

September 27, 2023

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



RE: Public Utility District No. 1 of Thurston County
Comments on Proposed Revisions to Municipal Water Policy 2030

Dear Mr. Melcher:

On behalf of the Public Utility District No. 1 of Thurston County (“Thurston PUD”), this letter provides comments on the Department of Ecology’s (“Ecology”) Public Review Draft of Policy 2030 “Municipal Water Law Interpretative and Policy Statement” (June 2023) (“Draft POL-2030 Update” or the “Draft Policy”). Thurston PUD appreciates the opportunity to provide comments. As a starting premise, Thurston PUD joins in and fully concurs with the comments being separately submitted by the Washington Public Utility Districts Association (“WPUDA”) and the Washington Water Utility Council (“WWUC”). Thurston PUD worked closely with both WPUDA and WWUC in the development of their respective comments and appreciates Ecology’s careful review and consideration of the same.

Thurston PUD is a public utility district organized under Title 54 RCW. Thurston PUD owns and operates 279 public water systems. These public water systems range in size from over 1,775 connections serving populations of more than 4,200 persons to small systems serving as few as two connections. Thurston PUD operates each of these systems as public water systems under an Umbrella Part A Water System Plan with the State of Washington Department of Health (“DOH”). To avoid repetition, Thurston PUD comments on only a few specific components of the Draft Policy and associated the Municipal Water Law (“MWL”) considerations below:

Governmental and Governmental Proprietary Purposes. In adopting the MWL, the Legislature included in the definition of “municipal water supply purposes” a beneficial use of water “for governmental or governmental proprietary purposes” by any “city, town, public utility district, county, sewer district, or water district.” RCW 90.03.015(4)(b) (emphasis added). Washington courts have on numerous occasions and in varied contexts, taken up the issue

of whether a particular action, or service provided, by a governmental entity is for a “governmental” or “proprietary” purpose. Recent authority has noted that this involves a “fact-specific, reality based inquiry,” sometimes “regardless of whether” the specific activity has been “traditionally classified as governmental or proprietary.” See *Michel v. City of Seattle*, 19 Wn. App. 2d 783, 799, 498 P.3d 522 (2021). However, Draft POL-2030 Update need not and should not engage in this debate. As a general matter, it is well understood under Washington law that local governments act in one of two capacities, either governmental or proprietary.¹ The Legislature, in enacting the MWL, purposefully avoided any need for doubt by expressly providing that any beneficial use of water for *either* “governmental” or “governmental proprietary” purposes is considered a “municipal water supply purpose” under the MWL. Yet, the Draft POL-2030 Update confusingly groups “governmental or governmental proprietary purposes” together, purporting to provide examples of such purposes without differentiation.² In so doing, the Draft POL-2030 Update limits the intended breadth of the MWL as evinced by the plain language of the statute. As a public entity, all of Thurston PUD’s use of water is for either a governmental or governmental proprietary purpose. Thurston PUD respectfully asks Ecology to reevaluate and reconsider the Draft POL-2030 Update’s limiting approach to the Legislature’s broad language.

Group B Water Systems. As part of its collection of water systems and utility operations, Thurston PUD owns and operates more than 200 water systems classified by the DOH as Group B water systems. The Draft POL-2030 Update mistakenly notes on several occasions that Group B water systems do not and cannot qualify as being for municipal water supply purposes.³ This is incorrect

¹ See *Okeson v. City of Seattle*, 150 Wn.2d 540, 549, 78 P.3d 1279 (2003) (“A municipal corporation is generally considered to act in one of two capacities—a governmental capacity or a proprietary capacity.”); see also *Branson v. Port of Seattle*, 152 Wn.2d 862, 870, 101 P.3d 67 (2004) (“Generally, a municipality acts in either a governmental or proprietary capacity”).

² See Draft POL-2030 Update at 4 (noting “Governmental and governmental proprietary purposes include, but are not limited to providing water for commercial, industrial, irrigation of parks and open spaces, institutional, landscaping, fire flow, water system maintenance and repair, and related uses.”).

³ See, e.g., Draft POL-2030 Update at 3 (noting “There are no Group B public water systems that are municipal water suppliers); see also *id.* at 5 (noting “Domestic use water rights issued to or acquired by a governmental entity that do not qualify as being for municipal water supply purposes under the more specific requirements of RCW 90.03.015(4)(a) (because they do not meet the residential service connection or nonresidential population served requirements) cannot qualify as being for municipal water supply purposes under the more general requirements for governmental or governmental proprietary purposes in RCW 90.03.015(4)(b).”); see also *id.* at 7. These provisions conflict with the Legislature’s adopted definitions in RCW 90.03.015(4)(b) when such rights are held by one of the listed public entities, including PUDs.

and conflicts with the plain language of the MWL. Rather, as noted above, the Legislature included in the definition of “municipal water supply purposes” a beneficial use of water “for governmental or governmental proprietary purposes by a city, town, public utility district, county, sewer district, or water district.” RCW 90.03.015(4)(b) (emphasis added). Thurston PUD owns and operates more than 200 Group B water systems under its umbrella of water systems, some of which benefit from certificated water rights. As a public utility district, Thurston PUD is unquestionably a “municipal water supplier” and its exercise of water rights for such systems represents “municipal water supply purposes” consistent with RCW 90.03.015(4)(b). This should be confirmed in the Draft Policy, or blanket exclusions of Group B water systems should be removed. Thurston PUD respectfully asks Ecology to reevaluate and reconsider its language excluding all Group B water systems from the definition of municipal water supply purposes in the Draft POL-2030 Update.

Original Intent. Thurston PUD is concerned regarding Draft POL-2030 Update’s use and reliance on the term “original intent” as it exists throughout the review draft. The term “original intent” appears nowhere in the MWL. The Legislature enacted the MWL in 2003 to provide “certainty and flexibility of municipal water rights” and for the “efficient use of water.”⁴ Rather than furthering the purpose of the MWL to provide “certainty and flexibility” of municipal water rights, the new insertion of an “original intent” factor has the opposite effect. First, rather than providing “certainty,” the Draft Policy provides “original intent” is to be “determined on a case-by-case basis.”⁵ This leaves municipal providers subject to the discretionary and often subjective positions of permit writers, leading to unpredictability in application. Second, overemphasis on the perceived “original intent” ignores the “flexibility” the MWL was intended to provide municipal water suppliers and the need to provide safe and reliable drinking water to changing and growing communities. Restricting municipal water rights based on the “original intent,” including examination of the “place of use” within “the geographic area identified in the original water right authorization” ignores the changing realities over time associated with expansion of urban growth areas, annexations, population growth, and development patterns and market conditions entirely outside the purview or control of public entities like Thurston PUD. The Draft Policy’s apparent overreliance on a confined geographic area based on a subjective evaluation of “original intent” (limited to geographic area and not the underlying municipal water supply purpose) is overly restrictive, counter to the dictates and purpose of the MWL, and retracts public entities’ like the PUD’s ability to adapt to

⁴ SESSHB 1338 (2003 1st Spec. Session)

⁵ Draft POL-2030 Update at 11.

changing development patterns.⁶ Thurston PUD respectfully asks Ecology to reevaluate and reconsider its new and significant reliance on “original intent” in the Draft POL-2030 Update.

Acquired Water Rights. The Draft POL-2030 Update’s restriction on conforming water rights for municipal purposes does not appear grounded in the statute. For example, the Draft Policy provides that “[i]f a right for a governmental purpose . . . was issued to a non-governmental entity . . . and later acquired by a governmental entity then the water right does not qualify as being for municipal water supply purposes.” Such and other restrictions are inconsistent with the conforming right under RCW 90.03.560 (providing for conforming documents upon request) and the definitions in RCW 90.03.015 (focusing exclusively on the current beneficial use and not prior ownership). Thurston PUD respectfully asks Ecology to reevaluate and reconsider its approach to acquired water rights in the Draft POL-2030 Update which does not appear grounded in the MWL.

Relinquishment. Thurston PUD remains concerned regarding the Draft Policy’s treatment of relinquishment issues and protection. Water rights “claimed for municipal water supply purposes” are exempt from relinquishment. RCW 90.14.140(2)(d). As the Washington Supreme Court has explained:

. . . in scenarios involving system capacity certificates for municipal supply purposes, relinquishment is simply not an issue. System capacity certificates for municipal supply purposes represent rights “in good standing,” i.e., the water rights are deemed perfected, even if the rights were not actually put to beneficial use.

Cornelius v. Dep’t of Ecology, 182 Wn.2d 574, 597-598, 344 P.3d 199 (2013). Despite this, the Draft Policy appears to in fact impose a beneficial use requirement in order to assert the exemption from relinquishment inconsistent with both the MWL and *Cornelius*.⁷ Creating additional uncertainty regarding

⁶ It is axiomatic that nearly all changes involve some measure of change from the original intent – such is the very purpose necessitating a change. Yet, Ecology’s POL-1200 (“Policy for the Evaluation of Changes or Transfers of Water Rights”) (rev. Sept. 2014) makes no mention of “original intent” or the “original purpose.” The Draft Policy’s apparent singling out of municipal water rights to provide a more restrictive discretionary analysis runs counter to the intent of the MWL.

⁷ While Thurston PUD recognizes and appreciates retention of what was formerly known as the “safe harbor provisions” it has concerns with the Draft Policy’s description that such protections only apply if the water right is “properly” identified (without definition or any understanding of what that means, and further imposing a temporal limitation, regarding previously unidentified, or possibility “improperly” identified, water rights as not being afforded

the application of the relinquishment exemption for municipal water rights is of significant concern to the Thurston PUD, which relies on its water rights to serve growing populations in Thurston County and its service areas. Thurston PUD respectfully asks Ecology to conform how it addresses relinquishment, and the recognized statutory exemption, with the MWL and the Washington Supreme Court decision.

Water System Consolidation. Finally, the Draft POL-2030 Update's discussion of water system consolidation describes consolidations in an overly limited way. The Draft Policy notes that a "consolidation occurs when two municipal water suppliers merge to become one entity."⁸ As is often the case for Thurston PUD, consolidation can also occur when a singular municipal water supplier consolidates adjoining or nearby owned systems into a singular consolidated system. Such consolidations can increase efficiencies, provide additional redundancy, and improve reliability, and for such reasons are favored by DOH and typically better serve our communities.⁹ The Draft Policy should recognize the varied types of consolidations.¹⁰ Further, given the well-recognized benefits of consolidation, the Draft Policy should encourage and not frustrate the flexibility afforded under the MWL intended to encourage efforts such as system consolidation. For example, rather than furthering the MWL purposes, the Draft Policy purports to impose a new "original intent" factor in the evaluation of changes to municipal water rights, including evaluating the "geographic area in the original water right authorization record."¹¹ Such discretionary policy creates significant uncertainty and operates to discourage system consolidation, and may result in dramatic increases in receiverships of failed water systems becoming a liability of counties throughout the state. Thurston PUD has, on numerous occasions, taken over operations of otherwise failing or vulnerable water systems. Applying new restrictive "original intent" and "original purpose" factors discourage these consolidation efforts critical to ensuring safe and reliable drinking water. It is self-evident that most if not all proposed system consolidations triggering a change application (for a new

the same protection and begging the question or how far Ecology may look back. This raises significant new issues made less clear by the Draft Policy.

⁸ Draft POL-2030 Update at 10.

⁹ See DOH Pub. 331-559-F (DWSRF, Consolidation Feasibility Study Grant Application Guidelines) (noting DOH seeks to promote consolidation of small Group A water systems into larger entities with greater technical, managerial, and financial capacity. These efforts encourage improved capacity, sustainability, and reduce the number of small Group A water systems that serve fewer than 10,000 people.").

¹⁰ See *also id.* ("Consolidation is either (1) physically joining two or more separate water systems into an existing Group A water system, or (2) changing ownership of a water system where the prospective new owner is a public entity, also referred to as restructuring.").

¹¹ Draft POL-2030 Update at 11.

Austin Melcher
September 27, 2023
Page 6

source well or source flexibility) would almost uniformly involve needed flexibility in the exercise and use of water rights in a broader - consolidated – geographic area. The draft language discourages system consolidation based on an “original intent” construct not founded in the Water Code and inconsistent with the MWL. Thurston PUD respectfully asks Ecology to reevaluate and reconsider its approach to consolidation in the Draft POL-2030 Update.

Thurston PUD appreciates Ecology’s past and ongoing engagement on the Draft POL-2030 Update and the broader MWL considerations. Thank you for your consideration of these comments.

Sincerely,

A handwritten signature in black ink, appearing to read "J. Rehberger". The signature is fluid and cursive, with the first name "J" and last name "Rehberger" clearly distinguishable.

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cc: John Weidenfeller, General Manager, Thurston PUD