

Van Ness Feldman LLP

On behalf of the Washington Water Utilities Council, Cascade Water Alliance, The Washington Association of Sewer and Water Districts, the Washington Public Utility Districts Association, and Seattle Public Utilities, please see attached comments.



AWWA- Pacific Northwest Section
Washington Water Utilities Council



WASHINGTON PUBLIC UTILITY DISTRICTS ASSOCIATION
WPU DA
YOUR connection



**Seattle
Public
Utilities**

October 13, 2017

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

Re: Water Utility Comments on Proposed Reclaimed Water Rule

Dear Ms. Jones:

Thank you for the opportunity to comment on the Department of Ecology's (Ecology) proposed reclaimed water rule, dated August 23, 2017. Please accept this comment on behalf of the Washington Water Utilities Council, Washington Association of Sewer and Water Districts, Washington Public Utility Districts Association, Cascade Water Alliance, and Seattle Public Utilities.

Please find enclosed a General Comment on the proposed rule supported by all of the above water utilities and organizations. The last page of the General Comment sets out a single proposed new section that, if included in the final rule, would suffice to address our comments for this rulemaking.

The Washington Water Utilities Council 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. WWUC 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.

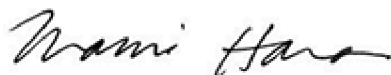
The Washington Association of Sewer and Water Districts represent the interest of 182 special purpose districts that provide essential water and sewer services throughout the State of Washington. We provide 22% of the state's population with clean water and 21% of the state's population with sewer transmission and/or treatment services.

The Washington Public Utility Districts Association represents 27 nonprofit, community-owned utilities that provide electricity, water and wastewater services, and wholesale telecommunications to more than 1.7 million people in Washington. Seventeen of these PUDs provide water services to more than 113,000 customers and own or operate more than 400 water systems.

Cascade Water Alliance is a municipal corporation that provides safe, clean and reliable drinking water to its seven members, the cities of Bellevue, Kirkland, Redmond, Issaquah and Tukwila, the Sammamish Plateau Water and the Skyway Water and Sewer District. Cascade, which was formed in 1999, today serves more than 380,000 residents and 20,000 businesses.

Seattle Public Utilities provides mountain drinking water to 1.4 million customers in the Seattle metropolitan area. In addition, SPU provides sewer, drainage and solid waste services that protect public health, maintain infrastructure and protect, conserve and enhance the region's environmental resources.

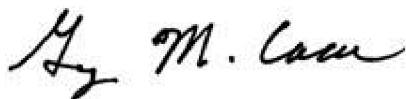
We support reclaimed water as a key, coordinated element of our water future. Water utilities must have ongoing, substantive input and involvement in decisions in order to achieve a truly comprehensive regulatory program. The rule needs to address how to manage the development and use of reclaimed water in the larger public interest, for customers, public health and the environment.



Mami Hara
General Manager/CEO
Seattle Public Utilities



Chuck Clarke
CEO
Cascade Water Alliance



George Caan
Executive Director
Washington PUD Association



Joan M. Kersnar
Chair
Washington Water Utilities Council



James Kuntz
Executive Director
Washington Association of Sewer & Water Districts

Enclosed Document:

General Comment from Water Utility Viewpoint:
Proposed Reclaimed Water Rule, Ch. 173-219 WAC (08-23-17 version)

General Comment from Water Utility Viewpoint:
Proposed Reclaimed Water Rule, Ch. 173-219 WAC (08-23-17 version)

This comment from the water utility viewpoint on the Department of Ecology’s proposed reclaimed water rule, dated August 23, 2017 (the “Proposed Rule”), is joined by the utilities and organizations identified in the cover letter. Appended to this comment is a proposed new section to the Proposed Rule that provides a simple, rational, but important solution to the issues we have raised.

In the proposed rule, we are concerned that the Department of Ecology (“Ecology”) is disregarding legislative intent in significant ways. The legislature’s direction to Ecology and the Department of Health (“Health” or “DOH”) calls for the departments to “coordinate efforts” on reclaimed water. Unfortunately, this is not evident in the proposed rule. Ecology is proposing a rule that covers only a portion of the subject matter and leaves out significant areas that should be of interest to DOH.¹ Ecology’s Proposed Rule does not yet address adverse impacts of reclaimed water on water utilities and other unintended but potentially significant consequences of the Reclaimed Water Act, chapter 90.46 RCW. Although Ecology may have other solutions than those proposed by water utilities, it is imperative for state agencies to directly address adverse impacts on drinking water sources, supply planning, utility affordability, and ratepayers. In sum, the proposed rule is too narrowly framed, overlooking important broader public policy issues and leaving water utilities to manage the downstream consequences to the detriment of customers. In the end, this serves neither water nor reclaimed water providers and customers well, leaving key issues, processes and public health concerns unaddressed.

Preliminary Draft Round of Rulemaking

As part of this rulemaking process, water utilities submitted detailed comments and specific revisions to the text of the preliminary draft rule, dated May 3, 2017. Cascade Water Alliance and Washington Water Utilities Council submitted detailed comments and revisions proposing a service area agreement modeled after the system in the Public Water System Coordination Act of 1977, chapter 70.116 RCW, for water utility service areas. The Washington Association of Water and Sewer Districts also submitted detailed comments and revisions proposing recognition of and local input about wellhead protection areas for groundwater drinking water sources. These May 2017 proposed rule revisions from water utilities are incorporated by reference in this comment; Ecology could add these to the Proposed Rule with minor editing.

Ecology did not incorporate the water utility sector’s preliminary comments, expressing concern it could be viewed as seeking to “prohibit” and “reject” use of reclaimed water.² That is not the intent of the utility’s proposed changes to the rule. The Proposed Rule as it is currently

¹ In a revision to the preliminary draft, the Proposed Rule’s purpose is, more narrowly, to establish “a comprehensive regulatory framework.” WAC 173-219-020 (proposed). Symbolic of Ecology’s uncoordinated rulemaking approach is the Proposed Rule’s use of the defined term “source water” to mean raw or treated sewage wastewater. DOH regulations already use the defined term “source water” to mean untreated drinking water. WAC 246-290-010 (214).

² *Preliminary Regulatory Analyses*, Chapter 173-219 WAC (Reclaimed Water), Dep’t of Ecology Publication No. 17-10-022 (August 2017), p. 38.

written too narrowly reflects Ecology and DOH’s mission under the reclaimed water statute. Thus far, Ecology has failed to address the important local public water system role in protecting designated wellhead protection areas on grounds that it “does not meet the goals and objectives of the statute of encouraging the production and use of reclaimed water.” Ecology needs to protect public health by reconciling this proposed rule with aquifer protection rules— rather than overriding them for reclaimed water sales and service.

Water utilities are not proposing that a reclaimed water generator needs to become a water utility. Ecology previously rejected the service area proposal on grounds it is “contrary to the purpose and intent of the statute”, which Ecology appears to have interpreted as providing reclaimed water generators with unfettered rights to sell reclaimed water regardless of third-party impacts. Ecology cites to *Cedar River Water and Sewer District v. King County*, 178 Wn.2d 763 (2013), for the point that generators need not become water utilities. This is not relevant to the service area issue that needs to be addressed. At issue in *Cedar River* was whether certain reclaimed water expenditures were properly funded with wastewater utility revenues. No such issue exists here. Nor was it proposed that the Public Water System Coordination Act provides technically applicable legal authority. Instead, our preliminary draft proposal used the Coordination Act as a policy template for fulfilling legislative intent in the Reclaimed Water Act, including through coordination with DOH rules. Finally, Ecology cannot rely on *Cedar River* to claim it lacks authority to regulate reclaimed water sales and service.³

If Ecology does not include language as proposed here by water utilities such as what was done with the May 2017 comments, then Ecology’s Proposed Rule will fail to address adverse impacts to drinking water. This is inconsistent with legislative intent and sound public policy. If Ecology does not concur with the specific language of our various proposals to protect ratepayers and drinking water sources, then Ecology (and Health) must create its own rule provisions to address these concerns.

Lack of Water Utility Representation

When Ecology resumed work on the reclaimed water rule, we understand the rule advisory committee (RAC) was reconvened without confirming that its membership was inclusive of all stakeholders. According to the legislation, the “advisory committee shall be composed of a broad range of interested individuals representing the various stakeholders that utilize or are **potentially impacted** by the use of reclaimed water.”⁴ We are concerned that the RAC does not appear to have a representative of a municipal water supplier or Group A water system entity that does not have a reclaimed water project. The state agencies need to address the context where the reclaimed water generator and the water utility are different entities with valid and differing viewpoints and responsibilities. Reclaimed water is a competing product in this context, and the state agencies have yet to consider governance or utility considerations in this rulemaking. The RAC has strong membership on technical subjects and generation projects, but the RAC lacks the perspective of key stakeholders that will be potentially impacted.

³ We note that, while Ecology has expressed that it lacks authority to regulate sales of reclaimed water, the Proposed Rule would require Ecology review and approval of all “use agreements.” WAC 173-219-290 (proposed) (providing for required content of a use agreement, which omits any requirements or a reference to a DOH rule).

⁴ RCW 90.46.050 (emphasis added).

Policy of Holistic Water Management

Reclaimed water rules should advance comprehensive or holistic water management and should not be organized around traditional agency program boundaries or categories.⁵ The legislature intended the agencies to work together to adopt a comprehensive and rational regulatory program. The Reclaimed Water Act gives shared jurisdiction to Ecology and Health and directed the agencies “to coordinate efforts” to develop the program.⁶ The two agencies’ rules “must address all aspects of reclaimed water use.”⁷ In the purpose section, Ecology concedes that its Proposed Rule falls short by striking the word “comprehensive” from the phrase “regulatory framework” in stating the objective of the rule. For the regulatory framework to be successful, it must be comprehensive, or risk creating more adverse impacts.

Agency Coordination

The two agencies’ rules regarding reclaimed water must be considered *together* when assessing the adequacy of Ecology’s proposed rule. We note that Health recently updated its Group A water system rule without proposing or adopting any new provisions regarding reclaimed water distribution or use. We understand that Health’s Group A rule speaks to reclaimed water only by continuing the requirement that water system plans evaluate “opportunities for the use of reclaimed water, where they exist, as defined in RCW 90.46.120.”⁸ The Group A rule does not address other provisions of RCW 90.46.120 regarding planning coordination. In addition, Health’s Group A water system rule is silent as to how reclaimed water fits into the service area regulatory framework to coordinate and resolve purveyor and customer conflicts. Thus, a water system plan must evaluate opportunities for reclaimed water, but no regulations guide the coordination needed with water suppliers that enable the best outcomes for customers as well as the resource.

Similarly, the Proposed Rule narrowly approaches reclaimed water from the perspective of the reclaimed water generator or the agencies themselves. The Proposed Rule excludes many relevant subjects and issues important to water utilities, including service area coordination, planning coordination for resources and infrastructure, protection of groundwater sources, water utility financial integrity, efficient infrastructure planning and investment, avoidance of stranded assets, revenue and ratepayer impacts, and use of reclaimed water. Because Health has not covered these subjects either, the state agencies’ reclaimed water regulations remain incomplete and deficient. Reclaimed water generator(s) can assert unfettered legal authority to sell and supply reclaimed water for use inside any other entity’s service territory, without planning coordination or interlocal agreement or assessment of impacts. In this context, reclaimed water is now a *product* in the water business, and therefore it is necessary to include reclaimed water in water service and provision processes, as appropriate for the new and unique commodity.

⁵ The “One Water” approach seeks a unified policy approach to wastewater, stormwater, and water supply (*i.e.*, drinking water, municipal water).

⁶ RCW 90.46.005.

⁷ RCW 90.46.015.

⁸ WAC 246-290-100(4)(d)(vii) (applies to systems serving one thousand or more total connections). This water system planning requirement rebuts Ecology’s assertion that a water utility could “prohibit” reclaimed water use.

Legislative Intent

The legislature intended for reclaimed water use to be coordinated and integrated into water system plans and regional water planning. In the Reclaimed Water Act, the legislature found that reclaimed water should be “a source of supply integrated into state, regional, and local strategies to respond to population growth⁹ and global warming.” The legislature further found as follows:

“Use of reclaimed water constitutes the development of **new basic water supplies** needed for future generations **and local and regional water management planning should consider coordination of infrastructure, development, storage, water reclamation and reuse**, and source exchange as strategies to meet water demands associated with population growth and impacts of global warming.”¹⁰

In the most recent amendments to the Reclaimed Water Act, the legislature included a statement of intent about addressing planning and financial “barriers” to the use of reclaimed water and specifically about reclaimed water use to advance water supply objectives and to be consistent with water plans.

“It is therefore the intent of the legislature to:

- (a) Effectuate and reinvigorate the original intent behind the reclaimed water act to expand the use of reclaimed water for nonpotable uses throughout the state;
- (b) Restate and emphasize the use of reclaimed water as a matter of water resource management policy;
- (c) Address current barriers to the use of reclaimed water, where changes in state law will resolve such issues;
- (d) Develop information from the state agencies responsible for promoting the use of reclaimed water and address regulatory, **financial, planning**, and other barriers to the expanded use of reclaimed water, relying on state agency expertise and experience with reclaimed water;
- (e) **Facilitate achieving state, regional, and local objectives through use of reclaimed water for water supply purposes in high priority areas of the state, and in regional and local watershed and water planning;**
- (f) Provide planning tools to **local governments** to incorporate reclaimed water and related water conservation into land use plans, **consistent with water planning;**
- (g) Expand the scope of work of the advisory committee established under chapter 279, Laws of 2006 to identify other reclaimed water issues that should be addressed; and

⁹ In addition, municipalities planning under the Growth Management Act must plan for and fund public facilities, which include domestic water systems and storm and sanitary sewer systems. RCW 36.70A.030(12), 36.70A.020(12). Reclaimed water needs to be better integrated with GMA planning, especially in contexts where the reclaimed water generator and the water supplier are different entities.

¹⁰ RCW 90.46.005 (emphasis added).

(h) Provide initial funding, and evaluate options for providing additional direct state funding, for reclaimed water projects.”¹¹

If Ecology and Health continue to refuse to “address regulatory, financial, planning” issues regarding drinking water and water utility service, then those issues will increasingly become a “barrier” to expanding reclaimed water usage.

Successful Water Utility Management and Protection of Ratepayers

Water utilities need to be part of the decision-making process to manage their assets and future investments and to protect the integrity of rate structures. Although the rate impact is not significant at present given the small number of current reclaimed water customers, ratepayer impacts will become more pronounced going forward as reclaimed water distribution and use expand.¹² The type of customer who is a reclaimed water marketing target is one with substantial irrigation needs in the summer. Over the long run, it may be in the public interest to shift this sort of customer use to reclaimed water, but it needs to be planned and coordinated with utilities who are the current water service providers to avoid duplicative investments and maintain long-term affordability and rate stability for customers. By seeking a meaningful voice in the process, water utilities are not seeking to prohibit or reject the use of reclaimed water. Rather, we are seeking to assure reclaimed water is integrated into water planning and provision in a way that best serves our customers and public health.

Protection of Drinking Water Sources

Water utilities need to be part of the decision-making process related to reclaimed water use that could affect drinking water sources, especially groundwater sources. The Proposed Rule uses an arbitrary set-back distance on the land surface with the intent to protect groundwater sources from reclaimed water facilities and end uses.¹³

The Proposed Rule should use a hydrologically-based approach consistent with the wellhead protection program. According to the Department of Health:

Groundwater is the **source of drinking water for about 65 percent of Washington citizens**. In some counties, dependency on groundwater approaches 100 percent. Groundwater used for drinking water supplies is often vulnerable to contamination. Most public water supply wells are in or around the communities using them as a drinking water source. Therefore, public water systems must take preventive measures to **minimize the possibility that land uses will contaminate the groundwater** they use.¹⁴

¹¹ Laws of 2007 c 445 §1 (uncodified legislative findings) (emphasis added); *see* RCW 90.46.005.

¹² Typically, these water ratepayers are also sewer ratepayers, such that inefficient infrastructure investments or uncoordinated system development can adversely affect same ratepayer twice; the state agencies have yet to acknowledge this “cost equity” issue in the reclaimed water regulatory program.

¹³ WAC 173-219-210.

¹⁴ Wellhead Protection Program Guidance Document, at <http://www.doh.wa.gov/portals/1/Documents/Pubs/331-018.pdf>. (emphasis added).

DOH developed the Wellhead Protection Program, adopted in regulation in 1993 in WAC 246-290-135, to protect this vital resource. DOH requires purveyors using groundwater to develop and implement Wellhead Protection Programs. The Wellhead Protection Program recognizes and protects against the risks that contaminants will be released into the environment and flow into and pollute aquifers used for drinking water. Currently, there are numerous groundwater supplies in the State that do not require treatment, or even disinfection. Given the chlorination required for reclaimed water, any evidence of chlorine showing up in the water supply would inevitably lead to a requirement to provide continuous disinfection for a source previously served without the need for chlorination. This adds to the cost of serving customers and impacts the aesthetics of existing supplies, such as taste and odor, that are also important to protect.

It is possible to reconcile reclaimed water use with wellhead protection. In the Proposed Rule, however, Ecology does not “coordinate efforts” with DOH’s rule and public water systems that have designated wellhead protection areas in their service areas. Facilities and use sites for reclaimed water should not be allowed within a reasonably protective distance (delineated by the 5-year (or equivalent) capture area of the well) from a water supply well, unless there is a written agreement with the public water system owner/operator of the well. The protective area should be at least the Wellhead Protection Area designated under WAC 246-290-135. As a practical matter, regulating reclaimed water proximity to underground drinking water sources through an agreement is unlikely to reduce reclaimed water sales.

Further, we note that Ecology proposes that reclaimed water generally not be allowed for use to supplement Category I and II wetlands. Drinking water deserves at least the same level of protection, if not greater, as that proposed for wetlands.

The Reclaimed Water OCPI Underscores the Need for Interlocal Agreement

The Proposed Rule recognizes that reclaimed water uses may degrade groundwater quality. The *Preliminary Regulatory Analyses* document explains that where the associated treatment standards are not adequate to meet groundwater quality standards, then degradation of groundwater quality may be justified to avoid costs based on overriding considerations of the public interest (OCPI).

“Ecology believes codifying the Overriding Considerations of Public Interest (OCPI) for reclaimed water purposes will benefit reclaimed water purveyors by mitigating the costs of compliance overall with groundwater quality standards.”¹⁵

The Proposed Rule would pre-position all reclaimed water sales and uses to take advantage of OCPI. The Proposed Rule directs such “reclaimed water purveyors” to make the demonstration set forth in the groundwater quality standards guidance document, which consists of a simple balancing test:

¹⁵ *Preliminary Regulatory Analyses*, p. 22, 37 (emphasis added).

“Overriding public interest must be demonstrated through one of the following ways. There must be:

- An alleviation of a public health concern;
- A net improvement to the environment; or
- Socioeconomic benefits to the community.”¹⁶

With respect to review under the State Environmental Policy Act (SEPA), Ecology’s use of a SEPA determination of non-significance (DNS) means the Proposed Rule could be adopted without analysis of the impacts on groundwater quality, drinking water supply, or the built environment of drinking water infrastructure.¹⁷ We note that the SEPA checklist and DNS prepared for the rule do not even mention the OCPI “codification” or underground drinking water sources.¹⁸ When combined with the DNS, Ecology’s pre-authorization of OCPI has the effect of making reclaimed water decisions more remote from a local process. The Proposed Rule would set in motion a process going forward that makes an end run around local input and water utility participation on decisions that directly affect their customers and groundwater sources.

These short-cuts have the effect of excluding water utilities and necessitate a corrective measure such as the interlocal agreement approach we propose. The proposed new section would add a modest level of balance to the reclaimed water rule and provide a more workable process for local entities to reach a fair and equitable agreement. If Ecology proceeds with the Proposed Rule as currently drafted, then the lack of a comprehensive policy will result in avoidable “barriers” to reclaimed water use. The lack of a balanced decision-making process will compel water utilities to look outside the Ecology process for a rational policy outcome.

¹⁶ *Implementation Guidance for the Groundwater Quality Standards*, Publication no. 90-02 (rev. 2005), p. 18.

¹⁷ SEPA Determination of Non-Significance, ECY Water Quality Program lead agency (August 23, 2017).

¹⁸ See SEPA Checklist Part D (non-project action statement silent on OCPI).

WAC 173-219-095 NEW SECTION
Interlocal Agreement with Affected Water Utilities.

- (1.) When an operator, a distributor, or a permittee proposes to supply reclaimed water for municipal use at one or more location(s) within the service area of, or that may impact, a Group A public water system, the operator or distributor must enter into a written agreement, consistent with chapter 39.34 RCW, with such system as to a) reclaimed water supply within the water service area and b) groundwater source protection areas of the Group A public water system. If a non-governmental entity owns the Group A public water system, then the written agreement should in substance address the subjects to be covered in an interlocal agreement. “Service area” has the same meaning as defined in WAC 246-290-010 (232).
- (2.) This section does not apply to the use of reclaimed water for stream augmentation, wetlands or other environmental purposes of use unless the use it is within a wellhead protection area, as identified under WAC 246-290-135(3), or is hydraulically connected to a groundwater drinking water source that is subject to a wellhead protection area.
- (3.) An affected Group A public water system, in its sole discretion, may waive the interlocal agreement requirement in WAC 173-219-095(1) for a period of time not to exceed ten (10) years.
- (4.) If no interlocal agreement has been established, or no waiver granted, after a conscientious effort by the operator, distributor, or permittee within one year of commencing consultation with a public water system, then any such party may initiate mediation, consistent with RCW 7.07. The operator, distributor, or permittee and the Group A public water system will make a good faith effort to resolve the dispute by mediation for at least 90 days.
- (5.) If no interlocal agreement has been established following the mediation and the dispute has not been resolved, then the operator, distributor, permittee, or Group A public water system may petition the secretary of the department of health, or his or her designee, who will issue a decision.