



COMMISSIONERS  
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GENERAL MANAGER  
RANDALL M. BLACK

September 27, 2023

Dear Washington State Department of Ecology:

Lakewood Water District (LWD) is providing this comment letter on the Department of Ecology's (Ecology) Draft POL-2030 Update -- Municipal Water Law Interpretative and Policy Statement (Draft Policy). LWD also generally concurs with the comment letters provided by the Washington Water Utilities Council (WWUC) and the Regional Water Cooperative of Pierce County (RWPCPC), of which LWD is a member. We appreciate the opportunity to review the Draft Policy and urge Ecology to make the changes suggested by LWD, WWUC, and RWPCPC in order to better provide the certainty and flexibility for municipal water rights that the Legislature intended in its adoption of the Municipal Water Law of 2003 (MWL).

LWD has a growing retail service area south of Tacoma and a wholesale service area encompassing most of Pierce County that is rapidly running short of water. We are also experiencing some of the worst problems in the state with groundwater contamination from PFAs and PFOs due to our location adjacent to the Joint Base Lewis/McChord. Groundwater contamination from PFAs and PFOs and new state and federal drinking water regulations are resulting in the need to drill new wells and acquire other municipal purpose water rights in order to protect the health of our retail and wholesale customers and to continue providing for the security of our public water system and planned growth throughout Pierce County. To be consistent with state statutes and policy, LWD relies upon Ecology's management of water resources, including the interpretation and application of the MWL to LWD's extensive water rights portfolio.

We believe there is an unintended consequence with Ecology's draft 2030 Policy update that will result in increased costs for LWD to mitigate the extensive PFAS contamination in its supply wells and will lead to higher water rates. These higher water rates reduce housing affordability. Housing affordability is a challenging problem that Gov. Jay Inslee and the WA Legislature focused heavily on during the most recent legislative session; the Governor signed a series of bills that address housing affordability issues. Ecology's draft 2030 MWL Policy update will cause an overall increase in water rates, which is in contrast to Gov. Inslee's and WA State Legislator's efforts to make housing affordable.

In adopting the MWL, the Legislature intended to provide certainty and flexibility to municipal water rights and to clarify municipal water rights. Instead of implementing the Legislature's intent, the Draft Policy has created several new impediments to the certainty and flexibility of municipal water rights, many of which appear to lack statutory authority or case law confirmation of Ecology's interpretations. This in turn endangers LWD's mission and increases the risk of delays and costs that will be borne by the citizens of Pierce County. It will also jeopardize the development of housing and other essential public services to this rapidly growing population.

To avoid taking a step backward from Ecology's last iteration of POL-2030 and an increase in litigation relating to Ecology's authority to implement the Draft Policy, Ecology should make the following corrections before final issuance.

1. Original Intent. The Draft Policy's formulation and application of "original intent" exceeds Ecology's delegated authority from the Legislature. While the Draft Policy references "original intent" seven times, this term does not appear in the Water Code or the MWL. Ecology failed to cite a legal basis for its claimed authority to use "original intent" as (1) a litmus test for the "good standing" of MWSP water rights, (2) for the analysis of the scope and validity of MWSP water rights, (3) as a test for adding a new well that requires a change application, or (4) for case-by-case determinations about MWSP water rights proposed for use as mitigation. The Legislature did not include "original intent" as a statutory requirement for water rights changes or trust water rights. See RCW 90.03.570, RCW 90.03.380, RCW 90.42.040, and RCW 90.44.100. In addition, the purpose and intent of the MWL overrides Ecology's concept of "original intent" as a potential limiting factor of MWSP water rights. For example, RCW 90.03.260 provides that for a municipal water supplier that has an approved water system plan, the population figures in the application or any subsequent water right document are not an attribute limiting exercise of the water right. RCW 90.03.386 automatically changes a MWSP place of use to coincide with the service area in an approved water system plan. Both provisions of the MWL clearly demonstrate the Legislature's intent to override the general concept of "original intent" as a limiting factor for MWSP water rights and replace it with recognition of the growing communities' doctrine. Finally, we note that the Court of Appeal's recent decision in Burbank Irrigation District #4 v. Ecology corrects Ecology's interpretation and proposed application of "original intent." Thus, this term should be clarified and limited in its application consistent with the MWL purpose and intent, the Burbank decision, and the WWUC comment letter, which provides more detail and background on this issue.
2. Good Standing, Relinquishment Protection, and Active Compliance. Section 4 of the Draft Policy mistakenly creates the impression that Ecology has ad hoc authority to determine the "good standing" and relinquishment status of MWSP water rights outside of the strict enumeration of exceptions in RCW 90.03.330(2). RCW 90.03.330(3) is self-executing regarding the "good standing" qualification of MWSP water rights issued under the "pumps and pipes" certification method. It does not provide or imply any other authority to Ecology to question the good standing or relinquishment status of such water rights. This has been a contentious issue with Ecology for years, and the courts have not approved Ecology's "active compliance" interpretation or its equivalent in Section 4 of the Draft Policy. We agree with WWUC's comment letter that POL-1120 and the Cornelius decision expressly recognize that the "good standing" provision in RCW 90.03.330(3) necessarily limits the scope of Ecology's tentative determination authority, and that the Legislature did not give Ecology authority to conduct a good standing "assessment" in its place. Please correct this problem in your final policy language by asserting that certificates for MWSP water rights that qualify for "good standing" under RCW 90.03.330(3) remain so and qualify for the relinquishment exemption unless and until one of the exceptions in

subsection .330(2) is invoked, and by eliminating the requirement to put MWSP water rights to beneficial use once every five years to remain in good standing.

3. Public Interest and Mitigation. The Draft Policy is an inappropriate tool for Ecology to impose a new standard for evaluating the use of MWSP water rights for mitigation or for acceptance as permanent trust water rights. LWD is aware of Ecology's change application decision relating to U.S. Golden Eagle Farms, in which Ecology used the "public interest" test to deny the use of a perfected MWSP water right as mitigation despite Ecology's finding that this mitigation prevented impairment. That decision was not upheld by the PCHB or the appeals courts, has no precedential value, and does not convey any authority to Ecology for this new use of a public interest test. Ecology has also failed to identify the public interest factors involved in such a test. If this particular use of the public interest prong of the 4-part test remains in the Draft Policy as a precondition for acceptance of permanent trust water rights or the use of perfected MWSP water rights for mitigation, it would violate the APA rule-making requirement and spurn litigation over Ecology's legal authority rather than adding certainty and predictability to MWSP water rights. It would also discourage the use of the Trust Water Program by municipal water purveyors as a means of better managing and protecting water resources in partnership with Treaty Tribes and Washington Department of Fish and Wildlife.
4. Consolidation of Municipal Water Systems. LWD appreciates Ecology's acknowledgment in Section 7 of the Draft Policy that consolidations which do not require change applications do not involve Ecology determinations of the extent and validity of water rights. However, we are concerned with the general statement in Section 7 that filing a water right change application under RCW 90.03.380 or 90.44.100 is required if a change or additional point of diversion and/or withdrawal is needed. Given the severity of PFAs and PFOs contamination, the high cost and uncertainty of treatment, and the impact of "forever pollutants" on public health, we would appreciate it if Ecology included examples of statutory exceptions to the change application requirements and abbreviated procedures relating to public health emergencies and water system consolidations resulting from failed water systems. See, e.g., RCW 90.03.390.
5. The Need for Increased Flexibility and Use of Existing MWSP Water Rights. The problems identified above and in the WWUC and RWCPD comment letters make it harder for municipal suppliers to use existing MWSP water rights to serve growing communities and respond to climate change and environmental justice problems. This, in turn, forces municipal suppliers to file more water rights change applications and new applications despite the near impossibility of meeting the current and unsustainable "perfect mitigation" standard for impacts on instream flows due to the Foster decision. Thus, Ecology's Draft Policy is exerting more control over the use of municipal water rights and the development of growing communities than intended by the Legislature. Ecology can assist municipal water suppliers like LWD to comply with their public health and growth management obligations by eliminating the identified roadblocks and uncertainties and revising the Draft Policy to honor the legislative intent and purpose to provide certainty and flexibility to municipal water rights.

Thank you again for this opportunity to comment on the Draft Policy.

Sincerely,

A handwritten signature in black ink that reads "Randall M. Black". The signature is written in a cursive style with a large, stylized initial "R".

Randall M. Black  
General Manager

Cc:

Commissioners John S. Korsmo, Jr., Gary J. Barton, and Gregory J. Rediske