

Van Ness Feldman LLP

On behalf of the Washington Water Utilities Council, please see attached comment.



Washington Water Utilities Council

October 13, 2017

Ms. Jocelyn Jones
Washington State Department of Ecology
P.O. Box 47600
Olympia, WA 98504-7600

Re: Preliminary Draft Reclaimed Water Rule, Ch. 173-219 WAC (08-23-17 version)

Dear Ms. Jones:

Thank you for the opportunity for informal comment on the Department of Ecology's (Ecology) proposed reclaimed water rule, dated August 23, 2017, and please accept this comment on behalf of the Washington Water Utilities Council (WWUC). Separately, the WWUC has joined a water utility general comment and specific proposed rule revisions. The purpose of this letter is to comment specifically on one section of the proposed rule regarding water rights.

The WWUC is a 31-year-old, non-partisan organization of managers, superintendents, and directors of more than 150 water-service utilities and publicly elected officials who set policy for these utilities. Our members supply drinking water to more than 80 percent of the state's population, in accordance with federal and state regulations for the protection of public health and safety.

This comment pertains to WAC 173-219-100 entitled "Water rights protection." As proposed, the "Water rights protection" section is merely an abridged version of past attempts that appears to remove all substance regarding impairment assessment and determination proposed in prior versions of the rule. In past iterations or phases of this rulemaking, Ecology received several comments from the water utility perspective and other stakeholders regarding issues and concerns with proposed water right impairment regulations. Because the proposed rule does not appear to have addressed them, we reference and call to Ecology's attention past comments rather than restating them here.

Accordingly, the WWUC offers the following summary comments on the August 23, 2017 version of the water rights impairment regulation, proposed WAC 173-219-100.

1. *Presumption of impairment.* Prior rule proposals presumed that any reduction in wastewater discharge to a freshwater body equaled impairment of downstream water rights. This approach had viewed any wastewater discharge reduction as a water right change. Unfortunately, the

proposed regulation appears to be merely a shorter and more general restatement of prior versions that were withdrawn or rejected. For example, the details are contained in the *Reclaimed Water Facilities Manual* ("Purple Book" dated August 2017, p. 37), which still relies on the 2009 stakeholder report for the "recommended" impairment approach. Many prior comments in Ecology's file detail problems with this approach.

2. *Inconsistency of water resources and water quality requirements.* Clean Water Act discharge permits (NPDES) or clean-up plans (TMDL) that require removal or reduction of discharge to a freshwater body contrast or conflict with prior versions of the impairment regulation. Prior comments in Ecology's file call out the inconsistency between water quality regulatory directives and water resources requirements.
3. *Unique reclaimed water impairment law.* Ecology's past "impairment" approach relied on the unique reclaimed water law, RCW 90.46.130, not on water rights law. The WWUC incorporates by reference its prior comment letter (dated September 21, 2015) urging Ecology to rely solely on RCW 90.46.130 as legal authority for its impairment regulation.
4. *Ecology stretches to create its role.* In WAC 173-219-100, Ecology proposes to make impairment determinations and determine compensation or mitigation to downstream water rights holders. Unlike other sections of the Reclaimed Water Act, there is no mention of Ecology or its role in RCW 90.46.130. Also, RCW 90.46.130 provides that any "compensation or mitigation for such impairment is agreed to by the holder of the affected water right." As a result, Ecology goes beyond the plain wording of the statute to craft a decisional process designed to improve the functioning of the reclaimed water permitting process. This approach is inconsistent with Ecology's strict interpretation of its own authority to make rules to implement the statute.

Thank you for the opportunity to comment on this important rulemaking.

Sincerely,



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