



MEMORANDUM

Via Ecology's Online Comment Portal

To: Austin Melcher, Ecology Water Resources Program

From: Chris Heimgartner, General Manager

Date: September 28, 2023

Re: **Whatcom PUD comments on Ecology POL-2030 Update (June 2023)**

Public Utility District No. 1 of Whatcom County (Whatcom PUD) is a municipal water supplier with a longstanding commitment to regional water resource solutions in the Nooksack Basin. One of Whatcom PUD's primary goals is to assist in developing solutions that improve flow in the Nooksack River and its tributaries and meet the needs of salmonids, the Lummi Nation, the Nooksack Indian Tribe, other municipal water suppliers, local residents, farmers, and businesses. To that end, Whatcom PUD has expressed a willingness to commit more water from its mainstem source to improve streamflows to meet fish habitat needs.

As a municipal water supplier with a county-wide wholesale service area, Whatcom PUD is positioned to facilitate water supply solutions throughout WRIA 1. In order to implement such solutions, Whatcom PUD will need the flexibility and certainty the Legislature provided through the 2003 Municipal Water Law. We are profoundly disappointed by Ecology's latest iteration of a Municipal Water Law Interpretive and Policy Statement which, if implemented by Ecology, would frustrate the purposes of the Municipal Water Law.

Whatcom PUD shares the concerns of the Washington Water Utilities Council (WWUC) and the Washington Public Utility Districts Association (WPUDA) with the June 2023 POL-2030 update, and endorses the comments submitted by the WWUC and the WPUDA. We are commenting separately to underscore our concerns on the following topics:

Changes to Unperfected Municipal Surface Water Rights (RCW 90.03.570)

Section 14 of the Municipal Water Law (codified at RCW 90.03.570) provides explicit authorization to change or transfer unperfected surface water rights for municipal water supply purposes. Subsection (1) allows an unperfected surface water right for municipal water supply purposes or a portion thereof to be changed or transferred for any purpose "in the same

manner as provided by RCW 90.03.380” if four criteria are met. If those criteria are not met, Subsection (2) provides that an unperfected municipal surface water right may nonetheless be changed or transferred under four circumstances, including to provide water for an instream flow requirement established by Ecology rule. (See RCW 90.03.570(2)(a).) This critical provision offers a mechanism for municipal water suppliers to support streamflows by forgoing future out-of-stream use of presently inchoate portions of their water rights.

Ecology’s existing Policy 2030 – which purported to be a section-by-section explanation of the MWL – inexplicably ignored Section 14. In the current draft policy update, Ecology mentions RCW 90.03.570 in only two places (pages 9 and 12), but without offering any meaningful interpretation of the statute. Ecology apparently does not recognize any distinctions between changes and transfers under RCW 90.03.570 and other types of changes authorized by RCW 90.03.380.

In the context of RCW 90.03.570, changing or transferring an unperfected surface water right for municipal water supply purposes “in the same manner as provided by RCW 90.03.380” means to follow the process set out in RCW 90.03.380. That process involves:

- a written application;
- publication of notice;¹
- direct electronic notice to county commissioners for certain interbasin transfers; and
- an evaluation of whether the transfer or change may be made without injury or detriment to existing rights.

See RCW 90.03.380(1), (9).

Ecology’s draft policy appears to state at pages 9 and 12 that a tentative determination of extent and validity would be performed for an inchoate municipal surface water right proposed for change under RCW 90.03.570. For an unperfected right, an “extent and validity” determination involves no more than ascertaining the specific diversion rate and annual volume authorized and verifying that a water right was in fact granted and has not been rescinded. Instead of acknowledging this reality, Ecology’s draft policy invents a “good standing” assessment for inchoate municipal rights tied to the “original intent” in the water right authorization.

As the WWUC has ably pointed out, there are many problems with Ecology’s proposed “good standing” assessment, not least of which is the fact that for “pumps and pipes” municipal certificates, the Legislature has already made that determination in RCW 90.03.330(3). Ecology’s Policy 1120, endorsed by the Washington Supreme Court in *Cornelius v. Ecology*, 182 Wn.2d 574, 595-96 (2015), explicitly recognizes that the “in good standing” provision in RCW

¹ RCW 90.03.570(4) additionally requires Ecology to provide direct notice of such changes/transfers to affected tribes.

90.03.330(3) necessarily limits the scope of Ecology's tentative determination authority. The Legislature did not give Ecology authority to conduct a "good standing assessment" in its place.

In the context of RCW 90.03.570(2), Ecology's proposed "good standing" assessment is especially problematic because logically it would preclude **any** change of an unperfected surface water right to provide water to meet instream flow requirements. In practice, the requirements proposed in Ecology's draft policy would eviscerate the statute, contrary to the Legislature's intent.

"Annual Consumptive Quantity" Determinations (RCW 90.03.380(1))

The section on "Adding Mitigation as a Purpose of Use" on page 13 of the draft policy muddles the "annual consumptive quantity" (ACQ) test required under RCW 90.03.380(1). An ACQ evaluation is triggered only for the irrigation of additional acreage or the *addition* of new uses to an existing water right. Thus, for example, if a municipal water right were to be changed in its entirety to "instream flow" purposes, it would not trigger any requirement to calculate ACQ. Similarly, if a new use were to be *substituted* for an existing use of a portion of a right (e.g., by converting that portion from municipal supply to streamflow augmentation), it would not trigger any requirement to calculate ACQ.

In those circumstances where the ACQ evaluation is required (i.e., with the *addition* of new uses that do not replace existing uses), the draft policy fundamentally misrepresents the ACQ test. Where new uses are *added* onto an existing use, RCW 90.03.380(1) requires a **comparison** of consumptive use pre- and post-change, to ensure that consumptive use after the change would not be greater than consumptive use before the change. *It does not mean that only the consumptive portions historically used can be valid for change.* Ecology's statement to that effect on page 13 is incorrect.

"Municipal Water Supply Purposes" and Identification of Municipal Rights (RCW 90.03.015(4) and RCW 90.03.560)

Ecology's interpretation of the definition of "municipal water supply purposes" (MWSP) in RCW 90.03.015(4) is flawed in many respects, and that flawed interpretation of the definition is exacerbated by Ecology's reading of the municipal identification provision in Section 3 of the Municipal Water Law (RCW 90.03.560).

On page 4 of the draft policy, Ecology appears to limit "governmental" and "governmental proprietary" purposes to the list of water uses "generally associated with the use of water within a municipality" appearing in a different part of the definition. The "governmental or governmental proprietary purposes" category in RCW 90.03.015(4)(b) is much broader than Ecology appears to recognize, basically encompassing any use of water by a PUD or the other listed governmental entities. If Ecology believes there is any use of water by one of the six entities listed in the statute that would **not** qualify as a "governmental" or

“governmental proprietary” purpose, Ecology should say so and provide statutory support for its interpretation.

The Legislature did not exclude any use from this Subsection (4)(b) category.

- It did not limit this category to “consumptive” governmental or governmental proprietary uses;
- It did not exclude agricultural irrigation;
- It did not exclude residential water supply;
- It did not impose service or population thresholds on domestic water supply by the six listed entities; and
- It did not link or limit this category to the nonexclusive list of beneficial uses “generally associated with the use of water within a municipality” that appears later in the definition.

Contrary to Ecology’s policy (see pages 5 – 7), a Group B domestic water system right can be identified as for MWSP if the system is operated by one of the six listed governmental entities in subsection (4)(b). It is well-established that delivery of potable water supply to residential or industrial customers is a governmental proprietary purpose. As the WPUDA ably points out, Ecology’s interpretation jeopardizes the current and future operation of Group B water systems by public utility districts.

The residential connection/non-residential population thresholds in subsection (4)(a) are not “more specific” requirements that prevail over a “more general” category of governmental or governmental proprietary purposes in RCW 90.03.015(4)(b). Instead, subsections (4)(a) and (b) are equally weighted categories that can and do overlap in some circumstances. On page 5 of the policy, Ecology appears to be misapplying the “general-specific” rule of statutory construction, which is that a more specific **statute** will prevail over a more general statute with which it is in conflict. That rule does not apply internally to disjunctive categories in a definition. Ecology’s interpretation ignores the plain language of the statute and the rules of grammar, in effect adding words to the statute that the Legislature did not include. See *Cerrillo v. Esparza*, 158 Wn. 2d 194, 204 (2006).

Finally, the last two sentences in the definition apply to different scenarios and use different language. Ecology’s draft policy (at pages 4-5) fails to recognize important distinctions between them:

1) If a *water right is beneficially used for the purposes* listed in subsection (4)(a), (b), or (c), *other beneficial uses under the right* generally associated with the use of water within a municipality are also for MWSP. This allows “municipal” identification of ***other uses under a single right*** that is beneficially used for MWSP.

2) If a governmental entity² holds a water right that is for the purposes listed in subsection (4)(a), (b), or (c), its use or delivery of water for any other beneficial use generally associated with the use of water within a municipality is also for MWSP. This allows “municipal” identification of **other rights** beneficially used by a governmental entity that **holds** a MWSP right, consistent with the Legislature’s goal of certainty for municipal water rights. Ecology incorrectly assumes that this refers only to other beneficial uses under the **same** water right. Had the Legislature intended to so limit this provision, it could easily have done so.

Similarly, had the Legislature intended to limit “municipal” identification under RCW 90.03.560 to only those water rights “originally issued” to a municipal water supplier, it could easily have done so. Ecology’s focus (at pages 4 – 6 of the policy) on the entity that was originally issued the water right is contrary to the plain language of the statute, which applies to water rights “held or acquired” by a municipal water supplier.

Conclusion

With the 2003 Municipal Water Law, the Legislature embraced certainty and flexibility for municipal water rights coupled with stringent conservation and water use efficiency requirements. The MWL contains important tools to ensure certainty and flexibility of municipal rights and to enable municipal water suppliers to participate in basin-wide solutions to water resource challenges. As currently drafted, Ecology’s interpretation of the MWL undermines certainty and flexibility for municipal water rights, and unreasonably gives short shrift to key provisions such as RCW 90.03.570 that encourage use of municipal water rights to support instream flows.

In the Nooksack River Basin, long-term water resource management solutions could very well include use of portions of Whatcom PUD water rights for mitigation or other purposes. Ecology’s proposed policy would place new and unwarranted restrictions on municipal water rights and improperly limit the scope of options available to Whatcom PUD and other WRIA 1 stakeholders.

Whatcom PUD believes strongly that effective water resource management – grounded in flexibility, certainty, and creativity – is critical to ensure healthy and productive fish populations and to serve all the people who live and work in Whatcom County. Whatcom PUD is committed to working in concert with Tribes, cities, and other WRIA 1 stakeholders to meet future water supply needs in our community for both instream and out-of-stream uses. We hope Ecology will contribute to this effort by rethinking its approach to the Municipal Water Law and applying the MWL to fully recognize and carry out the Legislature’s goals.

² As used in the last sentence of RCW 90.03.015(4), the term “governmental entity” includes, at a minimum, the six listed entities in subsection (4)(b).