



## SQUAXIN ISLAND TRIBE

September 29, 2023

Austin Melcher  
Washington State Department of Ecology Water Resources Program  
P.O. Box 47600  
Olympia, WA 98504-7600  
austin.melcher@ecy.wa.gov

RE: Comments on Public Review Draft POL-2030 Update

Dear Mr. Melcher:

Thank you for the opportunity to submit comments on the Public Review Draft POL-2030 Update.

The Squaxin Island Tribe (“Squaxin” or the “Tribe”) is a federally recognized Indian tribe located in Southern Puget Sound in Mason County, Washington with treaty rights to harvest fish and shellfish, “at their usual and accustomed fishing places in the shallow bays, estuaries, inlets and open Sound of Southern Puget Sound and in the freshwater streams and creeks draining into those inlets.”<sup>1</sup> The Tribe’s cultural and economic well-being depend upon sufficient water to support abundant and sustainable fisheries. As such, the Tribe has vital interests in ensuring that policies intended to protect water quantity, and thus aquatic habitat, reflect the needs of the fish, as continued existence of fish is necessary for the Tribe to sustain traditional lifeways and exercise its federal treaty rights.

Ecology’s Public Review Draft POL-2030 does not reflect the needs of the fish, one of three categories of needs that the agency purports to manage. Instead, the document is focused almost entirely on the needs of people. The Tribe believes that the state would be better served by a document that fairly balances the needs of people and fish. First, this would require that conservation be highlighted as an initial step in every scenario contemplated by the policy, as it is the only way to create “new” water and battle scarcity. Second, tribal consultation and consideration of tribal treaty rights, including the tribes’ unadjudicated federal reserved water rights, should be included in all actions contemplated by the policy. Finally, the policy must reflect the need for the Department of Ecology and the Department of Health to work in lockstep to protect the state’s dwindling water supply.

Below, please find the Tribe’s suggested language for tribal coordination and comments on each section of the draft policy.

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<sup>1</sup> See generally *United States v. Washington*, 384 F.Supp. 312, 378 (W.D. Wash. 1974); *United States v. Washington*, 459 F.Supp. 1020 (W.D. Wash. 1978).

**Tribal Consultation and Cooperation.** To ensure that water is effectively managed to support federal treaty rights, the Tribe must have access to and meaningful consultation. The following language should be added as a new section to the policy:

“The Department of Ecology is fully committed to the principals of government-to-government consultation and cooperation with Tribes consistent with our mission to protect, preserve, and enhance Washington’s environment, and promote the wise management of our land, air, and water for the benefit of current and future generations. Our commitment includes protecting the quality of the natural environment, especially retaining sufficient river and stream flows to provide for preservation of wildlife and a robust fish population that supports the exercise of treaty fishing rights. Ecology recognizes that, in order to fulfill our commitment to the principals of government-to-government consultation and cooperation with Tribes, affected tribes must be notified and consulted when any actions described in this document are considered and before any of those actions are taken.”

**Section 1: Definitions and Background.** Two definitions are of particular concern, “original intent” and “reasonable diligence.” Both are subjective and allow for too much decision-making latitude on the part of Ecology staff.

- The definition of original intent says two different things. It says that “original intent” is “the nature of the project as described in the original water rights application and original water rights documents” and that “original intent” is “the quantities of water necessary to supply the place of use of the water right at full buildout of the geographic area identified in the original water right authorization.” The definition should be clarified.
- Per RCW 90.03.320 and Ecology’s POL-1050, referenced in the definition of reasonable diligence as additional guidance, an evaluation of “reasonable diligence” should include consideration of the public interests affected. Thus, when evaluating reasonable diligence, Ecology should balance any “sufficient effort” with consideration of environmental impacts. Under Ecology’s guiding principles of protecting, preserving, and enhancing the environment, this balancing should include serious consideration of whether the sufficient effort achieved outweighs any risk to the protection, restoration, and recovery of threatened and endangered species such as salmon. This is particularly true as climate change impacts water availability and historical plans for water use no longer serve the greater public interest.

**Section 2: Municipal Water Suppliers and Municipal Water Supply Purposes.** The definition of municipal water supply purposes found in RCW 90.03.015(4) allows for practically every use of water *except* to protect, preserve, and enhance the environment. Under the statute, beneficial uses include “commercial, industrial, irrigation of parks and open spaces, institutional, landscaping, fire flow, water system maintenance and repair, or related purposes.” This appears to allow, for example, a private developer to obtain a water right to serve enough residential connections for that developer to become a municipal water supplier due to size. In addition to serving homes (residential use) that water right could also be used by the private developer to irrigate a golf course, supply a water park, or some other proprietary, commercial, or industrial use. Ecology’s policy should align with their guiding principles and promote conservation.

Conservation in this scenario looks like water that was designated for residential uses being used only for that purpose. Section 2 as written highlights the problematic nature of a system that allows engineering related approvals by the Department of Health to dictate how water is consumed.

### **Section 3: Issuing, Conforming, and Population/Connection Limits of Municipal Water Rights.**

#### Issuing Certificates (page 5)

- This section should be edited to emphasize that a change application is required along with the accompanying analysis, especially with regard to the second bullet that covers splitting a partially developed permit.
- The second bullet on page five should give more detail regarding how Ecology determines that a municipal user is “working toward full development of the remaining inchoate portion of the permit.” It is important that this process encourages conservation rather than a rush to develop an inchoate portion of water that may not actually be available.
- The third bullet on page 5 should be edited to say, “Ecology shall include a development schedule.”

#### Conforming water rights (page 5)

- This section should address the criteria Ecology uses to determine whether an application for a change in use is required as opposed to Ecology’s correction of the listed purpose of use.
- The final bullet on page 6, continuing on to page 7, should include the transfer limitations in RCW 90.44.105. Proposed edit underlined below.

“Permit-exempt groundwater rights may be consolidated with a valid groundwater permit or certificate through an amendment under RCW 90.44.105, provided that the statutory requirements are met. RCW 90.44.0105 identifies the following requirements, among others: discontinued use and decommissioning of the permit-exempt well, development of agreements to not serve that same area with a new permit-exempt well, and the use would not impair existing water rights (including minimum streamflows (instream flows) adopted by rule). The amount of water to be consolidated is limited to, among other limits, historic average withdrawal amounts.” (pages 6-7)

#### Population and connection limits (page 7)

This section highlights the problem with a regulatory system that allows water system plans and connections approved by the Department of Health to dictate overall water use, rather than being dictated by the agency that is charged with managing the state's water supply, Ecology.

While we understand that the two departments are in the process of updating their MOU addressing joint review procedures, given past failures in communication and our inability to review the updated MOU, it is difficult to imagine a collaboration between the two agencies that is fully protective of the state’s water supply. Relying on these two agencies to communicate is not a

reliable path forward. There is too much being left to decisions by the department of health, an agency that is concerned with the engineering of water delivery and not the availability of water or the impact on surrounding resources. The approval of a water system plan must be consistent with Ecology's mandated management and regulation of water rights, including protection of instream flows.

**Section 4: Relinquishment Protection for Municipal Water Rights Certificates.** Rather than reflecting only the interests of people and farms, this section should be rewritten to reflect all three of Ecology's priorities, including fish. Incorporating the needs of fish means that this section should include a provision to enforce relinquishment alongside the provision to protect against relinquishment. Both perspectives are critical to balancing the diverse needs of the state.

**Section 5: Changing Municipal Water Rights Certificates.** Again, this section is missing the balance between people, farms, and fish. The policy must expand on the meaning of public welfare to include protecting, preserving, and enhancing the environment. There is no public welfare without a healthy ecosystem and this document should reflect that truth. When considering whether any inchoate quantities of water specified in a certificate remain in good standing and valid for change, Ecology must consider the impact on other water rights, especially instream flows.

**Section 6: Service Area Expansions and Water Right' Place of Use.**

- It is problematic that the place of use can be altered simply through the water system planning process without any involvement from Ecology or, more specifically, going through the requirements of a water right change including an evaluation of the extent and validity of the water right.
- The fifth bullet on page ten, should require that the water supplier demonstrate consistency through a detailed analysis and in doing so reference the comprehensive plan and any other development regulations. The references to the comprehensive plan or other regulations should be specific and the burden should be on the water supplier to prove consistency.

**Section 7: Consolidation of Connected Municipal Water Suppliers.** The first full paragraph on page eleven should be edited to require that even where no water right change application is involved, Ecology must evaluate the extent and validity of the water right, including original intent and reasonable diligence.

**Section 8: Transfer/Sale of Inchoate Municipal Water Rights to Another Entity.** The fundamental problem with this section is the underlying law that makes a distinction between surface and groundwater when we know that the two are inextricably connected. As stated in our comments to section one, an evaluation of "reasonable diligence" should include consideration of the public interests affected, especially environmental impacts. An analysis of detriment to public welfare must include consideration of protecting, preserving, and enhancing the environment.

**Section 9: Using Municipal Water Rights for Mitigation.** The policy should require robust implementation of conservation measures before municipal water supply can be used for mitigation. Inchoate water should not be used for mitigation.

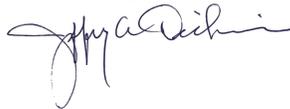
**Section 10: Coordination with Department of Health.** Coordination, communication, and collaboration between the Department of Ecology and the Department of Health is of the utmost importance. We encourage all measures that will facilitate this.

To that end, Ecology’s policy must recognize the extent to which it and Health must integrate their efforts and endorse common policies. See RCW 43.70.310. The policy should also be consistent with Ecology’s mandate to take steps to require that Health, whenever possible, carries out its powers in a manner that is consistent with the 1971 Water Resources Act. RCW 90.54.090. More specifically, the policy must ensure that Ecology and Health conduct sufficiently thorough examination of the water rights claimed by municipal water suppliers in water system plan self-assessments, and not merely rely on suppliers’ assertions of the nature and scope of their water rights. This inquiry must occur prior to plan approval.

Finally, while we applaud the idea that Ecology may impose more stringent conservation requirements than the Department of Health, we believe this pursuit of conservation principles should be reflected throughout the policy document. It is disappointing to see the issue of water conservation appear in the last paragraph of the policy when it should be incorporated into every section of the document as it is, in fact, the only viable source of “new” water.

Thank you for the opportunity to comment.

Sincerely,



Jeff Dickison  
Assistant Director of Natural Resources  
Squaxin Island Tribe

# 9.29.2023 ECY Municipal Water Comment Letter

Final Audit Report

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