

Arden Thomas

Comments submitted by Arden Thomas, Kittitas County Water Resources Manager.

Kittitas County appreciates the opportunity to review and comment on Ecology's Draft Policy on Administration of the Statewide Trust Water Rights Program, and the Draft Request to Establish or Modify a Water Bank Form. We'd appreciate Ecology's consideration of the following comments.

General Comments on Proposed Policy Statement

The establishment of water banks has been essential for allowing for new water uses within our County. Further, market re-allocation is one of seven core elements in the Department of Ecology sponsored Yakima Basin Integrated Water Management Plan, reflecting the importance of this tool in addressing future water supply issues. Kittitas County has directly benefited from the role the Department of Ecology has undertaken to identify, develop, and fund the establishment of water banks and Trust Water Right Program transactions. Unfortunately, the Policy and Interpretive Statement proposed amounts to gatekeeping, whereby Department of Ecology staff will have discretion to deny water banking applications based on subjective criteria. This will have a chilling effect on water bank creation.

We appreciate the significant amount of Department of Ecology staffing required to review and approve water banks, let alone proactively engage in water bank formation. However, the current proposal is for Ecology staff to deny water bank formation because a poorly defined public interest bar has not been reached. For water transfer requests, the Department of Ecology already utilizes a model to address capacity issues, which prioritizes water transfer applications utilizing Hillis Rule priorities and offers a cost re-imbursement pathway to accelerate processing. Prioritized processing and cost re-imbursement options for water banks should either align with water transfer requirements and options, or it should be clearly articulated why that model is not appropriate for water banks.

The proposed Policy and Interpretive Statement is the outcome of Recommendation No. 10 in Ecology's "Water Trust, Banking, and Transfers in Washington State Findings and Recommendations Informed by Ecology's Advisory Group on Water Trust, Banking, and Transfers" (Publication 20-11-091). Recommendation No. 10, "Clarify statutory requirements and administrative processes for trust water and water banking in program policy and guidance" proposed to clarify the administrative process, define key terms, simplify the temporary donation process, and improve notice for the creation of trust water rights. Not only do the evaluation criteria proposed within this policy document exceed the scope of Recommendation No. 10, they effectively implement Ideas No. 24 "Amend chapter 90.42 RCW to establish that Ecology may prioritize working on water banks that serve the greatest public need" and 25 "Clarify in statute that Ecology may deny a proposal to establish a new water bank", two ideas identified in the report as "ideas considered but not recommended." The proposed policy should be re-written to more narrowly focus on the objectives originally articulated in Recommendation No. 10.

Additionally, Recommendation No. 10 proposed to improve notice for the creation of trust water rights. Further, chapter RCW 90.42.130 requires that "the department shall seek input from agricultural organizations, federal agencies, tribal governments, local governments, watershed

groups, conservation groups, and developers on water banking, including water banking procedures and identification of areas in Washington where water banking could assist in providing water supplies for instream and out-of-stream uses." The proposed policy is silent on any process to seek this input. This policy should be revised to include procedures for notice and soliciting for and responding to input from the entities identified in RCW 90.42.130.

The trust water agreement between Ecology and the Water Bank is a critical component of the water banking program. Concurrent with this policy development effort, Ecology is developing a new trust water agreement template. Given the ambiguity and discretion in this policy, and for a fuller review of how this policy will be implemented, we request the new draft trust water agreement also be circulated for comment so that the policy and its implementing document can be reviewed together.

Specific Feedback

Exclusion of activities under chapter 90.38 RCW

This policy specifies that it does not pertain to activities under chapter 90.38 RCW. Chapter 90.42 RCW clearly identifies banking activities, while water banking is much more generally identified in 90.38 RCW. Please clarify the pragmatic effect of excluding activities under chapter 90.38 RCW and the implications of the proposed processes and criteria for water banks either established within the Yakima Basin or utilizing water rights originating from the Yakima Basin.

Evaluation of a Water Banking Request

Ecology infers it has the authority to deny an applicant the right to create a water bank based on the work "may" in RCW 90.42.110(1). Critically, the policy does not set out any process by which an applicant denied such processing can be heard. The proposed policy is silent on what will happen if a banking proposal is not accepted. Would an applicant have a right to appeal? What would they appeal? How would they appeal if Ecology defers their decision to a later date? The only recourse Ecology appears to give is for the applicant to "modify and resubmit" their proposal. This does not appear to meet current statutory guidance on Ecology decision-making.

Ecology is proposing to regulate new water bank formation based on staff capacity. This is concerning as it could create a chilling effect on new banks being formed given that Ecology could deny them without clearly articulating what the criteria is needed for bank formation. Ecology currently operates under rule and procedures to handle similar capacity issues associated with processing water right change applications. In the case of water right change applications, they must be processed in priority and can use cost-reimbursement to accelerate their processing when appropriate. Rather than implement a policy where Ecology could simply deny new banks based on staff capacity, we would favor allowing water banks that otherwise meet chapter 90.42 RCW requirements a processing pathway while also addressing the financial and capacity burden on Ecology, such as extending the cost-reimbursement model to also cover water banking activities.

Changes to Water Bank Operations

There should be some consideration about what will occur if an entity ceases bank operations. For example, have all purchased water rights been fully processed by the Department of Ecology and if not, what are the bank's obligations until all mitigation permits are processed? Consider requiring notice to mitigation holders about certain changes to bank operations that could impact them.

Water Bank Request Form

Given chapter RCW 90.42.130 requirement that "the department shall seek input from agricultural organizations, federal agencies, tribal governments, local governments, watershed groups, conservation groups, and developers on water banking, including water banking procedures..." and that there was great support from the Ecology's Advisory Group on Water Trust, Banking, and Transfers to increase transparency around proposed mitigation bank operations, this section should elicit a much broader set of standard information from the applicant.

A) What will be the criteria for determining if a potential buyer of mitigation credit is eligible for water through the bank?

B) Will the entire quantity of water subject to the trust water rights agreement be available for purchase through the bank and are there any rules regarding water allocation (e.g: standard "package sizes," minimum and maximum purchases, requirements to put water purchased through the bank to use within a specified period of time, allocation schedule by the bank? For example, we are aware of at least one bank that only sells mitigation certificates sporadically. Unfortunately, there is no clarity on how much water they are planning on selling in total or in any given year, and so the full supply within an area is not known.

C) Does the bank align with any local planning efforts (e.g., local watershed plans or comprehensive plans prepared by local communities)?

D) Will the bank aid in developing storage facilities? If so, what is the operations and maintenance plan for the storage facilities, and will there be bonding to ensure the long-term O&M needs of physical facilities are met?

E) Will the bank assist in providing safe and adequate potable domestic supply?

F) Will the bank aid in creating public water systems?

G) Will the bank assist in preserving valid water rights?

H) Will the creation of the bank foreclose on opportunities to mitigate for new water needs, either known or foreseeable, at the time of bank creation (for example, does the bank involve a water right that is the only suitable source of mitigation for a local area to offset local impacts)?