Washington Public Utility Districts Association

The Washington Public Utility Districts Association (WPUDA) appreciates the opportunity to submit the attached comments to the Washington Department of Ecology (Ecology) on the agency's proposed revisions to Municipal Water Law Interpretive and Policy Statement 2030 (Proposed POL-2030). Please feel free to contact us if you have any questions.

WASHINGTON PUBLIC UTILITY DISTRICTS ASSOCIATION
WPUDA
YOUR connection

September 29, 2023

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

RE: Comments on proposed revisions to Municipal Water Policy 2030

Dear Austin:

The Washington Public Utility Districts Association (WPUDA) appreciates the opportunity to submit these comments to the Washington Department of Ecology (Ecology) on the agency's proposed revisions to Municipal Water Law Interpretive and Policy Statement 2030 (Proposed POL-2030). WPUDA represents 27 PUDs in Washington State, 17 of which provide municipal water supply for a variety of uses, and we were a primary supporter of the Municipal Water Law (MWL) when it was enacted in 2003.

We also participated in the development of comments submitted by the Washington Water Utility Council (WWUC) and fully support the WWUC comments. Since the adoption of the MWL, Ecology has issued a number of interpretations that are not supported by the statutory language, and that run counter to the Legislature's intent. For example, for years Ecology insisted on the correctness of its non-statutory "active compliance" interpretation of the municipal exception to relinquishment. This resulted in the absurd outcome that a water right was protected from relinquishment for non-use only if it was used. Now, in Proposed POL-2023 the prior "active compliance" interpretation has been substituted out of the game, replaced by a new player: "original intent."

In addition to creating new terms and interpretations that don't follow the statutes, not recognizing the "certainty and flexibility" that the Legislature intended runs counter to numerous state and local policies. The Growth Management Act is seeking to drive more growth into urban areas served by municipal water systems; recent housing legislation will increase zoned density in neighborhoods and near transit centers; climate change impacts will require more flexible use of water rights; and state and local policies strongly prefer municipal water service over more exempt wells. Invented constraints on municipal water rights run counter to all of these broadly supported state and local policy objectives.

While we have significant concerns with Ecology's proposed revisions and believe they conflict with both the law and legislative intent, we acknowledge the significant time and outreach that

Ecology has devoted to this issue through the WWUC, with WPUDA, and with others in the municipal water community.

(1) Ecology's new "original intent" criteria does not exist in statute, and conflicts with the Legislature's intent of "certainty and flexibility."

The Legislature passed the MWL in 2003, and the law remains among the most significant water legislation passed in recent years. The intent of the MWL, as evidenced by both the bill title and various provisions of the law, was an act relating to "certainty and flexibility of municipal water rights and efficient use of water." Proposed POL-2030 conflicts with the statute in a number of ways and is contrary to the overall policy of the law.

The MWL was enacted 20 years ago, and neither the legislation nor any other part of the water code directs Ecology to analyze the "original intent" of a municipal water right as part of the water right permitting process. For example, POL-2030 correctly cites to RCW 90.44.100 as the statutory authority under which "perfected and inchoate groundwater rights may be changed" – but then proceeds to assert that Ecology may determine "whether any inchoate quantities specified in the certificate remain in good standing" based on "the original intent described in documents in the record for the original water right authorization." *POL-2030, Page 9.*

In contrast, in the municipal water law the Legislature did not provide Ecology with any authority to evaluate whether a certificated inchoate municipal water right is in good standing – the Legislature has already made that determination in statute as part of the MWL: "Such a water right is a right in good standing." *RCW 90.03.330(3).* As the State Supreme Court stated in *Lummi Indian Nation v. State*, 170 Wash.2d 247, 264-65 (2010), "[c]onfirming existing rights was a legislative policy decision," and RCW 90.03.330(3) represents "an exercise of general legislative authority."

Similarly, Ecology has invented the term "original intent" (which like its precursor "active compliance" does not exist anywhere in the MWL or elsewhere in the water code) and through POL-2030 is seeking to apply it as an additional test for water right changes. As noted in the WWUC comment letter, the Court of Appeals, Division III recently rejected Ecology's proposed use of "original intent" as a legal doctrine or test for water right decisions. *See Burbank, at 15.*

(2) Proposed POL-2030 conflicts with RCW 90.03.330(2) regarding when a municipal water right may be revoked or diminished.

A key provision of the MWL is at RCW 90.03.330(2), which prohibits Ecology from taking an action to "revoke" or "diminish" a water right certificate for municipal supply purposes except in two situations:

> "Except as provided for the issuance of certificates under RCW 90.03.240 and for the issuance of certificates following the approval of a change, transfer, or amendment under RCW 90.03.380 or 90.44.100, the department shall not revoke or diminish a certificate for a surface or ground water right for municipal water supply purposes as

defined in RCW 90.03.015 unless the certificate was issued with ministerial errors or was obtained through misrepresentation."

The first reference to RCW 90.03.240 allows Ecology to issue certificates after the superior court makes its final determination of rights in a water right adjudication; such a certificate of adjudicated water right reflects the *court's ruling* on the validity, extent, and priority of the water right certificate. The second provision allows Ecology to "revoke or diminish" a municipal water right upon "issuance of certificates following the approval of a change, transfer or amendment" of a surface or groundwater right that is for municipal water supply purposes.

As Ecology knows, this "issuance of certificates" occurs only after a water right change decision has been approved by Ecology and the water has been put to beneficial use as authorized by the change. This then results in the issuance of a superseding certificate at the end of the process, not at the application stage, during Ecology's review of a change application, or during Ecology's review of a Water Conservancy Board decision. Under the language of RCW 90.03.330(2), Ecology's ability to revoke or diminish a municipal water right is only "following" the approval of a change, transfer, or amendment, it cannot occur as part of the decision itself. Only following this decision does Ecology have the authority to "revoke or diminish" a municipal water right certificate.

In contrast, Proposed POL-2030 would enable Ecology staff to "diminish" a municipal water right certificate at the application or decision stage of a water right change, by imposing new tests of "original intent," "reasonable diligence," and "public welfare" to determine whether a water right is in "good standing" and determine what quantity is eligible to be changed. This directly conflicts with the plain reading of RCW 90.03.330(2) of the MWL. "Following" means "after," not "during" or "before" and there is no basis in the statute for Ecology to preemptively initiate its review. These vague, non-statutory tests proposed for municipal water right changes are directly opposite from the "certainty and flexibility" sought to be created when the Legislature passed the MWL.

(3) Ecology's exclusion of Group B systems conflicts with statutory definition of municipal water supply purposes.

Draft POL-2030 states: "There are no Group B public water systems that are municipal water suppliers." *Page 3.* This statement conflicts with the definition of "municipal water supplier" and "municipal water supply purposes" at RCW 90.03.015(3) and (4). Under (4), "municipal water supply purposes" includes use of water "(b) for governmental or governmental proprietary purposes by a city, town, public utility district, county, sewer district, or water district."

Under this definition, the use of water by a PUD is a "municipal water supply purpose" and therefore a PUD is a "municipal water supplier." These statutory definitions do not depend on whether a PUD has Group A or Group B water systems – yet Ecology's Draft POL-2030 makes the blanket assertion that "there are no Group B water systems that are municipal water suppliers"

– this conflicts with the statutory definition. A number of PUDs have developed or assumed ownership of Group B systems, many times at the request of county health agencies, Washington Department of Health, or Ecology. It is unclear what purpose is served by excluding PUD-owned Group B systems from the MWL.

Further, even if there was an ambiguity in these definitions, Ecology's effort to limit the protections of the MWL for PUD-owned Group B systems runs counter to the policy of the MWL to provide "certainty and flexibility" for municipal systems, and also the policy in the state's Water Resource Act to encourage the development and use of water systems that serve the public rather than exempt wells. RCW 90.54.020(8). Many PUD-owned Group B systems exist in suburban or rural areas where if PUD water service is not available, the result will be continued or increased reliance on exempt wells.[1]

(4) Exclusion of beneficial uses of water conflicts with municipal definition.

Like the improper exclusion of Group B systems, Proposed POL-2030 also seeks to limit certain beneficial uses of water from the provisions of the MWL depending on the origin of the water right now held by a municipal supplier. The statute is clear that if a PUD holds a water right for governmental or governmental proprietary purposes, that "its use of water or its delivery of water for any other beneficial use generally associated with the use of water . . . 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.[2] Further, the Legislature recognized that water use for "municipal water supply purposes" can be under water rights "held" or "acquired" by a municipal water supplier. *RCW 90.03.560.*[3]

PUDs hold water rights for a variety of governmental and governmental proprietary purposes, and Ecology incorrectly states that "only consumptive uses are included in the types of water uses authorized under rights for municipal purposes." *Page 6.* This statement is in conflict with express purposes recognized in RCW 90.03.015(4) that are all either partially or wholly non-

[1] Here we note Ecology's curious embrace and renaming of SB 6091 from "An Act Relating to Ensuring That Water is Available to Support Development" to the "Streamflow Restoration Act." PUDs believe that providing water supply for new development through municipal water systems, rather than exempt wells, is preferable for both the environment and public health. It is difficult to understand why Ecology is placing unwarranted obstacles in the path of municipal water suppliers while enabling more exempt well drilling occurring through a preferred new bill title.

[2] We further refer Ecology to the extensive comments submitted by the WWUC on the importance of understanding the role of PUDs and other public entities in providing water for both "governmental" and "governmental proprietary" purposes.

[3] In *Crown West Realty, LLC v. Pollution Control Hearings Bd.*, 7. Wash.App.2d 710, 740-41 (2019), the Court of Appeals rejected a similar argument that "the use for which the Department of Ecology authorized [the water right] controls whether the use is one for municipal water supply purposes. . . . we see no legislative intent for such a construction of RCW 90.3.015(4). The statutory definition employs the present tense and refers none to the application or authorization process."

consumptive, including examples like domestic, commercial, fire flow, and water system maintenance uses. PUDs also currently hold water rights for a number of non-consumptive purposes, including operation of fish hatcheries and hydropower production, both of which are common governmental proprietary functions.

PUDs and other municipal water suppliers are also using municipal water rights for certain types of non-consumptive use in micro or pumped storage hydropower power production. This type of clean energy production can be either a non-consumptive water use within an existing municipal water system or within a pumped storage facility using a municipal water right. Nothing in RCW 90.03.015(4) excludes these or other non-consumptive water uses from the definition of "municipal water supply purposes."

(5) Ecology's proposed creation of additional water right permitting requirements is contrary to the *Pend Oreille PUD v. Ecology* Supreme Court decision.

The question of whether Ecology has the authority to create water right permitting requirements beyond those provided by the Legislature in statute is not new. In 2002, the State Supreme Court reviewed an Ecology decision in which the agency sought to apply a new "public interest" test to transfers of surface water rights, even though such a "public interest" criterion was not a statutory test adopted by the Legislature. In this case the Supreme Court held that Ecology must apply only the statutory tests for water right decisions, not create additional non-statutory criteria based on the agency's policy desires. See *Pend Oreille PUD v. Ecology, 146 Wn.2d 778, 795–96 (2002), ("Sullivan Creek").*

A number of the provisions in Proposed POL-2030 suffer from the same legal infirmity as the public interest test invalidated in the Sullivan Creek decision. As the Court stated:

> Because the Legislature omitted consideration of the public interest from RCW 90.03.380 where it included such a requirement in other closely related statutes, we conclude that Legislative intent is clear that a "public interest" test is not a proper consideration when Ecology acts on a change application under RCW 90.03.380.
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> . . .
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> Ecology advances public policy arguments in favor of public interest review when a change application is made. In particular, Ecology posits that one could essentially avoid public interest review by applying for a permit to appropriate water, undergoing public interest review, obtaining a water right, and then seeking to change it without further public interest review. We recognize this may be a legitimate concern, but believe the answer lies in persuading the Legislature to amend the change statute.

Id. Similarly here, the requirements for water rights permitting are adopted in statute, and Ecology does not have the authority to impose additional requirements through Proposed POL-2030.

(6) Proposed POL-2030 includes directives to Ecology permitting staff that would require rulemaking under the Administrative Procedures Act (APA).

Ecology has explained in a number of meetings that a primary purpose of Proposed POL-2030 is to ensure consistent decision-making by Ecology permitting staff on municipal water right decisions. A number of the provisions of Proposed POL-2030 would constitute a "rule" under the APA and thus rulemaking is required.

The recent published Court of Appeals decision regarding the requirements of the APA provides helpful authority to determine whether a state agency action must be subject to rulemaking under the APA. See *City of Tacoma et al. v. Department of Ecology*, Court of Appeals No. 39494-8-III (September 14, 2023). The City of Tacoma case concerned whether a number of Ecology actions, including a letter issued by the agency that would be implemented by Ecology staff in the form of new permitting requirements on wastewater treatment plants (WWTPs), constituted a "rule" under the APA. The Court analyzed Ecology's actions under the two-part test to determine whether rulemaking is required, as follows:

(1) First: is the agency order or decision "a directive of general applicability."

The Court summarized this element as . . . "[W]here the challenge is to a policy applicable to all participants in a program, not its implementation under a single contract or assessment of individual benefits, the action is of general applicability within the definition of a rule." The Court held that the agency action (a letter that applied to all WWTPs) is of general applicability because it applied to all WWTPs. The Court concluded the Ecology letter was a "directive of general applicability" as follows:

> As previously defined, a directive is something that impels action. The precise issue presented in this appeal is whether a directive can be an internal directive, e.g., a commitment by Ecology that its own staff will impose new requirements on permittees.
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> . . . [T]here is no functional difference between a promulgated rule that adds new terms for renewing a permit and a directive to staff to add new terms for reissuing a permit.

(2) Second: Does the directive of general applicability "establish, alter, or revoke" any qualification or requirement relating to the enjoyment of benefits or privileges conferred by law? Here again, the Court concluded that Ecology's action required rulemaking because the letter "promised that Ecology's permit writers would alter the qualifications and requirements for NPDES permits." The Court also noted that "issuance of an NPDES permit is a privilege conferred by law" because without an NPDES permit, no person or entity may discharge any substance into Puget Sound.

Under this two-part test in the *City of Tacoma* case, certain parts of Proposed POL-2030 would clearly constitute a "rule" under the APA.[4] For example, Ecology's announcement that a Group B water system cannot be considered a municipal water supplier is clearly a directive of general applicability (to all PUDs and other governmental entities operating Group B water systems) that "alters or revokes" benefits or privileges conferred by law (the specific provisions of the MWL). Other parts of Proposed POL-2030 function similarly as a "rule," such as the stated limitation on use of municipal water rights for non-consumptive purposes, or the agency's process for assessing the "good standing" of an inchoate municipal certificate notwithstanding the statutory protection in RCW 90.03.330(2) from having a municipal water right certificate "revoked or diminished" except in very specific, statutorily-defined circumstances.

(7) Ecology should not adopt POL-2030 without clarity on the outcome of the Burbank and City of Tacoma cases.

To our knowledge, PUDs and other municipal water purveyors are not requesting this update to POL-2030, and many are expressing concerns with how Proposed POL-2030 does not follow the law and will negatively impact their ability to provide water in the future. Beyond the proposed changes, the current posture of both the *Burbank* water rights appeal and the more recent *City of Tacoma* rulemaking case are such that WPUDA believes Ecology should consider suspending work on Proposed POL-2030 until those cases are completed.

The Burbank case involves the question of whether and how "original intent" has any role in municipal water rights permitting. Is "original intent" a legal doctrine that is applied by Ecology akin to a new legal test for certain water right changes, or is it a factual question to understand a water right and its attributes? Ecology's "original intent" theory is a foundational element of Proposed POL-2030 and so adopting a policy while this theory is being litigated is very problematic.

Similarly, the *City of Tacoma* decision raises significant questions for Ecology and municipal water suppliers because the circumstances of that case are so similar to those at issue in Proposed POL-2030: an Ecology directive to staff that will determine specific permitting outcomes. Many of the factors in the *City of Tacoma* case that led the Court to conclude that Ecology's action required APA rulemaking are very similar to the purpose and effect of Proposed POL-2030.

[4] While certain parts of Proposed POL-2030 could only be adopted through rulemaking, using the APA rulemaking process does not insulate an agency action against legal challenges for exceeding agency authority. For example, the action invalidated in the Sullivan Creek case would not have been lawful even if Ecology had adopted it through APA rulemaking. While the directives to Ecology staff in Proposed POL-2030 are of the kind that could only be created through rulemaking under the *City of Tacoma* decision, we are not requesting rulemaking and do not support a rulemaking effort because a number of the directives conflict with the statute, and therefore would not be lawful even through an APA rulemaking process.

WPUDA respectfully requests that Ecology either suspend work on Proposed POL-2030, or at a minimum, reissue a new proposed version for additional review and comment from all water resource interests, prior to finalizing the policy.

Please feel free to contact us if you have any questions.

Sincerely,

George Caan, Executive Director
Washington Public Utility Districts Association