey, WA 98503

Re: *Public Comments on "Policy and Interpretive Statement Administration of the Statewide Trust Water Rights Program"*

Dear Water Resources,

Trout Unlimited respectfully submits this letter in response to the Washington Department of Ecology's request for comments on the "Policy and Interpretive Statement Administration of the Statewide Trust Water Rights Program." This letter outlines our comments and requests for changes to the statement.

We welcome the opportunity to discuss the comments in this letter in more detail to determine the best path forward that improves the administration of and continues the profound benefits of Washington's Trust Water Rights Program.

### **Overall / Entire Statement**

There is no mention of where water right leases fit into the administration of the TWRP. These temporary acquisitions can provide clear benefits for mitigation purposes, drought leasing for instream flow, etc. but may not be subject to a Trust Water Rights Agreement (TWRA). Please add a section which includes associated policies for "Leasing Water Rights."

Additionally, while we recognize that Ecology is excluding the Yakima Basin from this statement, we would appreciate clarity on how water banks in the Yakima Basin will be managed because they are currently managed according to both 90.38 and 90.42. Please clarify.

### **Definitions Section**

The definition of "Long-term mitigation" states that long-term is anything "for a period of five years or longer" and is "temporary in nature." We think that a temporary, five-year period is too short to be considered "long-term." A five-year period, for example, may only encompass a

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#### *Washington Water Project*

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single crop rotation cycle or a single drought year frequency of occurrence. We recommend at least ten (10) years under this definition.

The definition of “Public interest” should be removed from the policy. The policy’s stated purpose is to “provide transparency and consistency in the Water Resources Program’s administration of the Trust Water Rights Program (TWRP).” However, we feel the inclusion of a Public Interest definition is more properly achieved through rulemaking or legislative action rather than a policy statement. Moreover, Ecology’s use of the OCPI test has proven controversial in the past and including a new definition here risks expanding the opportunity for controversy and disputes. Finally, it is unclear whether this definition refers to the use of the term “public interest” as it relates to the “exercise of a trust water right” as discussed in RCW 90.42.040(a) or a different type of public interest given that the definition as written references RCW 90.54.020 and not RCW 90.42.040(a).

Under the “Trust water rights program (TWRP)” sub-definition of “Trust water right” states that the water right is any water right “acquired by the state.” Clarity is needed as to what is meant by the verb “acquired.” This could, for example, include leases (not mentioned in the policy statement) or outside funding that results in a transfer of a water right to Ecology. In addition, most trust water rights for water banking are deeded to the State for management under the TWRP without any payment from Ecology and under their trust water right agreement the water right holder retains a beneficial interest in that trust water right – does Ecology intend to include that type of arrangement within the meaning of the phrase “acquired by the state” or does Ecology intend to exclude that arrangement from the definition of a trust water right? It may be better for Ecology to define the term “acquired by the state” for the purposes of the TWRP than to just restate the language in RCW 90.42.020(5).

#### **Section 4**

The second sentence in the first paragraph requires an application of the “public interest” but it is unclear whether Ecology believes that using the TWRP for water banking purposes is the “exercise of a trust water right”. RCW 90.42.040(a) provides Ecology with the authority to determine whether the “public interest would be impaired” when authorizing the exercise of a trust water right. It is entirely possible that the use of a water right associated with a water bank for mitigation could impair the public interest for one instance of proposed mitigation and not impair the public interest for another instance of proposed mitigation. Ecology should clarify whether it is using its statutory authority in RCW 90.42.040(4) as the basis for determining whether a trust water right may be authorized for a particular exercise of that trust water right or whether Ecology is imposing a “public interest” test when a water right is being proposed to be part of a water bank in general. The first instance appears to be consistent with RCW Chapter 90.42, the second instance appears to be a more general public interest test that is not envisioned under RCW 90.42.

The subsection “1. Requests to Establish or Modify a Water Bank” allows for a prospective water banker to submit a water banking request *either* before or in conjunction with a corresponding water right change application. This presents an opportunity for more confusion and wasted effort. We recommend an approach that requires submittal of a prospectus on the water bank *before* any water right change application. This advanced submission would be valuable to Ecology, the water banker, and the public to determine whether or not pursuing the change application is worth the time and expense before initiating that process.

Additionally, the language is not clear on when Ecology will post the accepted water banking requests. We believe it would benefit both the prospective water banker and the public to have Ecology post the accepted water banking requests within 30 days of acceptance.

The last paragraph in subsection 3 states that “Ecology will publish all final water banking agreements together with any associated final reports of examination for mitigating water rights on our website.” We recommend publishing the ROE before any water banking agreement is made final by Ecology. At the time of publishing the draft ROE, we recommend Ecology publish a draft water banking agreement for public comment.

Subsection 6 states “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.” The requirement to have an executed TWRA within 6 months or risk cancellation of the entire change seems a draconian approach that will sacrifice benefits that may be realized from the change (e.g., instream flow in flow impaired reaches). There should be a means to cancel the mitigation portion if an agreement has not been reached and allow the instream flow portion to continue if supported by the owner of the water bank. Doing so would allow instream benefits to continue to accrue because the water is protected from junior users during the negotiations of the trust water right agreement.

Subsection 7 has a similar “6-month requirement” that should be modified as suggested for subsection 6.

Subsection 8 omits the necessary transfer of the water right deed to Ecology. A water bank cannot legally be created until the TWRA is executed *and* the underlying water right is transferred to and recorded by Ecology.

## **Section 5**

The second to last paragraph states that “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)).” However, this does not allow for water rights that have been through a recent review of tentative

extent and validity by Ecology under RCW 90.03.380 or through a recent adjudication. As written, this policy would unnecessarily exclude water rights that may be well suited for mitigation and easily transferable (to simplify the process and reduce the administrative burden on Ecology staff).

We recommend adding language that allows for donation of a water right for mitigation purposes provided the water right has undergone a review of tentative extent and validity pursuant to RCW 90.03.380 or an adjudication in the last five (5) years.

**Conclusion**

Trout Unlimited appreciates the opportunity to comment and help shape administration of the Trust Water Rights Program. Please feel free to contact us with any questions.

Thank you,



Lisa Pelly, Director