

December 5, 2025

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RE: Comments on Proposed Revisions to “Consumptive and Nonconsumptive Water Use Policy and Interpretive Statement (POL 1020)”

Dear Noah:

The Washington Public Utility Districts Association (WPUDA) appreciates the opportunity to provide comments on the Department of Ecology’s (“Ecology”) proposed revisions to the “Consumptive and Nonconsumptive Water Use Policy and Interpretive Statement” (“POL 1020”). WPUDA represents 27 public utility districts across Washington, many of which hold water rights for a range of nonconsumptive uses that are essential to their operations and to statewide clean energy and environmental objectives.

WPUDA is concerned that the proposed revisions to POL 1020 would substantially narrow Ecology’s recognition of nonconsumptive water use without sufficient legal, technical, or practical basis. Many WPUDA members hold water rights historically characterized as nonconsumptive—including for hydropower generation, reservoir storage, pumped storage hydropower, and fish hatchery operations. As drafted, the revised policy could adversely affect these existing rights. We respectfully request that Ecology reconsider the proposed revisions.

Further, we understand from Ecology comments that a fundamental reason for this policy update is to ensure consistency between agency policies and case law, including the *Foster v. City of Yelm* decision. There are likely numerous Ecology instream flow rules and policies that may be inconsistent with *Foster* and its counterproductive outcomes. Rather than devoting significant agency and stakeholder resources to conform to the absurdities of the *Foster* decision, WPUDA encourages Ecology to provide leadership to modify *Foster*. After all, the *Foster* decision was contrary to Ecology’s position that the water code can allow mitigated water decisions that protect instream flows during critical times while ensuring net environmental benefits. Embracing the *Foster* decision is a step backwards for water resource management in Washington State.

1. Scope of Proposed Policy Revision

Consumptive vs. Nonconsumptive Classification - The draft policy appears to adopt an “all or nothing” approach to categorizing water rights as consumptive or nonconsumptive. This creates an artificial construct that may make it difficult—if not impossible—for any surface water diversion to meet Ecology’s new definition of nonconsumptive use. In practice, water uses often involve some level of incidental consumption, even when the overall purpose of use is nonconsumptive, such as run-of-the-river hydropower generation. Treating minor conveyance or operational losses as grounds to categorize an entire use as consumptive creates an unworkable and inequitable standard.

Nonconsumptive Groundwater Use - We request that Ecology revise the definition of nonconsumptive groundwater use to recognize the practical hydrology of aquifer recharge. A workable definition must incorporate the concept of no net loss over time, acknowledging that groundwater systems may have delayed recharge due to site-specific geological conditions.

Water Quality Standards - Water quality considerations, while critically important, should not determine whether a water use is classified as consumptive or nonconsumptive. Water quality is addressed through separate statutory and regulatory programs. Incorporating water quality elements into consumptive-use classification is inappropriate and risks conflating distinct regulatory frameworks.

Evaporative Loss - All surface water uses are subject to some amount of incidental evaporative loss. Ecology's proposal to treat evaporative loss as an indicator of consumptive use represents a substantial and unwarranted departure from long-standing practice. This shift would impose significant consequences for hydropower and reservoir operations without providing measurable benefit to senior water rights or instream flows.

2. Implications for Hydropower Systems

Under the existing version of POL 1020, hydropower is recognized as a distinct operational context. However, the proposed revisions do not reflect the realities of hydropower system design and operation. Hydropower facilities do not divert and return water at the same point simultaneously; instead, water is conveyed through penstocks to turbines and returned downstream within the project footprint. As drafted, the revised definition would classify all hydropower diversions as consumptive, which is inconsistent with past practice and does not reflect how such systems function.

WPUDA supports Tacoma Public Utilities' recommendation that Ecology either (1) exclude hydropower from the revised policy, or (2) adopt a hydropower-specific subsection specifying that hydropower use is nonconsumptive where the following conditions are met:

1. All hydropower project lands are owned or controlled by the hydropower operator (i.e., within the FERC project boundary);
2. Return flows of diverted water occur within project lands; and
3. Minimum instream flows or flow augmentation are provided as required by the project's FERC license.

These conditions ensure protection of instream flows and senior rights while aligning the policy with federal licensing requirements and established operational realities. This approach fits within Ecology's framework and provides a practical, technically supported means to evaluate hydropower uses.

3. Retroactive Application

Although Ecology has described the revised policy as forward-looking, the draft language does not explicitly prevent reconsideration of prior determinations regarding nonconsumptive use. This omission is significant. Many hydropower operators hold water rights that have long been recognized as nonconsumptive. As drafted, the policy could be interpreted to reclassify those rights as consumptive, resulting in uncertainty and inconsistency with established determinations. We request that Ecology

include clear language specifying that prior nonconsumptive classifications will not be revisited or altered absent a change in the manner or place of use.

Conclusion

WPUDA supports Ecology's intent to provide clearer guidance on the distinction between consumptive and nonconsumptive water use. However, the proposed revisions introduce substantial uncertainty for hydropower and other nonconsumptive water rights holders, and they do so without demonstrating a clear need or statutory basis for this policy shift. We respectfully request that Ecology reconsider the proposed revisions and work with stakeholders to develop a policy that reflects operational realities, protects existing rights, and continues to safeguard instream flows and senior water rights.

Thank you for considering our comments. We look forward to continued engagement on this important issue. Please feel free to contact me with any questions.

Sincerely,

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