



CLEAN, FLOWING WATERS FOR WASHINGTON

The Center for
Environmental Law & Policy

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Dear Mr. McDonald:

The Center for Environmental Law & Policy (CELP) appreciates the opportunity to provide comments on the draft reclaimed water rule, proposed chapter 173-219 WAC. CELP has actively participated in the rule development process, and vigorously supports the integration of reclaimed water into the state's management of water resources. The use of reclaimed water for nonpotable purposes is an essential component of a modern and efficient water management scheme. This year's drought conditions--for instance, record low streamflows, and record-sized wildfires--and the increasingly obvious effects that climate change is having and will continue to have on the state's water resources require that the state move forward with much more efficient use of its water than it has in the past.

The draft rule, however, contains significant and serious deficiencies that should be corrected before the rule is adopted. If the rule's purpose, as stated in WAC 173-219-020 is "to encourage the generation and beneficial use of reclaimed water in this state," it fails to measure up. Taken as a whole, the rule instead appears to perpetuate certain barriers to the use of reclaimed water, and adds confusion and ambiguity that is likely to deter potential reclaimed water facilities from being planned, constructed and used. In addition, the draft rule

appears to be inconsistent with certain provisions of state law, particularly with regard to water rights impairment.

We offer several comments on specific provisions of the rule, but suggest that where there still remains significant disagreement among stakeholders regarding the rule's provisions, the Department of Ecology (Ecology) should either delay the rule completely, or place those provisions into guidance while they continue to be worked through.

Specific comments

Water rights impairment (as defined in draft WAC 173-219-010):

- There should be no definition of water right impairment placed in the WAC. The relevant statute (RCW 90.46.130) simply states that reclaimed water facilities “shall not impair any existing water right downstream” from the discharge point of those facilities, unless the potentially impaired water right holder agrees to compensation or mitigation. There is no indication that the Legislature intended that there be a separate definition of impairment for a reclaimed water facility than there is in other contexts. There is no definition of water rights impairment in either state statute or any existing Ecology rule, and water right impairment is therefore a matter of common law. Further, the proposed definition itself is flawed (see below). By placing an unprecedented and flawed definition in the reclaimed water rule, Ecology would be locking in a definition that may prove to be problematic. Simply placing a definition of impairment in a single WAC provision deviates from the legislative intent that the definition applied to reclaimed water facilities be the same as applies in other water rights contexts. For these reasons, the definition of “impairment” should be deleted from draft WAC 173-219-010.
- The proposed definition of “impairment” is flawed in that it appears to be simply a collection of some ideas from existing Ecology policies, and neglects to include other common law elements of impairment. For instance, it fails to account for the principle of “foreign water” or “developed water”—a water right principle that Ecology espoused in the 2015 legislative session—with regard to discharges arising from water imported to the basin where it is being discharged. It fails to account for Ecology’s history of issuing water rights to artificially generated flows—i.e., wastewater discharges—and not simply to naturally occurring flows—which is all the water right holder is entitled to generally. It fails to account for actions legally taken upstream (for instance, the exercise of a water right by a senior water right holder; or the reduction or elimination of a wastewater discharge, which Ecology has stated would not create any impairment). It fails to account for the common law principle of “intensified uses” by the holder of the

underlying water right(s), which would allow for reuse of water within an authorized place of use before being discharged (as occurs in many agricultural irrigation situations). In short, the proposed definition deviates significantly from many generally accepted principles of water law.

- The rule does not address how potential impairment of instream flows would be treated by Ecology under the provision of RCW 90.46.130 that requires compensation or mitigation of a potentially impaired water right. Ecology is currently moving down a path where it either accepts “out of kind” mitigation for impairment of stream flows (i.e., accepting habitat projects in lieu of in-time and in-place “water for water” mitigation), or simply the payment of money for speculative acquisition of water in the future. In CELP’s view, neither of these approaches complies with state law, and both are bad public policy. The rule should (even without a definition of impairment) preclude Ecology from accepting either. The rule should place the burden on an applicant for use of reclaimed water to demonstrate that any impairment of instream flow would be fully mitigated by in-time and in-place “water for water” replacement, and should expressly bar use of out-of-kind mitigation techniques in the reclaimed water context.
- The detailed provisions with regard to the impairment analysis (draft WAC 173-219-100(a)) should be no more onerous than the analyses required by Ecology for issuance of new water rights, or water rights changes or transfers, where Ecology must consider potential impairment. The rule should also comport with the statutory provision that limits the impairment analysis to downstream water rights; as it currently reads, proposed WAC 173-219-100(5) refers to a “study area,” without the downstream limitation prescribed in statute. Proposed WAC 173-219-100(1) refers to but does not incorporate RCW 90.46.130’s requirement that reclaimed water use not impair any *downstream* water rights; the final rule should make it clear that the impairment analysis also refers to downstream rights in order to ensure consistency with the statute.
- It is not clear what the scope of the analysis would be under draft WAC 173-219-100 where a reclaimer in the future increases the amount of water reclaimed (thereby further reducing the wastewater discharge). For example, if Ecology were to issue water rights relying on the wastewater discharge between the date of the first reclaimed water permit, and the modifications to the facility, would the reclaimer be required to compensate or mitigate for these later-issued water rights? This ambiguity

can be avoided by modifying the rule to expressly state that a reclaimed water permit (and the associated impairment analysis) is for a defined quantity of reclaimed water, and that an increase in the amount reclaimed would require a new impairment analysis.

Conveying reclaimed water through surface waters (draft WAC 173-219-540)

- While the ability to convey reclaimed water through the surface waters of the state promotes the use of reclaimed water, how will Ecology address the reclaimed water component in instream flows during times of low flows—such as 2015—when it curtails withdrawals by existing water rights holders? Given the absence of any water right for reclaimed water, what will Ecology’s regulatory approach be to such low flow conditions? Would a reclaimer’s ability to withdraw the reclaimed water from a stream be based on the priority date of the water right associated with the water that was ultimately reclaimed? Would a downstream right holder with a priority date later than this initial withdrawal be curtailed in favor of the reclaimer? Or would the reclaimer be prevented from withdrawing the reclaimed water to benefit any downstream user with a priority date senior to the date that the reclamation began?

Streamflow augmentation (draft WAC 173-219-610)

- CELP supports the use of reclaimed water for streamflow augmentation where it may be done consistent with existing water resource management plans, and where it does not jeopardize water quality or tribal rights with regard to maintenance of fisheries. It would be good to see provisions regarding modification of these rules to reflect any new science, particularly with regard to effects on fish from endocrine-disrupting compounds. The rule could require, for example, that the Department of Fish and Wildlife review all plans to augment streamflow with reclaimed water.

Groundwater recharge (draft WAC 173-219-620)

- CELP fully supports the use of reclaimed water for groundwater recharge, as a water management practice, provided that it will not degrade water quality in any significant amount.
- With regard to the use of reclaimed water for surface percolation (draft WAC 173-219-620(3)), the statutory standard for water quality is state drinking water standards (RCW 90.46.080(1)), and the rule should conform to the statute.

For too long, the state has not done an adequate job of managing and protecting its water resources. For instance, it has not required holders of water rights to return the water, once

used, to the basin or watershed of origin. It has not prevented degradation of groundwater quality, even where there is clear evidence of both the degradation and the source of it. It has issued water rights premised on the continuation of wastewater discharges, even when there are inadequate natural flows to support the water right, and the wastewater facility is under no legal obligation to continue its discharges.

The consequences of such management practices are becoming more apparent. And they should be corrected. However, Ecology should be using this reclaimed water rulemaking as an opportunity to develop a forward-looking water management strategy, and should not be inflicting the consequences of past mistakes on the reclaimed water community. The rule should, in fact, do more to require the use of reclaimed water for nonpotable uses when it is available and cost-effective—for instance, to irrigate parks, open spaces, golf courses, cemeteries, and other facilities where reclaimed water is the ideal source. Ecology should not be issuing any water rights—either new, or transferred—for purposes where reclaimed water is or could be available as alternative supply.

We hope these comments are helpful, and would be happy to respond to any questions you might have. Please contact me at the above address if you have any questions regarding the comments.

Sincerely,

/Dan Von Seggern/

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Staff Attorney