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TACOMA PUBLIC UTILITIES

December 5, 2025

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

Re: Comments on Proposed “Consumptive and Nonconsumptive Water Use Policy and Interpretive Statement (POL 1020)” Update

Dear Director Sixkiller and Water Resources Program Staff:

The City of Tacoma, Department of Public Utilities, Light Division, Public Utility District No. 1 of Snohomish County, and Public Utility District No. 2 of Grant County, collectively submit the following comments on the Department of Ecology’s (“Ecology”) proposed update to the “Consumptive and Nonconsumptive Water Use Policy and Interpretive Statement” (“POL 1020”). We share Ecology’s commitment to stewarding Washington’s water resources consistent with statute, case law, and sound science. We write from the perspective of public power utilities responsible for generating, transmitting, and distributing electricity to meet rapidly growing regional demand while maintaining reliability and environmental compliance in a changing climate.

The region stands at an inflection point. The 2025 Northwest Regional Forecast indicates electricity demand growth of an extraordinary magnitude over the next decade, with recent projections estimating an increase above 30 percent.¹ Electrification of transportation, buildings, and industry is a central element of Washington’s decarbonization strategy and will reshape load profiles.² Concurrently, data center development and AI-related computing are driving unprecedented baseload and peak demand.

Against this backdrop, Washington utilities are planning and investing to meet regional needs in the context of climate change, evolving hydrology, and increasingly complex operations across our portfolio of hydropower projects.

¹ Pacific Northwest Utilities Conference Committee, Northwest Regional Forecast of Power Loads and Resources, August 2025 through July 2035 (April 2025) (“2025 Northwest Regional Forecast”), available at <https://www.pnucc.org/wp-content/uploads/2025-PNUCC-Northwest-Regional-Forecast-final.pdf>.

² See, e.g., Washington State Department of Commerce, Washington State Energy Strategy (December 2020), available at <https://deptofcommerce.app.box.com/s/zsbjvf0nato9q7dk3t7jih0vjb4iqof> (designed to provide a roadmap for meeting the state’s greenhouse gas emission limits).

Hydropower is the region’s largest power source.³ Carbon-free hydropower provides over half of total utility generation even under low water conditions in the Pacific Northwest.⁴ In 2024, in Washington State, hydropower accounted for 59% of Washington’s total net electricity generation.⁵ Hydropower is essential to both grid reliability and decarbonization goals. We support and refer to Northwest Hydroelectric Association’s (“NWEA”) comment letter regarding POL 1020 and its fundamentally flawed approach to hydropower water use.

Our purpose in commenting is straightforward: to ensure that Ecology’s water rights and resources policies align with Washington law, reflect an accurate and current understanding of hydropower operations, and avoid retroactive disruption of settled rights and established projects. As drafted, the proposed POL 1020 does not meet that standard. It introduces uncertainty and unnecessary risk for hydropower without clear legal basis or demonstrated resource protection benefits. We respectfully request revisions to restore legal fidelity, technical accuracy, and regulatory predictability.

I. Concerns with POL 1020 Update

A. Scope and Purpose of the Policy Revision

Ecology has stated that the policy update responds, in part, to changes in case law, and specifically references the Washington Supreme Court’s decisions in *Postema*⁶ and *Foster*.⁷ However, the proposal is not accompanied by legal analysis explaining the link between *Postema* or *Foster* and the policy’s new treatment of consumptive versus nonconsumptive use. *Postema* addressed the instream flow rules and de minimis impairment of existing rights.⁸ *Foster* addressed the impairment and mitigation of out-of-priority groundwater withdrawals.⁹ Neither case redefined the legal meaning of “consumptive use.” Ecology has not adequately explained how these cases dealing with impairment require updates to a policy on consumptive and nonconsumptive use. Also, assuming these cases are the basis for the policy update, it is still unclear why this update is being proposed now—10 years after the *Foster* decision and 25 years after the *Postema* decision.

³ 2025 Northwest Regional Forecast at 8.

⁴ *Id.* at 8-9 (the Northwest Regional Planning Area is the area defined by the Pacific Northwest Electric Power Planning and Conservation Act, including the states of Oregon, Washington, and Idaho; Montana west of the Continental Divide; portions of Nevada, Utah, and Wyoming that lie within the Columbia River drainage basin; and any rural electric cooperative customer not in the geographic area described above but served by Bonneville Power Administration on the effective date of the Act).

⁵ U.S. Energy Information Administration, Washington State Energy Profile (last updated May 15, 2025), available at <https://www.eia.gov/state/print.php?sid=WA>.

⁶ *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 11 P.3d 726 (2000).

⁷ *Foster v. Washington State Dep’t of Ecology*, 184 Wn.2d 465, 362 P.3d 959 (2015).

⁸ *Postema*, 142 Wn.2d at 82, 92.

⁹ *Foster*, 184 Wn.2d 471-72.

This unclear legal basis for the update is concerning as the proposed update appears more restrictive than governing statutes and case law. If *Postema* and *Foster* are the driver for the update, Ecology should explain how those decisions impact the consumptive versus nonconsumptive classification.

For hydropower specifically, mitigation is already provided consistent with *Foster*. Hydropower project diversions are routinely returned to the source. Additionally, project-specific license conditions already guard against impairment. The Federal Energy Regulatory Commission (“FERC”) licenses and regulates hydropower projects. Although the state maintains primary authority over water rights, we are concerned about how the administration of this policy could bleed into, and potentially misalign with, FERC’s robust licensing and regulatory requirements for hydropower projects.

We respectfully request that Ecology publish a clear legal and technical basis for any changes, including: the specific statutory provisions being interpreted; the case law relied upon; and the problem the revision is intended to solve. Absent that foundation, the proposed revision risks misapplication and litigation without advancing resource protection.

B. Retroactive Application and Reliance Interests

Ecology has represented that the policy is forward-looking. Yet the draft contains no express language to preclude reconsideration of prior nonconsumptive determinations. That omission is consequential. Many utilities operating hydropower projects hold water rights that have been issued or characterized as being for nonconsumptive purposes. Those rights reflect decades of administrative determinations, federal licensing proceedings, stakeholder settlements, and operational investments premised on the classification.

As drafted, POL 1020 could be read to classify hydropower diversions as consumptive in a manner that conflicts with prior determinations and established practice. This raises four related concerns.

1. Whether Ecology or third parties might argue that longstanding hydropower operations require new or amended “consumptive use” water rights, notwithstanding that the manner of use has not changed. This could arise even where there is no change or new application for a water right.
2. How Ecology will evaluate new applications for existing operations—including impacts on those water rights for existing operations. For example, if a water right holder with an existing water right for hydropower purposes submitted an application for a new water right for the same use (i.e., to facilitate additional

- generation), would this process “reopen” any previous nonconsumptive determination by Ecology for the existing water right or rights?
3. How Ecology will evaluate changes to existing water rights characterized as nonconsumptive. For example, if a water right holder for a water right for hydropower purposes submitted a change application, would this process “reopen” any previous nonconsumptive determination by Ecology?
 4. Whether Ecology would evaluate impairment for new third-party applications vis-à-vis existing hydropower rights previously determined to be nonconsumptive. For example, if a third-party applies for a new water right but argues that an existing water right previously classified as nonconsumptive is actually consumptive and results in impairment, could Ecology through this policy reopen that previous nonconsumptive hydropower use water right determination?

Taken to its logical extreme, the policy could be read as requiring water rights holders with existing nonconsumptive water rights to apply for and obtain new consumptive water rights in order to continue existing, unchanged operations. Doing so would have a dramatic impact on Washington hydropower, destabilizing grid reliability, limiting economic growth in Washington, and jeopardizing ongoing decarbonization efforts.

To avoid undermining settled rights and operations, and needlessly burdening reliable generation, Ecology should include explicit non-retroactivity language confirming that prior nonconsumptive determinations will not be reopened absent a change in the manner of use or operations that materially alters return flows.

C. Hydropower Should Be Addressed Separately and Accurately

The existing version of POL 1020 recognizes hydropower as a distinct operational context. The proposed update, however, introduces confusion, and does not appear to reflect how hydropower projects are actually configured and operated in Washington. Hydropower systems vary materially—storage and run-of-river projects have different hydraulic, temporal, and environmental characteristics—and those differences can matter to any analysis of consumptiveness. Along with NWA, we are concerned that new POL 1020 mischaracterizes hydropower project operations and run-of-the-river project configuration, and we echo NWA’s comment that Ecology policy should not be contrary to long-standing FERC policy regarding hydropower.

Even with these differences, hydropower projects are all generally designed and operated to return diverted water to the source river system. Additionally, to the extent there is any area where the diverted water avoids the natural river course, the hydropower operator’s FERC license typically mandates minimum instream flows and other protections for senior rights

and aquatic resources. Ecology should be well aware of these protections as Ecology participates in the licensing process as one of the licensing partners that FERC expects to hear from.

We note two primary concerns with how the policy update seems to specifically change Ecology's interpretation of hydropower water uses. First, like all surface water uses, hydropower operations can involve limited, incidental evaporative losses to open water conveyance and reservoir surfaces. A standard that deems such inevitable effects to be "consumptive" per se would be unworkable and would not meaningfully advance the protection of senior rights and instream flows.

Second, the policy update's narrow, black-and-white consumptive versus nonconsumptive definitions enables Ecology to characterize all hydropower uses as consumptive. In addition to the inevitable "consumptive" evaporative loss associated with any surface water use, many hydropower projects, including run-of-the-river projects involve *some* diversion of the water (such as through penstocks) but return that water in close proximity¹⁰ to the diversion point or with full mitigation for any stretch where the water is diverted, similar to most fish hatcheries. Treating this type of water use like a fully consumptive use where water is not returned to the source leads to an unfair and unreasonable result for everyone in the river system. The policy update's draconian consumptive or nonconsumptive approach is unfair and unreasonable as applied to hydropower projects where there could be incidental evaporative losses and where water is arguably diverted and not "immediately" returned to the source.

Accordingly, we recommend that Ecology either carve out hydropower use from this policy or add a new section specifying that hydropower water use is nonconsumptive where the following conditions are met:

1. all hydropower project lands are owned or controlled by the hydropower entity (i.e., within the FERC project boundary or authorized by FERC license);
2. return flow of diverted water is returned within those project lands; and
3. minimum instream flows or flow augmentation are provided as required by the FERC license for the project.

These conditions will ensure adequate protection of instream flows and other water rights. Further, this approach aligns Ecology's policy with FERC hydropower license conditions. Finally, this approach fits within Ecology's proposed framework, while also providing a workable solution in light of the technical realities of hydropower water uses.

¹⁰ Notably, the policy update deletes "in close proximity" language in the current policy, removing the reasonable flexibility provided by that phrase.

D. Recommended Revisions to POL 1020

We request the following revisions to ensure legal defensibility, technical accuracy, and administrative workability:

1. Provide a detailed legal rationale for all policy changes, including how the policy aligns with governing statutes and case law, and clarifying that *Foster* does not redefine consumptive or nonconsumptive classifications or automatically alter the classification of hydropower diversions.
2. Include an express non-retroactivity provision stating that prior nonconsumptive determinations for perfected and inchoate rights will not be revisited or reclassified absent a material change in the manner of use or operations.
3. Either exclude hydropower water rights from the policy or add a hydropower-specific section that sets out criteria under which hydropower is deemed nonconsumptive.

II. Conclusion

We support Ecology’s goal of providing clear guidance on consumptive and nonconsumptive use. The proposed POL 1020, however, would create material uncertainty for hydropower without a demonstrated legal or technical need, and it risks destabilizing settled water rights and operations that underpin reliable, low-carbon electricity for Washington. We urge Ecology to revise the policy to: align with statute and case law; respect existing rights, reliance interests and settled classifications; accurately reflect hydropower operations; and provide a workable framework that continues to safeguard senior rights and instream flows.

We appreciate your consideration of these comments and would welcome further dialogue to refine the policy in a manner that protects water resources while preserving dependable hydropower operations that are vital to Washington’s clean energy future.

Respectfully submitted,

The City of Tacoma, Department of Public Utilities, Light Division

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