



Joseph G. Carroll  
Of Counsel

Admitted in WA & ID  
JCarroll@whc-attorneys.com

September 29, 2023

Austin Melcher  
Washington Department of Ecology  
Water Resources Program  
P.O. Box 47600  
Olympia, WA 98504-7600

*Via USPS*

RE: Comment on Draft Policy 2030

Dear Mr. Melcher:

While we represent several irrigation districts as well as other potable water purveyors including for and not for profit corporations in Spokane County, this comment is made in general and not in the representation of any particular client or clients.

We concur with the comments that are made by the Washington Water Utilities Council. We present this comment to make a more detailed evaluation of RCW 90.03.015 (4) and to suggest to Ecology that Policy 2030 should not be used to create a definition for “governmental entities”, especially when it results in discrimination against urban irrigation districts serving potable water, which operate under title RCW 87.03, and corporations serving potable water, all of whom are clearly municipal water purveyors under RCW 90.03.015(a), and serve water the same as water districts, PUDs, counties and cities.

RCW 90.03.015 (4)(b) states: “Municipal water supply purposes’ means a beneficial use of water: ... (b) for governmental or governmental proprietary purposes by a city, town, public utility district, county, sewer district, or water district.” Ecology interprets that as defining “governmental entities” exclusively as cities, towns, public utility districts, counties, sewer districts, or water districts and to the exclusion of irrigation districts and port districts.

The Ecology draft policy reads: “RCW 90.03.015 (4) (b) states that the beneficial use of water supplied for governmental or governmental proprietary purposes by certain types of government entities is considered to be for municipal water supply purposes.” (Emphasis added) Nowhere else in the Revised Code of Washington is the term “governmental proprietary purposes” used. In other words, Ecology jumps to the conclusion that the six listed entities are the only exclusive, permissible or possible “governmental entities.” This incorrect jump by Ecology results in discrimination against irrigation districts and corporations distributing potable water that otherwise qualify for municipal water supply purposes under RCW 90.03.015(4)(a) by serving fifteen or more residences or providing residential use of water for a nonresidential population that is, on average, at least twenty-five people for at least sixty days.

As is clear on its face, RCW 90.03.015 defines “Department”, “Director”, “Municipal water supplier”, “Municipal water supply purposes”, and “Person”. RCW 90.03.015 (1), (2), (3), (4), and (5). These terms are put in quotation marks. The terms “governmental”, “governmental proprietary purposes” and “governmental entity” are not placed in quotation marks within the statute and are not defined.

The last sentence in RCW 90.03.015(4) reads:

If a governmental entity holds a water right that is for the purposes listed in (a), (b), or (c) of this subsection, its use of water or its delivery of water for any other beneficial use generally associated with the use of water within a municipality is also for "municipal water supply purposes," including, but not limited to, beneficial use for commercial, industrial, irrigation of parks and open spaces, institutional, landscaping, fire flow, water system maintenance and repair, or related purposes. (Emphasis added)

If in fact RCW 90.03.015(4)(b) was defining “governmental” or “governmental proprietary purposes” the definition would be circular since it would describe that a governmental entity is only a governmental entity if it holds a water right for a governmental entity.

There are cases prior to the municipal water law in which the governmental nature of irrigation districts has been upheld. For example, in *Outlook Irr. Dist. V Fels*, 176 Wash. 211, 219 (1934) the Court stated:

What we have said with respect to the status of the irrigation district as a governmental agency disposes of one of the minor contentions of appellants; namely, that chapter 194, p. 928, Laws of 1933, contravenes section 12, article 1, of the state Constitution, which provides: ‘No law shall be passed granting to any citizen, class of citizens, or corporation, other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations.’

The act does not contravene this section, because the irrigation district, in proceeding under it, acts in a governmental capacity, and not as an individual.

In post municipal water law cases, irrigation districts have been found to be governmental entities. In *Carlisle v Columbia Irr. Dist.* 168 Wn.2d 555, 560 (2010) the Court stated “Irrigation districts are local government entities created and regulated according to the legislature’s design.”

Most importantly, one post municipal water law case which analyzed RCW 90.03.015 extensively, *Crown West Realty, LLC v. Pollution Control Hearings Board*, 7 Wash. App.2d 710, 752-753, (2019) found that an irrigation district, Consolidated Irrigation District No. 19, was a government entity.

A careful look at the six entities listed in RCW 90.03.015(4)(b) reveals that some are more governmental than others. While all have the power of eminent domain, cities, towns and counties have police power and land use jurisdiction, which the special purpose districts, water-sewer districts and public utility districts, do not. Yet typically all municipal water purveyors have a very strong governmental public

The Washington State Department of Ecology  
Letter  
9/29/2023  
Page 3 of 4

health function under the safe drinking water act and the Department of Health regulations, in addition to other public services such as ensuring adequate fire flow.

The description in RCW 90.03.015(5) is not much help in ferreting out RCW 90.03.015(4) since it is merely defining "person".

By way of example, as to how the interpretation by Ecology of the six entities listed as being the sole governmental entities does not follow reality, the ten irrigation districts in Spokane County have all been urbanized, and while they function under a different section of the RCW's than do water districts and cities, as far as the delivery of water for all practical purposes they deliver water the same as water districts or the City of Spokane. Of the public water purveyors serving the City of Spokane Valley, which has a population of over 105,000, six are irrigation districts, one is a private corporation, and three are water districts.

The draft Policy 2030 groups urbanized irrigation districts serving potable water as well as other municipal water purveyors such as corporations as second-class entities and leaves their members and users to be deemed second-class citizens.

The only logical, forward-looking approach is for Ecology to acknowledge that it needs to look at the present function of the entity involved, and that RCW 90.03.015(4)(b) does not say it is exclusive to the six entities listed as "governmental" or "governmental proprietary purposes". Public health and public services are becoming more and more important, especially as urbanization continues and the urban density increases. A present example of this is the need for monitoring and filtering out PFAS chemicals.

Ecology should also go beyond the policy of stating that individual cases will be handled on their own facts to avoid the "rule by men vs. rule by law" conundrum and acknowledge the important public health benefits of all municipal water purveyors.

In *Crown West Realty v Pollution Control Hearings Board*, supra, at 736-737 the Court found that the appropriate time to determine the municipal status was at the time of application for a change, not at the creation of the water right. It is respectfully submitted that Policy 2030 should echo this approach, looking forward and not backward, in its treatment of all present municipal water purveyors.

Sincerely,



Joseph G. Carroll  
Aaron D. Dunham

JGC:jf

CC: Ria Berns, Department of Ecology  
Dave Christensen, Department of Ecology

The Washington State Department of Ecology  
Letter  
9/29/2023  
Page 4 of 4

Holly Myers, Department of Health  
Carrie Sessions, Governor's Policy Office  
Laura Watson, Department of Ecology  
Jaime Short, Department of Ecology