



December 04, 2025

Noah Wentzel
Washington State Department of Ecology
PO Box 47600
Olympia, WA 98504-7600

Re: Comment Letter on Public Review Draft: Consumptive and Nonconsumptive Water Use, POL 1020

Dear Mr. Wentzel,

On behalf of the City of Seattle's departments Seattle Public Utilities and Seattle City Light ("Seattle"), we are providing comments on the Public Review Policy Draft Consumptive and Nonconsumptive Water Use, POL 1020 ("Draft Policy"). The Draft Policy has implications for both Seattle's municipal water supply and production of power at its hydropower facilities.

As a preliminary observation, the Draft Policy improperly conflates consumptive use of water with impairment of other existing water rights. While the consumptive use of water is a consideration in determining whether there may be impairment from a new water right or a change to an existing water right, it does not itself determine that there is impairment.

Impairment, not consumptive use, is the legal standard by which Ecology determines whether to grant a new water right or authorize a change to an existing water right. RCW 90.03.290(3), 380(1) In this regard, Seattle disagrees with The Department of Ecology's (Ecology) apparent reliance on *Foster v. Ecology*, 184 Wash.2d 465, 362 P.3d 959 (2015) for these proposed, significant revisions in the Draft Policy. *Foster* was primarily a decision denying Ecology's use of overriding considerations of public interest (OCPI) to allow impairment to a minimum instream flow which functions as any other water appropriation and was established by administrative rule with a priority date as of the date of establishment. RCW 90.03.345. The *Foster* court concluded:

The prior appropriation doctrine does not permit even de minimis impairments of senior water rights. Therefore we reject the argument that ecological improvements can "mitigate" the injury when a junior water right holder impairs a senior water right.

It is important to understand that the impairment standard is defined by impact to existing water rights, not merely to the potential or temporary diminishment to the water source. If there was not a minimum instream flow, there would not have been impairment to the stream in *Foster*. However, it appears the Draft Policy would imply impairment when there is no established minimum flow or a water right that could be impaired. This is contrary to the standards for obtaining a water right and changing an existing water right under Washington water law.

Further, the Draft Policy ignores the definition of consumptive use currently in Ecology's regulations, which provides that consumptive use occurs when there is a diminishment of the water

source. WAC 173-500-050(5). It is a measurement of the quantity of water. The Draft Policy inappropriately and inaccurately expands that definition by equating a consumptive use with impairment. Under the dictionary definition and water related literature, consumptive use is a measurement of the quantity or volume of water. See also POL 1210 which defines annual consumptive quantity of water.

Most significantly, the Draft Policy inappropriately removes any discretion regarding a finding of consumptive use. The Draft Policy's new limitations on nonconsumptive use are so absolute and prescriptive as to effectively eliminate any diversionary nonconsumptive uses. Doing so ignores the second half of the definition of nonconsumptive use, which is a diversionary use where there is "no diminishment of the source." WAC 173-500-050(9). It is also inconsistent with RCW 90.54.120(2) which includes a list of "long-recognized" diversionary uses for "consumptive or nonconsumptive beneficial purposes" such as domestic, industrial, commercial, and hydropower production.

With these observations in mind, the following are specific concerns for the City.

- The Draft Policy adds very restrictive language to provide that consumptive use results in a water source being made smaller or less "*to any degree in quantity*" which is inconsistent with the balancing of competing uses necessary to achieve maximum net benefits under RCW 90.54.020(2). There must be recognition that determining this level of measurement is not possible, and that modeling will always show some degree of impact, when in reality there may not be diminishment of the source for other uses. We recommend deleting this new language.
- The Draft Policy removes critical language that provided water use is consumptive if it is returned to the same source "*not in close proximity to*" the point of diversion. Ecology appears to be relying on the concept of impairment for this change, which is, as discussed elsewhere in this letter, inappropriate as consumptive use and impairment are distinct policy and legal considerations. Even if impairment were an appropriate consideration, the Draft Policy misconstrues the law of impairment with this proposed change. Unless there are minimum flows established by rule, returning water to the exact location of the diversion may not be necessary to avoid impairment to existing water rights. We recommend retaining existing language.
- The Draft Policy adds language regarding impacts to water quality including temperature. Water quality is not an appropriate consideration when determining consumptive use of water. While reduction in water quality could affect other water uses, any change in water quality is not a consumption of the water. Further, Ecology regulates actions that impact the quality of water under the Washington water pollution laws in Ch. 90.48 RCW and Ecology's authority under the federal Clean Water Act (i.e., 401 Certifications). Impacts to water quality are simply not a legal basis for determining consumptive use in

water right decisions. We recommend removing language that includes changes in water quality as a consumptive use.

- The Draft Policy states that a water use is consumptive for “*any interval of time*” that water is withdrawn and not returned. It is not reasonable to suggest the same molecules of water that are withdrawn must be returned immediately for the use to be nonconsumptive. This is inconsistent with existing water rights certificates and Ecology’s historic assessment of non-consumptive use. Many facilities may withdraw water for a short period of time for beneficial use and then return water to its source with no diminishment of the water source. As stated above non-consumptive is defined in WAC 173-500-050(9) as “where there is either no diversion from a source body, or where there is no diminishment of the source.” The policy’s treatment of these types of uses as consumptive is inconsistent with state regulations and could negatively and inappropriately impact beneficial use for many hydropower generating activities in Washington State and related projects such as fish hatcheries. We recommend removing “any interval of time” as an element of consumptive use.

The Draft Policy poses significant concerns for hydropower projects, which by necessity remove water from the stream to run through turbines and later return water to the stream below the turbines. Yet, the Draft Policy is confusing regarding its applicability to hydropower projects. It fails to provide clear criteria as to when the use of water for hydropower is deemed nonconsumptive. The Draft Policy has the potential to adversely affect hydropower projects by its addition of non-discretionary timing limits on nonconsumptive use, its deletion of the “*not in close proximity to*” language for return flows, its deletion of criteria for evaluating consumptive use relative to same pool systems, and its deletion of Ecology’s recognition that while some generally nonconsumptive uses such as fish hatcheries and same pool hydro systems have limited consumptive elements “it is Ecology’s policy to classify the project’s water user as nonconsumptive.” We recommend retaining the language of the existing policy as it relates to hydropower projects and also setting forth specific criteria for determining when hydropower use is nonconsumptive, such as uses in compliance with instream flow protections established through FERC licenses.

Separate and apart from impairment, consumptive and nonconsumptive use as defined in WAC 173-500-050, reflects a regulatory policy to be considered in allocation of water resources among users, e.g., in the instream flow regulations found at WAC Ch. 173-501 to 173-564. *See, e.g.,* WAC 173-500-020 (regulations’ purpose is to provide guidelines for “further development of water resources to the extent of their availability for further appropriation” including allocating quantities for beneficial uses). The regulations, including the definition of consumptive and nonconsumptive use, are adopted under and implement the Water Resources Act of 1971, which includes among its fundamental principles that “Allocation of water among potential uses and users shall be based generally on the securing of the maximum net benefits for the people of the

state. Maximum net benefits shall constitute total benefits less costs including opportunities lost.” RCW 90.54.020(2).

Just as maximum net benefit requires a balancing of competing considerations, so should designation of a water use as consumptive or nonconsumptive, as is reflected in the current Policy 1020 (*see, e.g.*, discussion of fish hatcheries and diversions/returns to the same pool). The Draft Policy would eliminate this balancing, as is required under the statute. It would also have the effect of retroactively changing policy decisions about priorities of uses already embodied in existing instream flow rules – and in existing water rights. Should Ecology choose to seek such far-reaching changes, they should be appropriately accomplished through rulemaking, not through adoption of an interpretive policy.

To the extent that Ecology retains Policy 1020, or any of its proposed revisions, the Policy should be revised to expressly state that it will only be applied prospectively and will not be retroactively applied to or used to constrain existing water rights and uses, or to existing determinations of non-consumptive use for hydropower projects or other uses. Both RCW 90.54, and the regulations based upon it which contain the definitions of consumptive and nonconsumptive use clearly state that they do not affect existing water rights. *See* RCW 90.54.900 (“Nothing in this chapter shall affect any existing water rights . . . nor shall it affect existing water rights relating to the operation of any hydroelectric or water storage reservoir or related facility”). WAC 173-500-060(3) (“Water rights established prior to the effective date of rules adopted under chapters 173-500 and 173-501 through 173-599 WAC shall not be affected by such rules.”). Existing statute and rules preclude actions affecting existing water rights and uses; Policy 1020 should reflect the same.

The concerns identified above, including the failure to expressly limit the application of Draft Policy 1020 to future requests for new water rights or water right changes, and not to existing water rights or water uses, would introduce significant and unnecessary risk and uncertainty to Washington’s municipal water suppliers, including hydropower operators. As Washington strives to accommodate population growth and increased demand for power, Ecology should carefully consider the potential negative impacts of the Draft Policy on safe and reliable water supplies, and on clean and renewable power supplies, before proceeding.

Finally, the Draft Policy is so broadly construed and could affect the rights of water users in a manner that Seattle believes may violate the Administrative Procedures Act (APA) as illegal rule making. For example, to the extent the policy is effectively eliminating all diversionary nonconsumptive uses, it would be inconsistent with RCW 90.54.120(2)’s list of “long-recognized” diversionary uses that can be nonconsumptive. The APA makes a distinction between agency policy statements and rules. A policy is the current approach of an agency for the implementation of a statute. A rule is an agency order, directive, or regulation of general applicability, which among other actions, establishes, alters, or revokes any qualification or requirement relating to the enjoyment of benefits or privileges conferred by law. An agency policy that falls within the definition of a rule without going through a proper rulemaking process is null and void.

Thank you again for the opportunity to comment on the Draft Policy. Please do not hesitate to reach out to clarify anything we've included in our letter.

Sincerely,



[Alex Chen \(12/04/2025 15:07:40 PST\)](#)

Alex Chen, Deputy Director of Water Line of
Business & Shared Services Branch
Seattle Public Utilities



[Mike Haynes \(12/04/2025 16:58:48 PST\)](#)

Mike Haynes, Chief Operating Officer
Seattle City Light