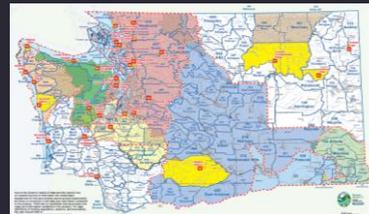
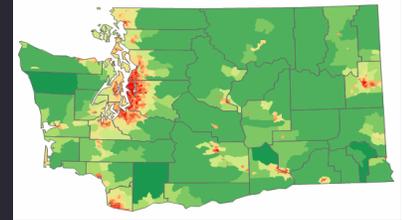
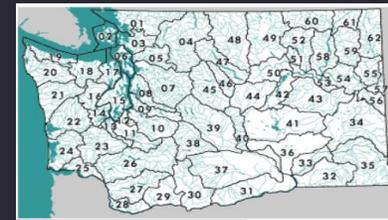
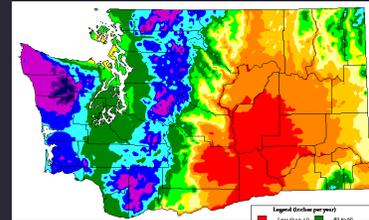
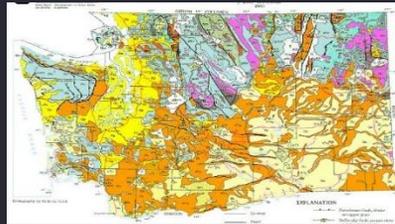


Advisory Group on Water Trust, Banking, & Transfers

Meeting 5
Policy Review

June 30, 2020

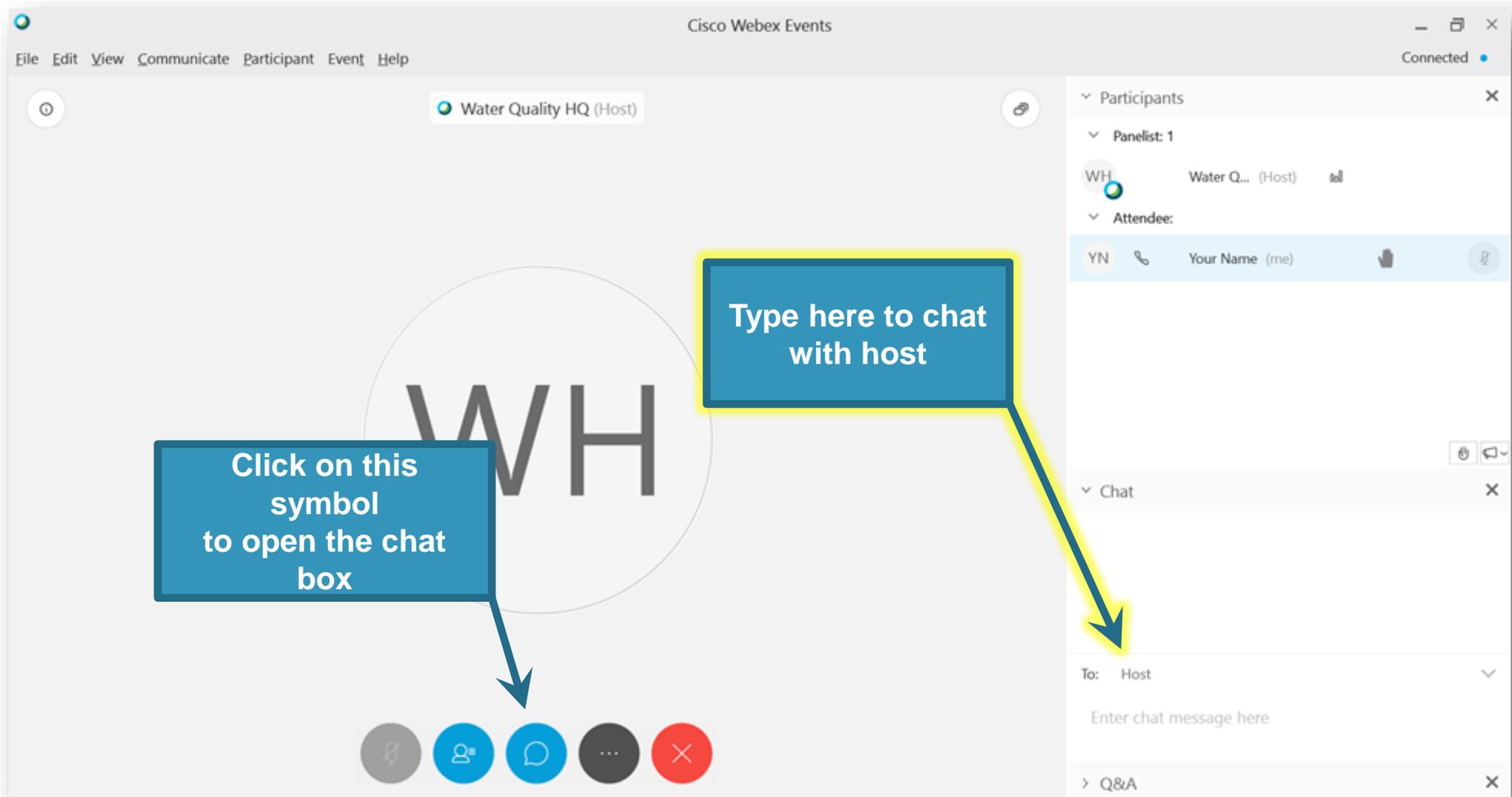
9:30am – 12:30pm



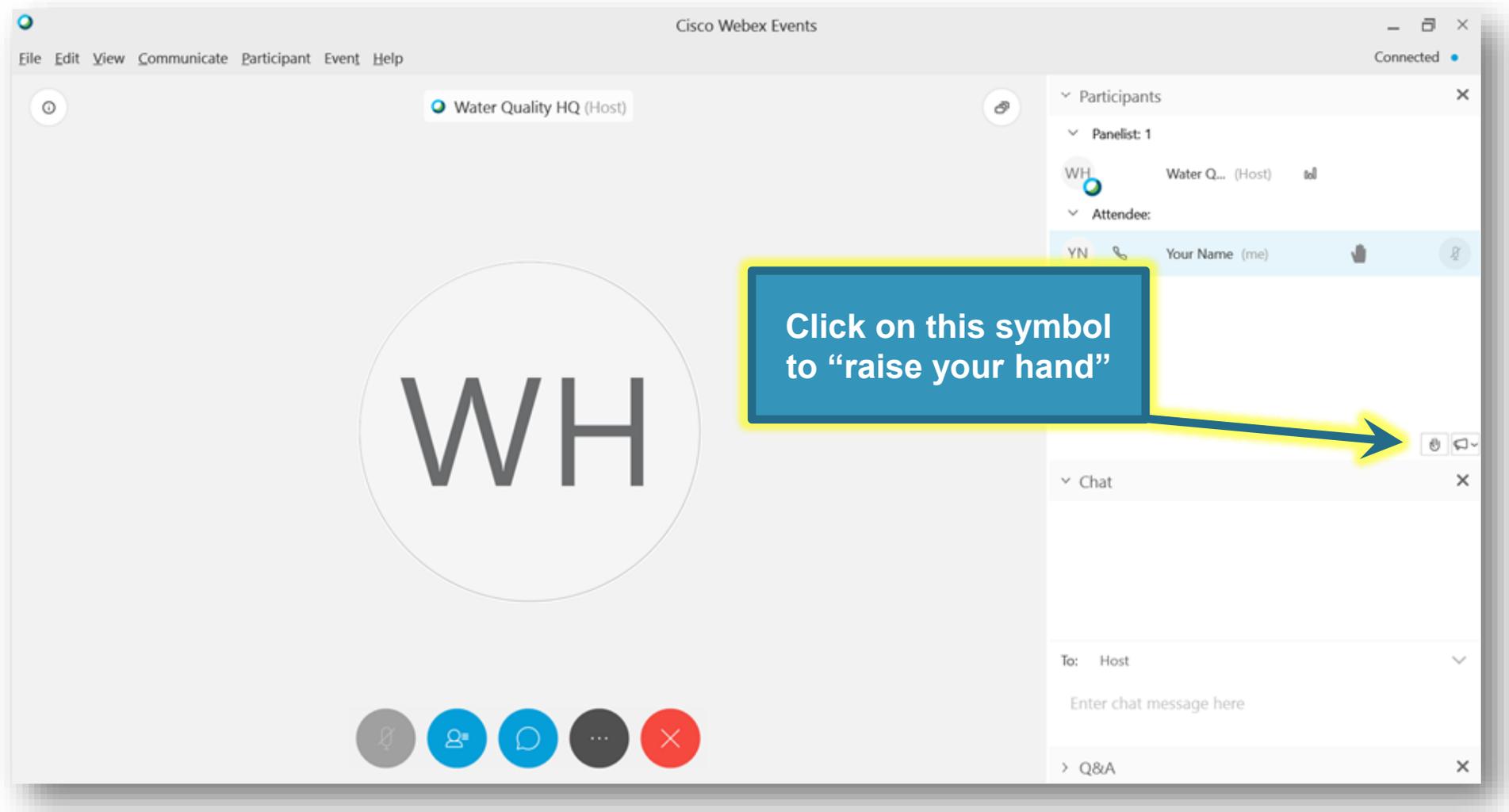
Today's Agenda

Time	Topic	Presenter
9:30 – 9:40	Welcome, review agenda & objectives, introductions, summary of last meeting	Carrie Sessions
9:40 – 10:30	Topics 1 & 2: Out-of-basin transfers and transparency in water right sales	Dave Christensen
10:30 – 11:20	Topic 3: Private investment and marketing of water rights (part A): Use of the state water trust	Carrie Sessions
11:20 – 11:30	Break	
11:30 – 12:15	Topic 4: Private investment and marketing of water rights (part B): Water banking	Dave Christensen
12:15 – 12:30	Wrap up, look ahead to next meeting	Carrie Sessions

WebEx Practice



WebEx Practice



Participants in Today's Meeting

- Susan Adams, Washington Water Trust
- Joel Baxter, House of Representative
- Justin Bezold, Trout Unlimited
- Henry Bierlink, Ag Water Board of Whatcom County
- Amy Boyd, Cowlitz Indian Tribe
- Lori Brady, SVID
- Charles Brushwood
- Dale Budzinski, Parkland Light and Water Co.
- Kathleen Callison, Law Office of Kathleen Callison
- Tyson Carlson, Aspect Consulting
- Joseph Carroll, Wolff, Hislop & Crockett
- Alan Chapman, WRIA 1 Planning Unit / Whatcom CD
- Jay Chennault, Associated Earth Sciences, Inc.
- Kelsey Collins, Dept. of Ecology
- Ann Congdon, Chelan Public Utility District Board of Directors
- Joe Cook, Washington State University
- Stuart Crane, Yakama Nation
- Carol Creasey, Clallam County
- Tracy Croshaw
- Mark Crowley, Kittitas County Conservation District

- Jon Culp, WA State Conservation Commission
- Tom Davis, Washington Farm Bureau
- Karlee Deatherage, RE Sources
- Seth Defoe, Kennewick Irrigation District
- Jeff Dengel, WDFW
- Atul Deshmane
- Jeff Dickison, Squaxin Island Tribe
- Nathan Draper, Selah Moxee Irrigation District
- Peter Dykstra, Plauché and Carr LLP
- Chris Elder, Whatcom County Public Works
- Karen Epps, Senate Committee Services
- Nelson Falkenburg, WDFW
- William Foster, City of Seattle
- Peggen Frank, Contract State Lobbyist
Stillaguamish, Hoh, Nez Perce
- Elizabeth Garcia, Seattle Public Utilities
- Davor Gjurasic, Nisqually, Swinomish, Port
Gamble S'Klallam
- Keith Goehner, State Rep
- Adam Gravley, Van Ness Feldman LLP
- Dan Haller, Aspect Consulting
- Jaclyn Hancock, WSDA
- Justin Harter, Naches-Selah Irrigation District
- Jim Hay, Robinson Noble, Inc.
- Mike Hermanson, Spokane County
- Chris Hyland, WWWMP
- Paul Jewell, Washington State Association of
Counties
- Isaac Kastama, Yakima Basin Joint Board
- Patricia Kirk, Ecology
- Ted Knight

- John Kounts, Washington PUD Association
- Jessica Kuchan, Confluence Law, PLLC
- Natalie Kuehler, Ryan & Kuehler PLLC
- Debra Lekanoff, Representative
- Amber Lewis, The Suquamish Tribe
- Kelsey Mach, Landau Associates
- Sarah Mack, Tupper Mack Wells PLLC
- Chris Marks, Confederated Tribes of the Umatilla Indian Reservation
- John Marsh, Cowlitz Indian Tribe
- Larry Martin, Attorney
- Mike Martinez, NWIFC
- Mark Mazeski, DOH Office of Drinking Water
- Wes McCart, Stevens County Commissioner
- Paul McCollum, Port Gamble S'Klallam Tribe
- Mary McCrea, Methow Group
- Tom McDonald, Cascadia Law Group
- Ken Merrill, Kalispel Tribe
- Doug Miller, Klickitat PUD
- Brandy Milroy, Mason County PUD No. 1
- Jamie Morin, Confluence Law, PLLC
- Thomas Mortimer, Attorney
- Holly Myers, Ecology
- Tom Myrum, Washington State Water Resources Association
- Craig Nelson, Okanogan Conservation District
- Mark Nielson, Franklin County Water Conservancy Board
- Jay O'Brien, Oroville-Tonasket Irrig. Dist.
- Mark Peterson, Crown
- Andrew Purkey, AMP Insights
- James Reyes, Mason County PUD 1

- Brandy Reynecke, ECY WR
- Kristina Ribellia, Western Water Market
- Saundra Richartz, Senate Republican Caucus
- Laura Robinson, Upper Columbia United Tribes
- Trish Rolfe, Center for Environmental Law & Policy
- Susan Saffery, City of Seattle, Seattle Public Utilities
- Jesse Salomon, Washington State Senate
- Robert Sappington
- Jennifer Seely, Washington Law Review
- Norman Semanko, Parsons Behle & Latimer
- John Sirois, Upper Columbia United Tribes
- Jeff Slothower
- Glen Smith, Washington State Ground Water Association

- Marie Sullivan, Confederated Tribes of the Umatilla Indian Reservation
- Lorah Super, Okanogan Conservation District, Methow Valley Citizens Council
- Arden Thomas, Kittitas County
- Benjamin Tindall, Washington State Farm Bureau
- Julie Tran, Senate Committee Services
- Dan Von Seggern, CELP
- Dawn Vyvyan, Tribal lobbyist
- Bruce Wakefield, Colville Tribes
- Jacquelyn Wallace, Trout Unlimited
- John Weidenfeller, Publicly Owned Water Utility
- Gary Wilburn, WA State Senate
- Cory Wright, Kittitas County
- Jonathan Yoder, Washington State University

Today's Objectives

1. Gather feedback on potential policy tools – which policies are most warranted? Which are least warranted or would cause significant problems?
2. Refine the pro's and con's for each potential policy tool discussed.

Today's discussion will inform the potential recommendations we bring to Meeting 6.

Current Draft Paper

- Draft findings and potential policy tools – for Meeting 5
- Blueprint for what Ecology will provide to the Legislature
 - We will revise it based on feedback received
- Includes:
 - Draft findings
 - Potential policy tools (including objective, pro's, & con's)
 - Ideas not recommended (including reasoning)

Caveats for Today

- We won't spend today debating draft findings or policies not considered.
- There will be an opportunity to:
 - Submit written comments on the draft.
 - Submit additional policy tools for consideration.
- Our discussion of a policy tool (or lack thereof), does not necessarily reflect its likelihood of becoming a recommendation.

Feedback on the Draft Paper

Discussion Today

- Some potential policy tools

Written Comments

- Draft findings
- Potential policy tools
- Ideas not recommended
- Additional policy tools we didn't address

Topics 1 & 2:
Out-of-Basin Transfers and
Transparency in
Water Rights Sales

Draft Findings – Out-of-Basin Transfers

1. They are a valuable tool for providing water to new uses and boosting instream flows.
2. The needs of each basin are unique – it will be difficult (and likely unwise) to seek one solution that fits all basins.
3. When water rights cannot be transferred back upstream, out-of-basin transfers can have real economic impacts to local communities and the state.

Draft Findings – Transparency in Water Right Sales

1. Generally, the public notice requirements of sales and transfers are not the problem – ease of access to information is the bigger issue.
2. Increased knowledge of sales and prices could help develop a more robust marketplace for trades.
3. The requirement to post notice of water right transfers in the newspaper is outdated.
4. Limiting who can buy a water right would be unwise.

P.1.1: Provide state and local governments the “right of first refusal” before a water right may be sold for transfer out of the basin of origin. Governments would have a set duration of time to act on the sale.

Objective: Increase the opportunity for water rights to stay in the basin of origin	
Pro's	Con's
Provides a mechanism to keep water rights in the basin of origin	Disclosure of the sale before the sale is final could complicate or derail the transaction
Increases local control	Lengthens the processing time for out-of-basin transfers
Could maintain economic benefits in the local community without affecting property rights	Requires a new source of funding to implement. Without funding this could create process with no result

P.1.3: Create an administrative tool or implement a process such that a water right may be moved back upstream without a finding of impairment to intervening users.

Objective: Create greater flexibility such that out-of-basin transfers are no longer “permanent” and may be transferred back upstream	
Pro’s	Con’s
Increased flexibility to move water rights back upstream after they have been transferred downstream	Could be costly, time consuming, and complicated to implement
Potential impacts on the local economy due to downstream transfers could become reversible	Moving a right back upstream after an extended period of time may result in ecological impacts, especially given the impacts of climate change

* Ecology could implement this within existing authority.

Topics 3: Use of the Trust Water Rights Program

Draft Findings

1. There is lack of consensus on basic terminology of the TWRP. The most important distinction between “types” of trust water rights is the role that Ecology will play in managing the right.
2. The flexibility of the TWRP is one of its greatest assets.
3. A water right being used for mitigation should first undergo a tentative determination of extent and validity.
4. No consensus on whether the TWRP enables speculation – and if it is even a problem. No common understanding on the meaning of “speculation.”

P.3.1: Amend chapter 90.42 RCW to differentiate between water that is put in trust for the purpose of instream flow enhancement and protection from relinquishment versus water that is placed in trust to be used as mitigation.

Objective: Create two categories of trust water rights to clearly differentiate their end use	
Pro's	Con's
Will clarify both Ecology's administrative role and the water right holder's long-term intentions for use	Lack of consensus on terminology and proper distinctions indicates this could be a difficult and potentially lengthy process
Provides clarity on mitigating new uses and administrative processes	
Ensures that use of trust water rights will not impair existing rights	

P.3.2: Clarify in chapter 90.42 RCW that any water right being used for permanent mitigation or mitigation lasting longer than 5 years must first undergo a tentative determination of extent and validity.

Objective: Ensure that new mitigated uses will not impair existing water users or instream flows	
Pro's	Con's
Added clarity from the Legislature will increase certainty and reduce legal risk	Unclear whether this is necessary – Ecology believes we already have the statutory authority to require this
Ensures that use of trust water rights will not impair existing rights	

Break



Topic 4: Water Banking

Draft Findings

- Water banks play a critical role in reallocating water between beneficial uses. Both public and private water banks are important.
- It can be concerning when a bank that provides water to meet basic health needs gains disproportionate market power. No consensus on the remedy.
- We should focus on how the state can better support banking where it can play a critical role in addressing water supply challenges.

P.4.1: Require that prospective bankers submit a “water banking prospectus” in which they outline their business plan. The prospectus would be made available for public comment.

Objective: Increase transparency on water banking activity	
Pro's	Con's
Requires bankers to engage with Ecology early in the process	Accepting and reviewing a prospectus may give the false expectation that Ecology would immediately begin working on establishing the bank
Provides transparency to the public on a water bank's plan	
Public comment could inform the terms and conditions of the water banking agreement	

P.4.3: Amend chapter 90.42 RCW to establish that water banks must define their service area and then have a “duty to serve” within that area.

Objective: Prevent price discrimination	
Pro's	Con's
Ensures that a customer is not denied service or charged a different rate based upon who they are	Places an additional restriction and limitation on water banks
Could decrease the number of banks established to serve the same customers	

P.4.5: In rulemaking, clarify Ecology’s authority to provision certain water bank activities in water banking agreements and trust water right agreements.

Objective: Provide greater consumer protections in banking agreements	
Pro’s	Con’s
Provides clear authority for more specific provisions in water banking agreements that address level of service and operational issues	Oversight of these provisions would require additional resources at Ecology
Provides a way to address unique issues in each water bank development with lower legal risk of being arbitrary and capricious	Rulemaking is costly and time consuming for the agency. It is unclear when Ecology will have resources to undertake this rulemaking in the near term

Next Steps



Comments

- We want your feedback on the draft findings and policy tools!
 - Include any additional potential policy tools that you would like to propose for consideration.
- eComments form available on our webpage
 - Comments will be accessible to everyone
- **This is your chance to provide us with comments to inform revised findings and potential recommendations, which we will share ahead of Meeting 6.**
- **Comments due July 7 at noon.**

Feedback on the Draft Paper

Discussion Today

- Potential policy tools

Written Comments

- Draft findings
- Potential policy tools
- Ideas not recommended
- Additional policy tools we didn't address

Schedule for Comments

July 7 noon	Deadline to send written comments
July 10	ECY to send agenda and meeting materials
July 16	Meeting 6

Meeting 6 – Wrap Up (July 16)

Materials provided ahead of time:

- Refined version of the draft findings.
- Refined version of possible policy tools with analysis, to include:
 - Additional policy tools not previously analyzed.
 - Potential Ecology recommendations.

Meeting agenda:

- Continued discussion of summary and potential Ecology recommendations.
- Concluding remarks.

After Meeting 6

Ecology will:

1. Consider comments and feedback.
2. With the Governor's Office, decide whether to pursue request legislation.
3. Finalize our findings and recommendations.
 - This will be posted for public comment. All comments will be appended to the final version.
 - The final version, including comments, will be provided to the legislature by December 2020.

Questions?





Thank You!

Contact: Carrie Sessions, Carrie.sessions@ecy.wa.gov, (360) 742-6582

Additional Policy Slides

P.1.2: Authorize Ecology to “close” a basin (or subbasin) to out-of-basin transfers through rulemaking.

Objective: Prevent out-of-basin transfers from those WRIsAs that are most affected	
Pro's	Con's
Basin-specific approach	Rulemaking is costly and time consuming for the agency
The rulemaking process would consider public comment	With other rulemaking priorities, it is unclear when Ecology will have resources to undertake this rulemaking in the near term
	Would need clear criteria for what would justify this rulemaking – this could be difficult to articulate and/or measure
	Even with authority to adopt rules with this standard, rulemaking requires that the benefits outweigh the costs and it's unclear whether that would be the case

P.2.1: Align disclosure laws for water rights sold separately from land with the laws for land sales. Require that water right sales (and prices) are reported to the state and made publically available.

Objective: Improve transparency	
Pro's	Con's
Improves market transparency	Administratively costly for both the state and local governments
Could make more water rights available with knowledge of prices	Might increase the price of water, including the cost of water right acquisitions

P.2.2: Make water right transfer application information more accessible to the public through administrative improvements. Post water right change applications in an integrated, publicly-accessible GIS interface. [Note, Ecology can implement this within existing authority].

Objective: Improve transparency	
Pro's	Con's
Improves access to information about water right transfers	Requires some administrative resources to implement

P.3.3: Amend chapter 90.42 RCW to establish that any water right temporarily donated into the TWRP may not be used to mitigate for new or existing uses.

Objective: Ensure that new mitigated uses will not impair existing water users or instream flows	
Pro's	Con's
This distinction would help to keep track of which rights can be used for mitigation	Precludes flexibility. While most agreed that use of donations for mitigation is often inadvisable, many people noted that in some unique circumstances, it can be appropriate
Helps to prevent the scenario whereby a permanent use is mitigated by a temporary trust right	Precludes flexibility for mitigation during droughts

P.3.4: Conduct rulemaking to define common terminology and administrative processes for trust water and water banking.
 [Note, Ecology could pursue this under existing authorities].

Objective: Clarify terminology	
Pro's	Con's
Increased clarity	Because of the unclear language in existing statute, a rule could be appealed by entities that disagree with the interpretation of the statute being clarified in rule. This creates some uncertainty going forward
Rulemaking process will allow for meaningful public process	Rulemaking is costly and time consuming for the agency
	It is unclear when Ecology will have resources to undertake this rulemaking in the near term

P.4.2: Authorize Ecology to recover the administrative costs of developing water banks.

Objective: Minimizes the public resources that are spent towards an activity that could mostly yield private gain	
Pro's	Con's
User pays; the burden is on the banker	Rulemaking may be needed to establish the cost and administrative process
Additional resources for ECY to help with permitting	

P.4.4: Amend chapter 90.42 RCW to establish that Ecology may prioritize working on water banks serving the greatest public need (such as public health and safety or creating a new water source in a basin).

Objective: Dedicate state resources to banks that will have the greatest impact	
Pro's	Con's
Allows Ecology to spend resources where the bank will yield the most benefit	Could be seen as picking "winners and losers." If Ecology deprioritizes an application, it may be years before we process it
	Unclear that new statutory authority is needed to pursue this

P.4.6: Require that draft water banking agreements are posted for public comment before finalized. [Note, Ecology could pursue this under current authorities.]

Objective: Increase transparency and opportunity for public comment	
Pro's	Con's
Increased transparency	Will lengthen the time it takes to develop water banking agreements
Give the public greater input on the terms and conditions placed on a water bank	