

Beryl Fredrickson (WWUC)

Please see the attached Washington Water Utility Council's comment letter.



Washington Water Utilities Council

December 5, 2025

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Water Resource Program
P.O. Box 47600
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RE: Comments on Proposed Revisions to “Consumptive and Nonconsumptive Water Use Policy and Interpretative Statement (POL 1020)”

The Washington Water Utilities Council (“WWUC”) appreciates the opportunity to review and comment on the Washington State Department of Ecology’s (“Ecology”) Public Review Draft of Policy 1020, “Consumptive and Nonconsumptive Water Use Policy and Interpretative Statement.” The WWUC is the state association of over 200 Washington water utilities including cities, water districts, public utility districts, mutual and cooperative water utilities, and investor-owned water utilities. The water systems owned and operated by WWUC members provide drinking water to over 80 percent of the state’s population.

The WWUC is concerned that the proposed revisions to Policy 1020 would materially narrow the scope of what Ecology has historically recognized as nonconsumptive water use, without a sufficient legal or technical basis. WWUC members hold nonconsumptive water rights that could be adversely affected by this policy shift. Specifically, WWUC members hold nonconsumptive water rights for hydropower generation, reservoir storage, pump storage projects, habitat enhancement, and fish hatchery operations—uses that Ecology has previously characterized as nonconsumptive. The WWUC notes and supports other use-specific concerns with the proposed policy updates, including hydropower-specific concerns. The WWUC supports the comment letter from the Northwest Hydroelectric Association regarding the effect of the proposed revisions to Policy 1020.

The proposed policy revisions introduce uncertainty and confusion for both new applications and existing nonconsumptive determinations because the draft policy does not

establish parameters regarding how or when the policy will be applied. This policy creates significant uncertainty regarding how Ecology will make consequential water rights decisions. As Ecology is aware, a “consumptive” or “nonconsumptive” determination can have significant implications, including priority processing and specialized treatment under numerous basin rules. For these reasons, the WWUC respectfully urges Ecology to discontinue the proposed updates to Policy 1020.

I. Legal and Technical Concerns

A. Unclear Legal Basis for the Proposed Changes

At the November 10 Water Resources Advisory Committee (“WRAC”) meeting, Ecology referenced the Washington Supreme Court’s decisions in *Postema* (2000)¹ and *Foster* (2015)² as justification for this policy update. However, the updated policy does not incorporate any caselaw standard for what constitutes “consumptive” or “nonconsumptive” use. Attempting to repurpose *Foster*—a decision focused solely on application of the “overriding considerations of the public interest” (“OCPI”) exception to groundwater right permitting—into a general rule redefining “consumptive” and “nonconsumptive” use is neither necessary nor warranted. If Ecology’s objective is to address impairment and mitigation issues arising from *Foster*, those issues should be addressed directly and in the appropriate statutory, regulatory, or policy contexts where they bear a logical nexus to the decision, rather than through a redefinition of “consumptive” and “nonconsumptive” use.

In addition, the draft policy identifies no statutory or regulatory directive necessitating a redefinition of “diminish.” Without clear legal authority, narrowing the meaning of “nonconsumptive” by expanding what counts as “diminishment” risks inconsistency with existing rules and settled expectations and invites legal challenge.

B. Rulemaking Problems

Without undertaking rulemaking, the draft Policy 1020 revises legally significant terms that are defined in regulation. This is especially concerning because Ecology does not state how or where the policy will be applied (or not applied), creating substantial uncertainty for water

¹ *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 11 P.3d 726 (2000).

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

right holders. By issuing these changes as a policy and interpretive statement, Ecology sidesteps procedural requirements that would otherwise compel an explanation of the action's basis and effect.

The draft policy also conflicts with existing regulations. The draft Policy 1020 defines nonconsumptive surface water use as use where the water is not diverted from the source and the source is not otherwise diminished: "Surface water use is nonconsumptive when the water is not diverted from the source and the source is not otherwise diminished." This conjunctive test departs from numerous basin rules that define nonconsumptive use disjunctively, as use where either there is no diversion or withdrawal, or there is no diminishment of the amount or quality of the source, e.g.: "A type of water use where either there is no diversion or withdrawal from a source, or where there is no diminishment of the amount or quality of the water source."³

A policy-level definition that conflicts with operative basin rules promulgated in accordance with Administrative Procedure Act rulemaking requirements would be both legally and practically problematic. It would create uncertainty for applicants and right holders, risk inconsistent outcomes across basins, and undermine the reliance interests of entities that secured or have operated under "nonconsumptive" determinations in conformity with existing regulations.

It is also difficult to square the draft policy's new definitions with the "annual consumptive quantity" statute. RCW 90.03.380 defines "annual consumptive quantity" based on the estimated or actual annual amount of water diverted pursuant to the water right, reduced by the estimated annual amount of return flows. This recognizes that consumptive use necessarily involves a change in the *quantity* of water available in the source.

To the extent Ecology's amendments to Policy 1020 purport to be driven by the *Foster* decision, it is notable that many Ecology basin rules independently establish exceptions based on OCPI—similar to the statutory "fundamental" interpreted in *Foster*.⁴ Other basin rules explicitly refer to and rely upon the RCW 90.54.020(3)(a) OCPI exception at issue in *Foster*.⁵ Piecemeal policy updates aimed at aligning with this contested court decision—rather than addressing the decision's underlying issues—create additional uncertainty and insecurity

³ See WAC 173-532-020 (WRIA 32), WAC 173-527-020 (WRIA 27), & WAC 173-528-020 (WRIA 28). Note, a number of other basin rules use similar "or" language too. See, e.g., WAC 173-564-040 (Snake River) and WAC 173-532-020 (WRIA 32); see also WAC 173-500-050(9) (defining "nonconsumptive use" in the disjunctive).

⁴ See WAC 173-515-070.

⁵ See WAC 173-546-050(4).

for water rights holders. *Foster* was decided 10 years ago, and we are unaware of any Ecology efforts to adopt or revise its rules in response to *Foster* or to persuade the Legislature to adopt legislative reforms to address problematic aspects of the court decision.

When Ecology adopts rules that touch and concern water rights, provisions to protect existing rights are generally included. For example, Ecology's instream resources protection program regulations for WRIA 1 provide that "Nothing in this chapter shall affect existing water rights, perfected riparian rights, federal Indian and non-Indian reserved rights, appropriative or otherwise existing on the effective date of this chapter, nor shall it affect existing rights relating to the operation of any navigation, hydroelectric, or water storage reservoir or related facilities."⁶ It is concerning that proceeding *via* a policy and interpretative statement enables Ecology to omit language protecting existing rights.

C. Retroactive Application

A related and significant concern is retroactive application of the policy's narrowed definition of "nonconsumptive" to water rights previously characterized as nonconsumptive. WWUC members are concerned that such an interpretation could require them to secure new, consumptive water rights for ongoing uses already authorized under existing water rights previously determined to be nonconsumptive. While Ecology has informally indicated a prospective intent, the revised policy does not contain any language that blocks application of the new definitions to existing rights, whether in connection with change applications or even where no change is requested by the right holder. If Ecology proceeds with the policy revision, Ecology should include specific language to forbid retroactive application to existing water rights and prior nonconsumptive determinations.

D. Water Quality is Not an Appropriate Criterion for Consumptive Versus Nonconsumptive Classification

The WWUC supports the protection of source water quality and recognizes Ecology's important role in administering state water quality laws. However, water quality considerations are addressed under distinct statutory and regulatory frameworks, including chapter 90.48 RCW and Clean Water Act Section 401 Water Quality Certifications. Importing water quality considerations into the definitions of "consumptive" versus "nonconsumptive" use blurs those

⁶ WAC 173-501-070.

frameworks in a manner misaligned with existing law. In addition, some Ecology instream resources protection program regulations prohibit diminishment of water quality for new water uses without involving the terms “consumptive” or “non-consumptive.”⁷ The WWUC supports protection of source water quality, but it is unnecessary and confusing to do so in defining terms that pertain to volume and flow.

To the extent the draft policy suggests that deviations from water quality standards, temperature concerns, or other quality parameters convert a use into a “consumptive” use by “diminishing” the source, that approach is misplaced. Consumptiveness is fundamentally about the volume of water returned to or lost to the source, not whether the use comports with separate water quality obligations. Ecology should preserve the longstanding separation between quantity-based regulatory classifications and quality-based regulatory controls to maintain clarity, legal defensibility, and programmatic coherence.

Additionally, as drafted, the policy update could be construed to convert otherwise nonconsumptive uses—where water is used and immediately returned to the source without any use-related change in quality—into “consumptive” use merely because the source water had preexisting quality impairments. Specifically, the statements in Sections 3 and 4 that return flows must “meet water quality standards for the source” could be interpreted to reclassify a nonconsumptive use as consumptive based solely on the source’s ambient water quality before use. This could unintentionally create additional water quality compliance duties for water right holders whose use does not affect water quality. For example, the draft policy does not address whether diminishment in water quality occurs in a situation where an Ecology-issued discharge permit or water quality certification applies to return flow from a water use.

E. Reservoir Issues

The draft policy appears to treat storage-related effects—such as evaporative loss or potential temperature changes—as categorical diminishment that would render storage “consumptive.” Such an approach would create a substantial barrier to necessary storage projects, contrary to the State’s adaptation objectives in the face of climate change. Reservoir storage is a critical tool to address increasing hydrologic variability. Treating storage as presumptively consumptive because of incidental evaporative losses or minor temperature variations would unduly burden new storage projects—and potentially existing storage projects

⁷ WAC 173-527-080(4)

based on the retroactive application concerns noted above. A blanket policy that classifies storage as consumptive due to temperature or evaporation would be overbroad and counterproductive.

F. Technical Infeasibility and Lack of Practicable Application

The policy attempts to create a bright-line rule that is infeasible based on technical realities. Like a dimmer switch, water-use “consumptiveness” varies by degree, and is not simply an on or off condition. Any surface water use could conceivably lead to some evaporative loss or temperature change. Accordingly, it is not clear that *any* surface water use could consistently meet Ecology’s proposed “nonconsumptive” definition. The draft policy update attempts to jettison a regulatory concept and approach used throughout Ecology’s basin regulations in favor of an inflexible artificial construct under which nearly any water appropriation could be labeled “consumptive.”

Further, the draft policy uses ambiguous phrases, such as “immediately,” “immediately after use,” and “to any degree” without defining those terms or explaining how *Foster* requires such stringent limitations. A workable policy must provide administrable criteria that align with existing rules and established hydrologic realities.

II. Conclusion

The WWUC respectfully requests that Ecology reconsider the proposed revisions to Policy 1020. Specifically, the WWUC urges Ecology to: refrain from importing *Foster*-related impairment and mitigation concepts into the definition of nonconsumptive use; protect existing nonconsumptive use determinations; maintain a clear separation between water quality and consumptive/nonconsumptive classifications; avoid categorical treatment of reservoir storage as consumptive based on incidental evaporation or temperature changes; and ensure that any refinements to the policy are technically feasible, objective, and administrable. If Ecology is unwilling to make such changes, then the WWUC submits that Ecology should drop the Policy 1020 update as unnecessary.

WWUC members are committed to working collaboratively with Ecology to protect water resources while ensuring reliable public water service. A durable, legally sound Policy 1020 should preserve the established regulatory framework for addressing consumptive and nonconsumptive uses and support the State’s water supply and environmental objectives.

While we understand that you are not intending to prepare a response to comment document, we would appreciate your specific response to the points in this letter. We appreciate your consideration of these comments and welcome continued dialogue.

Sincerely,

A handwritten signature in blue ink that reads "Beryl C. Fredrickson". The signature is written in a cursive, flowing style.

Beryl Fredrickson, Chair, Washington Water Utilities Council

cc: Casey Sixkiller, Department of Ecology Director
Ria Burns, Department of Ecology Water Resources Program Manager