



PUBLIC REVIEW DRAFT: POL-1010 UPDATE

DEPARTMENT OF ECOLOGY WATER RESOURCES PROGRAM POLICY AND INTERPRETIVE STATEMENT

ADMINISTRATION OF THE STATEWIDE TRUST WATER RIGHTS PROGRAM

Effective Date: 06/30/2022

Contact: Program Development and Operational Support Section

References: *Statute:* Chapters 90.38, 90.42, and 90.66 RCW; RCW 19.27.097, 90.03.290, 90.03.380, 90.14.140, 90.44.050, 90.44.110, 90.54.020, 90.80.055, 90.80.090

Administrative Rule: WAC 173-153-060

Policy: POL 2030, Municipal Water Law Interpretive and Policy Statement

Forms & Guidance: Request to Establish or Modify a Water Bank; Application to Transfer a Water Right to the TWRP; Temporary Donation to the Trust Water Rights Program Form; Administering the Trust Water Rights Program Guidance

Purpose: To provide transparency and consistency in the Water Resources Program’s administration of the Trust Water Rights Program (TWRP) when considering water banks and water right donations.

Application: The policy covers new trust requests and enrollment of water rights to be held in the TWRP under chapter 90.42 RCW.

- This policy does not supersede requirements in Chapter 90.38 RCW, which apply specifically to the Yakima Basin.

Municipal water rights have unique attributes and allowances under the Municipal Water Law that are not addressed in this policy. Specific provisions that apply to municipal water rights in regard to mitigation and water banking may be addressed in POL 2030, the Municipal Water Law Policy and Interpretive Statement.

SECTION 1: DEFINITIONS

Donation – A water right enrolled in the TWRP to preserve surface water or groundwater resources without monetary compensation.

- **Permanent Donation** – A donated water right held in the TWRP that has been deeded to Ecology.

- **Temporary Donation** – A donated water right held in the TWRP for a specified non-permanent period of time.

Mitigation for out-of-stream uses – Measures that eliminate impairment to existing rights from a proposed water use, referred to here as “mitigation.”

- **Mitigating rights** – Water rights held in the TWRP used to augment instream flows¹ for the purpose of offsetting adverse impacts from other out-of-stream uses of water.
- **Permanent mitigation** – Mitigation that is held in perpetuity and conveyed to Ecology by deed.
- **Long-term temporary mitigation** – Mitigation that is not permanent, lasting for more than five years.

Public interest evaluation – The consideration of impacts to the public at large that would result from the creation and operation of a water bank. General guidelines for consideration of the public interest are set forth in the water resources fundamentals in RCW 90.54.020. As applicable, considerations should include environmental impacts, with emphasis on the protection, restoration, and recovery of threatened and endangered species; environmental justice; implications for public health and safety; aesthetic, recreational, and economic effects; and impacts on publicly owned resources and facilities. The public interest can also be presumed to be reflected in watershed plans, ground water area management programs, related water supply plans, water conservation plans, Ecology administrative rules, and local land use plans and development regulations.

Trust water rights program (TWRP) – A statewide program created under chapter 90.42 RCW authorizing Ecology to hold and manage trust water rights.

- **Trust water right** – Any water right acquired by the state under chapter 90.42 RCW for management in the state’s trust water rights program. A trust water right acquired by the state and held or authorized for beneficial use by the department is considered to be exercised as long as it is in the TWRP (RCW 90.42.040(4)(c)).
- **Trust water right agreement** – An agreement between a water right holder and Ecology for Ecology to hold and manage a water right in the TWRP.
- **Water banking agreement** – A specific type of trust water right agreement for the establishment and operation of a water bank that constitutes the contractual basis for managing mitigating rights between Ecology and the water right holder.

Water bank – A mutually-agreed upon contractual arrangement comprised of:

- 1) transfer of legal interest in a water right to the state to be used as a mitigating right, and
- 2) an executed water banking agreement describing use of that water right through the TWRP to mitigate water resource impacts, future water supply needs, or any beneficial use under chapter 90.03, 90.44, or 90.54 RCW that would otherwise impair existing water rights.

SECTION 2: BACKGROUND

Chapter 90.42 RCW establishes and governs the statewide Trust Water Rights Program (TWRP). Through the TWRP, Ecology may acquire a water right through donation, lease, purchase, or other contractual

¹ For purposes of this policy, reference to instream flows also incorporates groundwater preservation.

means (RCW 90.42.080). Water rights held in the TWRP are not subject to relinquishment (RCW 90.14.140(2)(h)), and retain their original priority date (RCW 90.42.040(3)).

Ecology holds and manages trust water rights for specified purposes of use, including but not limited to:

- Instream flows
- Instream flows for mitigation
- Groundwater preservation
- Groundwater preservation for mitigation

SECTION 3: ESTABLISHING A TRUST WATER RIGHT

A trust water right is established when Ecology agrees to hold a water right in the TWRP (see Administering the Trust Water Rights Program Guidance for details on required documentation). A decision to approve a water right change under RCW 90.03.380 or RCW 90.44.100 by itself does not establish a trust water right.

Exercise of a trust water right may be authorized only if Ecology first determines that neither water rights existing at the time the trust water right is established nor the public interest will be impaired. Ecology will exercise its authorities under the law in a manner that protects trust water rights (RCW 90.42.040(1)).

Only perfected water rights will be accepted by Ecology as a trust water right for mitigation use. Ecology will not accept permits for mitigation use.

SECTION 4: WATER BANKS

Ecology has discretion whether to enter into a water banking agreement. Establishing a water bank requires the creation of a mitigating right that is considered exercised upon execution of the water banking agreement. Therefore, prior to establishing a water bank, Ecology must determine that development of the bank will not impair existing water rights or the public interest.

4.1 Request to Establish or Modify a Water Bank

An entity seeking to establish a water bank must submit a request to Ecology through the *Request to Establish or Modify a Water Bank* form (“water banking request”). A prospective water banker should submit their water banking request either before or in conjunction with the filing of one or more corresponding water right change applications.

Responses on the form should include, at a minimum:

- A description of the proposed water bank, including bank purpose, objectives, and timelines;
- Identification of the perfected water right(s) intended for mitigation (including water right change application numbers if available);
- A description of the anticipated demand to be served by the bank, including:
 - The geographic area for which the intended new uses will be located;
 - The purpose of use, period of use, quantity, and source of intended new uses; and
 - Any other information Ecology will need to evaluate the impacts from the intended new uses.
- Any relevant information that will assist in Ecology’s evaluation of the public interest; and

- A description of the anticipated public benefits that will result from water bank development.

Any existing water bank operator seeking to modify operations substantially from their executed water banking agreement will be required to submit a new water banking request form. Upon receiving a request to modify an existing bank, Ecology will follow the same procedure and evaluation as for a new banking request.

4.2 Evaluation of a Water Banking Request

Upon receipt of a completed water banking request form, Ecology will evaluate the request to determine whether to proceed with negotiation of a water banking agreement. Ecology may choose to decline to process the water banking request or defer the request until a later date.

For those water banking requests that Ecology intends to proceed with negotiation of a water banking agreement, the completed form will be posted online for public comment for a minimum period of 30 days. Ecology will consider all public comments to inform its negotiations and whether to continue to process the water banking request.

Reviewing water banking requests and negotiating water banking agreements are not conducted through the cost-reimbursement process authorized under RCW 90.03.265. Prioritization of these activities does not fall under the Hillis Rule (WAC 173-152-050). However, the change applications associated with water banking requests may be processed under cost-reimbursement when Ecology has determined to proceed with a water banking request. As stated in the Hillis Rule under WAC 173-152-050(2)(g), Ecology may prioritize change applications for processing when impairment is fully mitigated.

Ecology will consider the following criteria in evaluating a water banking request form, along with any other relevant factors:

- *Administrative capacity within the Water Resources Program.* Creating and administering a water bank requires significant staff time and resources. Therefore, when determining whether to proceed with the water banking request, Ecology will evaluate whether adequate staff resources are available.²
- *Alignment with Program priorities.* Ecology may prioritize water banking requests that align with program and agency goals and priorities. For example, this could include projects that:
 - Solve critical water supply problems by providing water for uses or users that would otherwise lack an available water supply;
 - Provide permanent augmentation of instream flows in critical stream reaches; or
 - Are supported by tribes and stakeholders.
- *Potential detriment or injury to existing rights* (see RCW 90.42.100(3) and RCW 90.42.040(4)). Evaluation of potential injury to existing rights will include (but is not limited to) an assessment of the extent and validity of the proposed mitigating right under RCW 90.03.380 and the water right's suitability to mitigate the proposed new or existing use(s).

² This consideration only applies to the water banking request and does not affect processing of relevant water right change applications under RCW 90.03.380, which may be processed by Water Conservancy Boards, under chapter 90.80 RCW, or through the Cost-Reimbursement process outlined in RCW 90.03.265.

- *Potential impairment of the public interest.* RCW 90.42.040(4) states that exercise of a trust water right may only be authorized if Ecology first determines that the public interest will not be impaired. Water rights transferred into trust and held or authorized for beneficial use are to be considered exercised while in the trust water right program. Therefore, Ecology is required to assess whether use of allocated mitigation is likely to impair the public interest prior to transferring water rights into trust.

Ecology's choice to dedicate agency resources to process a water banking request is not appealable. If Ecology chooses to decline a request, prospective bankers may choose to modify and resubmit their request form at a later date.

4.3 Agreements

As with any bilateral contract, Ecology has discretion whether or not to enter into a water banking agreement. This choice is not a regulatory decision and therefore is not an appealable action. If Ecology chooses to proceed with a water banking request, Ecology and the prospective banker will begin to negotiate a water banking agreement. The purpose of a water banking agreement is to establish mutually-agreed-upon terms that define the roles and responsibilities of the water banking entity and Ecology. Specific terms in the water banking agreement will include but are not limited to:

- The process for creating a suitable mitigating right to serve the water bank. This includes formally changing the right's purpose to instream flows for mitigation as well as conveying the right to Ecology by recorded deed if the new mitigated uses are permanent.
- The process the water banking entity will use to allocate mitigation to new or existing uses.
- Any considerations needed to protect against detriment or injury to existing water rights and the public interest.
- Any considerations needed to ensure that no undue administrative burden is placed on Ecology to regulate and/or assist bank operations.
- The process for modifying or terminating the water banking agreement, including the stipulation that any portion of a mitigating right that is allocated to a mitigated use cannot be removed from the TWRP.

Ecology will publish online all executed water banking agreements together with any associated change authorizations for mitigating water rights. For water banks that are actively allocating mitigation, Ecology will also publish the mitigating right balances and other water bank information required by RCW 90.42.170.

4.4 Consideration of Impairment

RCW 90.42.040(4)(a) establishes that exercise of a trust water right may only be authorized if Ecology first determines that existing rights will not be impaired. To ensure that Ecology's decisions meet this standard, the following requirements apply:

- Mitigating rights must undergo a review under RCW 90.03.380 which includes a tentative determination of extent and validity (RCW 90.42.110(2)).
- Mitigating rights must be authorized for instream flows for mitigation purpose of use through the approval of the change application reviewed under RCW 90.03.380.

- Mitigated water uses served by a water bank cannot exceed the historical consumptive use of the mitigating right. Therefore, Ecology’s review under RCW 90.03.380 must include a determination of historical consumptive use according to [Program Guidance: Determining Irrigation Efficiency and Consumptive Use](#).
- Mitigating rights that serve to mitigate permanent uses must be conveyed to Ecology by recorded deed. Ecology will not use water banking to “issue temporary water rights or portions thereof for new potable uses requiring an adequate and reliable water supply under RCW 19.27.097” (RCW 90.42.100(3)(b)).
- Mitigating rights determined to be valid following review under RCW 90.03.380 must also be determined suitable for the location, timing, and volume of the new use.

If impairment of existing rights or the public interest becomes apparent due to exercise of the mitigating right, Ecology will renegotiate, amend, or terminate the water banking agreement to eliminate the impairment (RCW 90.42.040(4)(b)).

Water rights used for municipal water supply purposes (as defined in RCW 90.03.105) have unique attributes and allowances in state law that are not specifically addressed by this policy. Municipal water suppliers should contact Ecology prior to initiating a water banking request.

4.5 Consideration of the Public Interest and Public Welfare

Ecology will evaluate the impact of a proposed water bank on the public interest and public welfare at the following junctures and per the following standards:

Document	Evaluation Standard and Statutory Citation
<i>Request to establish or modify a water bank</i>	Whether the proposed bank will lead to the exercise of a trust water right that impairs the public interest (RCW 90.42.040(4)(a)).
<i>Water right change application</i> OR <i>Application to transfer a water right to the TWRP (see p.6)</i>	Whether the proposed change or transfer will lead to the exercise of a trust water right that impairs the public interest (RCW 90.42.040(4)(a)). If the application is to change or transfer a groundwater right, Ecology will also evaluate whether the change is detrimental to the public interest (see R.D. Merrill Co. v. Pollution Control Hearings Bd., 137 Wn.2d 118, 969 P.2d 459 (1999)).

4.6 Water Right Changes to Create Mitigating Rights

To achieve the mitigation standard described above in Subsection 4: Impairment, most water rights intended for mitigation use will be required to undergo a change in purpose of use under RCW 90.03.380. The water right change application must include a description of the intended new uses to be served by the water bank (RCW 90.42.110(2)) that matches the water banking request form submitted to Ecology.

A water right holder may not use, allocate, or exercise a mitigating right without a water banking agreement with Ecology. If the corresponding water banking agreement has not been executed at the time of the change, Ecology will include the following condition:

If a water banking agreement is not executed within one year following completion of the appeal period under RCW 43.21B.110, the change will be canceled and the water right will revert to the original purpose of use.

Water rights established as family farm permits under chapter 90.66 RCW may be used as mitigating rights in some circumstances. However, this use must comply with the specific provisions in RCW 90.66.065 regarding changes to family farm permits. This requirement may limit the suitability or utility of family farm permits to mitigate for new water uses.

In the rare circumstance that the water right does not need to undergo a change (for example, the purpose of use of the right has already been changed to instream flows for mitigation), the prospective banker will need to submit an *Application to Transfer a Water Right to the TWRP* in conjunction with their water banking request. Ecology shall review the application under RCW 90.03.380, as required by RCW 90.42.110(2).

Ecology's decisions on or cancellations of change applications and *Applications to Transfer a Water Right to the TWRP* may be appealed to the Pollution Control Hearings Board.

4.7 Water Conservancy Boards

An application for a water right change may be submitted to Ecology or a Water Conservancy Board (where established). Water Conservancy Boards may act upon an application to establish a trust water right (RCW 90.80.055). However, Ecology retains sole discretion whether to accept and hold a trust water right.³

For applications processed by Water Conservancy Boards, a trust water right will only be established, and therefore protected from relinquishment under RCW 90.14.140(2)(h), upon the following:

- (a) A Water Conservancy Board record of decision ("Board's decision") under RCW 90.03.380 and WAC 173-153-060 that is affirmed or modified by Ecology to approve a water right change in purpose of use to instream flows for mitigation; and
- (b) A corresponding water banking agreement executed between the applicant and Ecology.

Therefore, when Ecology reviews a Board's decision, Ecology will determine if the applicant has a corresponding agreement in place. If not, Ecology will modify the Board's decision (provided that all other requirements under RCW 90.03.380 are met) to include the following condition:

If a water banking agreement is not executed within one year following completion of the appeal period under RCW 90.80.090, the change will be canceled and the water right will revert to the original purpose of use.

Ecology may affirm the board's decision if this condition is already included.

³ *Crown West Realty, LLC v. Pollution Control Hearings Board*, 7 Wn. App.2d 710, 721, 435 P.3d 288 (2019): "A conservancy board lacks final authority to authorize a transfer into the water trust program. RCW 90.80.055(1)(b)."

SECTION 5: DONATIONS INTO THE TRUST WATER RIGHTS PROGRAM

Under RCW 90.42.080, a water right holder may donate all or a portion of their water right certificate or claim to the TWRP for the purposes of instream flows or groundwater preservation. A water right holder may choose to donate their water right temporarily or permanently.

5.1 Temporary Donations

Water rights are temporarily donated to Ecology through submittal of the *Temporary Donation of a Water Right to the State Trust Water Rights Program* form, available on Ecology's website. Ecology shall accept temporary donation of a water right to hold in the TWRP to assist in providing instream flows or to preserve surface water or groundwater resources (RCW 90.42.080(1)(b)), provided that:

- The donated quantity of water will not exceed the highest quantity of water put to beneficial use over the most recent five-year period.⁴ Ecology may rely on attestation and information provided by the applicant to determine the quantity of water donated, or may conduct its own evaluation of water use for the previous five years to determine the quantity of water available for donation; and
- Other applicable requirements of chapter 90.42 RCW are met.

The effective date of a temporary donation is the date Ecology receives the donation form. A water right holder may modify the terms (such as duration or quantity) of a water right donation prior to its expiration without submitting a new donation form by contacting Ecology.

Permit-exempt uses under RCW 90.44.050 and water right permits are not eligible for donation to the TWRP.

A water right that has been temporarily donated cannot be used for mitigation because a donation itself is not evidence of the extent or validity of the water right (RCW 90.42.080(4)). However, a water right that has been donated to the TWRP may subsequently be used for mitigation once the requirements stated in Section 4.4 have been met.

5.2: Permanent Donations Into The Trust Water Rights Program

Ecology will accept permanently donated water rights that meet the requirements in RCW 90.42.080(4) in the form of a recorded deed conveyed to Ecology.

⁴ See RCW 90.42.080(9), (10), and (11) for qualifications.