

City of Arlington (James Kelly)

Please see attached letter with comments.



City of Arlington

Public Works

Noah Wentzel
Washington State Department of Ecology
Water Resources Program
P.O. Box 47600
Olympia, WA 98504-7600

Re: Comments on Public Review Draft of "Consumptive and Nonconsumptive Water Use Policy and Interpretative Statement (POL 1020)"

Dear Mr. Wentzel:

Thank you for the opportunity to comment on the Washington State Department of Ecology's (Ecology) Public Review Draft of Policy 1020, Consumptive and Nonconsumptive Water Use Policy and Interpretive Statement. We appreciate Ecology's ongoing efforts to provide guidance on water rights management.

The City of Arlington (City) operates water, wastewater, reclaimed water, and stormwater utilities in the heart of the Stillaguamish River basin. The geography along the south bank of the Stillaguamish River has provided the City with a tremendous opportunity to integrate the management of all of its water-based utilities. The City withdraws water from a well located on the south bank of the Stillaguamish River, treats the water at a filtration plant less the 500 yards away, distributes the potable water to the Arlington community, collects the wastewater from the Arlington community, and treats the wastewater at the City's water reclamation facility also located adjacent to the south bank of the Stillaguamish river.

Reclaimed water is either discharged into the City's constructed wetland (*also located on the south bank of the Stillaguamish River*) or discharged directly back into the river less than 400-ft downstream from where the water was withdrawn. The City takes pride in operating a potable water system that meets Washington state's goal for sustainable water systems, while also demonstrating responsible stewardship of water resources within the Stillaguamish river watershed. This sustainable stewardship is threatened by changes being proposed in Ecology's Public Review Draft of Policy 1020.

The City of Arlington strongly supports the comments submitted by the Washington Water Utilities Council on Ecology's Public Review Draft of Policy 1020. The City is submitting these additional comments to highlight the legal, technical, and implementation impacts of the proposed revisions on water use within the Stillaguamish Watershed, and for municipalities operating reclaimed water

facilities. Regarding Ecology's proposed revisions to Policy 1020, the City believes that they: are inconsistent with current regulations, including the Stillaguamish Instream Flow Rule (Chapter 173-505 WAC); unnecessarily restrict the use of water rights to meet future demands; and create a regulatory framework that is technically flawed.

1. Ecology's proposed revisions to the definitions of consumptive and non-consumptive use in Policy 1020 conflict with existing regulations, including Ecology's Instream Resources Protection and Water Resources Program for the Stillaguamish River Basin.

Washington State's Administrative Procedure Act (APA) allows an agency to issue interpretive or policy statements which "advise the public of its current opinions, approaches, and likely courses of action", however, the interpretative or policy statements are "advisory only." RCW 34.05.230(1). The APA does not authorize Ecology to expand, amend, or add regulatory elements to a statute or rule through an interpretive and policy statement. Ecology would exceed its authority under APA when its proposed changes to Policy 1020: 1) conflict with definitions of consumptive and non-consumptive use in rule, and 2) undermine opportunities identified in rule for alternative sources of water in a closed basin.

The terms "consumptive use" and "nonconsumptive use" do not appear as independent legal standards in RCW Title 90. WAC 173-500-050(5) defines consumptive use as "use of water whereby there is a diminishment of the water source." WAC 173-500-050(9) defines nonconsumptive use as "a type of water use where either there is no diversion from a source body, or where there is no diminishment of the source" WAC 173-500-050(9). In 2005, Ecology adopted Chapter 173-505 WAC, the Instream Resources Protection and Water Resources Program, for the Stillaguamish River Basin. In the Stillaguamish Instream Flow Rule (SIFR) defines consumptive use as the "use of water that diminishes the amount or quality of water in the water source." WAC 173-505-030(3). The SIFR defines nonconsumptive use as "a use of water that does not diminish the amount or quality of water in the water source." WAC 173-505-030(10). We understand the City's management of its water resources are subject to definitions in both 173-500 WAC and the SIFR (173-505 WAC).

Ecology states in both the existing version of and proposed revisions to POL-1020 that its purpose is to "expand upon" the existing definitions in WAC 173-500-050. POL 1020, pg. 1. However, the public review draft introduces new, mandatory legal standards—including time-based and location-based aspects of "consumptive use"—that are not present in the statute or rule. The public review draft states that water is consumptive "for any interval of time that water is withdrawn and not returned." The draft revises the definition of "bypass reach" to declare that a diversion is consumptive to the entire bypass reach, rather than considering the specific factual implications of the water use. See Public Review Draft, POL 1020, pg 2. No statute or regulation defines bypass reach or classifies bypass-reach operations as consumptive.

In addition, proposed modifications to several attributes that may distinguish between consumptive and non-consumptive use also exceed Ecology's authority under the APA.

- One description of non-consumptive is revised from "no diversion or no diminishment" to "no diversion and no diminishment". POL-1020, pg 2.
- Fish hatcheries, typically considered a non-consumptive use, are dropped as an example of it without explanation. POL-1020, pg 2.
- Water withdrawn from and returned to a dammed reservoir would be non-consumptive, but water withdrawn from and returned to a geomorphic pool in a natural river was revised to be consumptive. POL-1020, pg 3.
- Evaporative losses from impoundments now "may" be consumptive; but no quantity, time, or location based criteria are provided to help distinguish when that is. POL-1020, pg 2.

Also problematic of the revision is the vague and undefined quality of flows returning to a source which would constitute a non-consumptive use.

- Policy revisions indicate return flows must meet water quality standards for the source. POL-1020, pg 2. However, no criteria are provided to evaluate consistency with the intent of the policy.
- Return flows requiring NPDES permits may require mixing zones in the receiving body, can be considered non-consumptive.
- Return flows meeting Class A reclaimed water quality standards, and exceeding the quality of the receiving body, have not been considered non-consumptive.
- Return flows to groundwater meeting groundwater standards are non-consumptive, but so is domestic waste leaching from septic systems. POL-1020, pg 3.

Ecology defends its revisions as necessary to address the effects of case law on impairment standards and other attributes of water rights. The appropriation process for any beneficial use involves a continuum of consumptive and non-consumptive components that identify when a reduction in water availability could impair senior water rights and instream flows. A carefully defined rubric for identifying these conditions is warranted. Case law and the APA require Ecology to address these concerns in a comprehensive regulatory effort.

Under Ecology's current approach, multiple variations in existing definitions across multiple rules are not helped by modifications to one policy. Similarly, while Ecology has indicated it is not its intent to apply the policy revisions to water rights retroactively, multiple water rights issued with wide range of consumptive and non-consumptive attributes are not readily managed when definitions established in policies are modified over time.

When applied expressly to the City of Arlington's interests, Ecology's proposed revisions to Policy 1020 are counter to the Stillaguamish Rule's provisions which require creative, sustainable, and defensible

water solutions within a basin closed to new consumptive appropriations. The Stillaguamish Rule addresses future water needs, in pertinent part, as follows:

1) Surface and groundwater permits not subject to the instream flows and closures established in WAC 173-505-050 and 173-505-070 may be issued if any of the following situations apply:

(a) *The proposed use is nonconsumptive, and compatible with the intent of this chapter.*

(b) The applicant elects to submit a *scientifically sound mitigation plan*... If monitoring of a mitigation plan shows the mitigation is not effective, use of water under the permit shall then be subject to the instream flows...

(c) *The proposed groundwater use will not impair senior water rights. . . .*

WAC 173-505-110 (*emphasis added*). Furthermore, the Stillaguamish Rule recognizes alternative sources of water as necessary to the provision of new water and return flows resulting in non-consumptive uses, and/or the mitigation for new or changed water uses. The Stillaguamish Rule states, in pertinent part, that:

The legislature has long acknowledged that water supply and availability around the state are becoming increasingly limited, particularly during summer and fall months and dry years when demand is greatest . . . This need dictates the continued development and use of alternative sources of water, such as . . . reuse of reclaimed water. . . .

Alternative sources of water of equal or better quality than a new source can be used to *improve stream flows for fish, offset impacts of withdrawals on stream flows* and provide sources of water for future out-of-stream uses.

WAC 173-505-120 (*emphasis added*). The use of alternative water supplies, mitigation, reservations, and new nonconsumptive water uses is critical to meeting the future water needs in the Stillaguamish Watershed.

By attempting to address several issues of case law through revisions to definitions and applications of terms in a consumptive use policy, Ecology is exceeding its authority and causing unintended consequences in the management of water rights that hinders rather than facilitates water availability where it may be needed most.

By redefining and expanding the definition of “consumptive use”, the draft policy essentially rewrites the regulatory definitions in WAC 173-500-050 and WAC 173-505-030, and attempts to amend the Stillaguamish Instream Flow Rule without going through formal rulemaking. If Ecology seeks to amend its definition of consumptive use, then it should be updating the Stillaguamish Instream Flow Rule and other rules involving instream resources protection and not attempt to regulate via an advisory policy statement.

II. As clearly stated in the Stillaguamish Rule, the standard for protecting instream flows and existing water rights is impairment.

Washington's water code uses an impairment standard—not a consumptive-use standard—as the primary test for determining whether a water right might impair or cause detriment or injury to existing rights, including instream flow rights. Neither RCW 90.03, RCW 90.44, nor any other chapter of Title 90 establishes “consumptive use” as a legally binding standard for water right permitting, priority, or impairment. Instead, Washington water law considers and protects the relationship of water rights around impairment (RCW 90.03.290(3); RCW 90.44.060), detriment or injury to existing rights (RCW 90.03.380; RCW 90.44.100), and instream flow protection (RCW 90.22.010; RCW 90.54.020(3)). The Washington Supreme Court repeatedly confirms that the controlling legal test for water-right decisions is impairment, not consumptiveness. See: *Foster v. Dep't of Ecology*, 184 Wn.2d 465, 473–74 (2015) (Ecology lacks authority to impair minimum flows absent narrow statutory exceptions); *Postema v. Pollution Control Hearings Board*, 142 Wn.2d 68, 84–85 (2000) (hydraulic continuity and impairment require factual analysis; no presumption of impairment); *Dep't of Ecology v. Grimes*, 121 Wn.2d 459, 467–69 (1993) (impairment turns on actual effect on senior rights).

The Stillaguamish Rule consistently focuses on the impairment standard as the primary test for determining impact to existing rights, including instream flow rights. Under RCW 173-505-030(7) a mitigation plan “must show that the withdrawal with mitigation in place will not impair existing water rights. . . .” Future permitting actions under the Stillaguamish Rule cannot “impair” or cause “impairment” to existing rights, including instream flow rights. WAC 173-505-110. See also WAC 173-505-140 (Future changes and transfers). Washington law and the existing Stillaguamish Rule does not authorize Ecology to substitute “consumptiveness” for the required impairment analysis. Ecology cannot further restrict the use of water rights otherwise allowed under the water code based on a definition in a policy statement.

Washington law requires Ecology to evaluate water right changes, transfers, and new authorizations based on the factual basis of the proposed use and potential impairment of existing water users, not an arbitrary standard of consumptiveness. The Supreme Court rejected categorical rules of impairment in *Postema*, requiring case-specific factual analysis. The Water Code clearly mandates Ecology to consider impacts based on evaluating the hydrologic, hydrogeologic, and existing water rights for each proposed water use authorization.

III. Ecology's proposed revisions to Policy 1020 are technically inaccurate and inconsistent with other policies.

Ecology's rules and policies must be objective, measurable, and consistent with physical realities and scientific understanding. Ecology's proposed changes to Policy 1020 include terms that are not hydrologically or hydrogeologically well-defined, such as: “no diminishment”, “to any degree,”

“immediately back,” and “immediately after use.” Ecology does not specify the scale of a water source or bypass. These terms are likely not consistent with the Stillaguamish Rule. The Stillaguamish Rule’s definitions, as noted above, do not proscribe a period of time for consideration of return flows; rather, it is focused on the impairment standard.

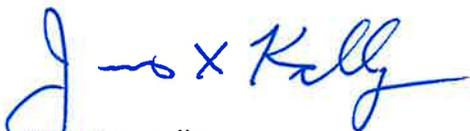
The revised policy also omits or deletes important and recognized processes that impact the understanding of consumptive use, like foreign flows and return flows, and specific water source geomorphology. In the existing Policy 1020, Ecology acknowledged that water use within a common pool, identified by specific geomorphological features, could be considered nonconsumptive. However, pools in natural river systems (including those meeting quantitative criteria) are inexplicably excluded from the revised policy without a scientific, fact-based reason. This arbitrary and capricious exclusion attempts to restrict the terms defined in the Stillaguamish Rule.

Ecology’s use of terms in the proposed revised Policy 1020 is inconsistent with other policies and rules. For example, in Ecology’s Final Guidance for Determining Net Ecological Benefit (prepared in response to Chapter 90.94 RCW and after the adoption of the Stillaguamish Rule) it includes a review of scientific literature to assess the consumptive use of domestic uses and provides a general estimate based on water withdrawal amounts. Ecology has applied a similar approach in rules like the Upper Kittitas Groundwater Rule, Chapter 173-539A WAC, which proscribes that consumptive use will be calculated at “twenty percent of domestic in-house use treated through a wastewater treatment plant . . .” WAC 173-539A-050(3). It is unreasonable for Ecology to adopt a policy now that conflicts with scientific understanding and its own rules and policies.

Conclusion

In its current form, Public Review Draft of Policy 1020 constitutes an expansion of regulatory definitions, introduces new legal standards, and replaces the statutorily required impairment analysis with an unsupported categorical framework. As a result, the draft exceeds Ecology’s statutory authority and violates the Administrative Procedure Act. We respectfully request that Ecology withdraw or substantially revise the policy in accordance with statutory authority, Washington case law, and rulemaking requirements. We appreciate ongoing collaboration to ensure that any policy changes are legally solid, hydrologically precise, and practically manageable.

Sincerely,



James X. Kelly
Public Works Director



Mike Wolanek
Water Resources Planner