City of Pasco

Mr. Melcher, Please let this email serve as official comments from the City of Pasco. The City of Pasco supports the WWUC's responses concerning Ecology's interpretation of the MWL in their draft POL-2030. Please feel free to reach out to me should you have any questions. Thank you,
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Washington Water Utilities Council

September 26, 2023

Austin Melcher
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Water Resources Program
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RE: Comments on Proposed Revisions to Municipal Water Policy 2030

The Washington Water Utilities Council (WWUC) appreciates the opportunity to review and comment on the Washington State Department of Ecology's (Ecology) Public Review Draft of Policy 2030, "Municipal Water Law Interpretative and Policy Statement," dated June 21, 2023 (Draft Policy).[1] The WWUC is the state association of over 200 Washington water utilities including cities, water districts, public utility districts, mutual and cooperative water utilities, and investor-owned water utilities. The water systems owned and operated by WWUC members provide drinking water to over 80 percent of the state's population. We appreciate the opportunity for dialogue with Ecology on these important issues.

The WWUC's members are dedicated to serving Washington's growing population by ensuring an adequate quantity of high-quality potable water at the lowest economic and environmental cost. The intent of the Municipal Water Law (MWL) is to provide certainty and flexibility for municipal water rights. However, the Draft Policy risks destabilizing municipal water at the very time that long-range planning is underway to meet future challenges. Drinking water utilities across the state are asked to prepare for significant population and economic growth in the planning horizon. According to the Washington Office of Financial Management (OFM), as of April 1, 2023, the state's population has grown to over 7.9 million residents. Although King County remains the most populous county overall, the fastest growing counties are Whatcom, Benton, and Snohomish. Looking forward, OFM forecasts that the state population will grow to 8 million by 2024, to 9 million by 2037, and will approach 10 million residents by 2050. This growth places a high burden on our drinking water utilities, and Ecology's Draft Policy would add to this burden by making it harder for municipal water suppliers to provide adequate and reliable supplies of clean drinking water to meet this growing population.

[1] Publication Number 23-11-004, *available at* https://apps.ecology.wa.gov/publications/summarypages/2311004.html?utm_medium=email&utm_source=govdelivery.

The WWUC and its members operate professionally managed public water systems at scale that are expected to meet the needs of a vast majority of the projected population growth. The Draft Policy should align with this vision, or at least acknowledge the statutory directive for this approach. Nevertheless, the severe limitations the Draft Policy would impose, combined with the focus on exempt wells over the past five years, is adverse to municipal water planning for serving growing communities.

The WWUC is concerned that the Draft Policy is a step backwards. Although several of the WWUC's concerns relate to elements carried over from the existing POL-2030, this Draft Policy would exacerbate those issues and create even more barriers for municipal water suppliers. For example, this Draft Policy is *less* transparent than the previous version, failing to provide clarity on important issues. Despite the Draft Policy's stated intent "to be consistent in the review of, and decisions, on municipal water supply issues," the Draft Policy leaves many critical issues for future Ecology assessment on a "case-by-case" basis. The Draft Policy's approach would increase the risks of inconsistent decision-making between Ecology regional offices and lead to more litigation.

We are very concerned that the Draft Policy asserts broad authority for Ecology without specific statutory or other legal support. Doing so allows for interpretations of the MWL that are contrary to statute and case law and creates a case-by-case decision making process that would increase uncertainty for municipal water suppliers.

As a result, the Draft Policy would undermine the MWL and aggravate water supply risks and barriers in several ways. First, it jeopardizes the ability of municipal water suppliers to fully use existing municipal water supply water rights to serve growing communities and to respond to climate change and environmental justice issues. This is particularly egregious as public water is the best way to serve the majority of Washington's growing communities. Stability for existing municipal water rights is critical with respect to Growth Management Act comprehensive plans, where the plan for growth does not generally account for risks or limitations regarding municipal water suppliers' ability to serve growing communities. Second, the Draft Policy unintentionally promotes inefficient use of water inconsistent with policy encouraging efficient water use.[2] The Draft Policy risks use of municipal water merely for Ecology's "active compliance" reasons when there is no practical operational need. Third, the Draft Policy creates additional risk for municipal water rights that require certainty and flexibility to respond to shortages and contamination issues intensified by climate change.[3] Fourth, the Draft Policy creates risk to already overburdened environmental justice communities by making it harder to get water to where people need it.

[2] The MWL directed the establishment of efficiency requirements municipal water suppliers. *See* RCW 70A.125.170; Chapter 246-290 WAC, Part 8 (Water Use Efficiency).

[3] The Washington Legislature has recognized that "climate change poses immediate significant threats to our economy, health, safety, and national security." RCW 19.40.010.

In addition to this summary of comments, the WWUC provides additional discussion and detail in the attached supplemental comments. The WWUC appreciates the opportunity for dialogue with Ecology and the opportunity to comment on the public review draft.

In conclusion, Draft Policy mistakenly excludes water rights held by WWUC members from legal protections from relinquishment, frustrates planning, and makes it harder to secure and maintain safe and reliable drinking water for Washington's growing communities. This strained interpretation of the MWL avoids legislative intent and precludes a common understanding of water law terms and requirements, which adversely affects the dialogue and problem solving needed to address current and future drinking water and water resources challenges. We appreciate the intent to increase consistency of interpretation and application of the MWL across Ecology regions. In the process, however, it should not diminish the certainty and flexibility of municipal water rights as the Legislature intended in the MWL.

Judi Gladstone, Washington Water Utility Council Chair

CC:

Ria Berns, Department of Ecology
Dave Christensen, Department of Ecology
Holly Myers, Department of Health
Carrie Sessions, Governor's Policy Office
Laura Watson, Department of Ecology

WWUC Detailed Comments Regarding Draft Policy 2030

In addition to the summary of issues in the WWUC comment letter, the WWUC is submitting for Ecology's consideration the following risks and recommendations with respect to specific elements of the Draft Policy.

1. Intent of the MWL – Certainty and Flexibility

The Draft Policy fails to recognize the express legislative purposes of certainty and flexibility. The 2003 bill title, "An Act Relating to Certainty and Flexibility of Municipal Water Rights and Efficient Use of Water," clearly articulates the MWL's purposes to provide certainty and flexibility for municipal water rights. These statutory purposes are critical to ensuring an adequate, usable supply of water to meet the needs of Washington's current population and future growth. Municipal water suppliers already comply with conservation and efficiency standards for water use required in the statute,[4] and continue to make significant progress in conservation and efficiency.

The Draft Policy Background Section on page 2 provides that the MWL was enacted to "clarify municipal water rights." This statement is illustrative of the disconnect between the Legislature's intent as manifested in the text of the MWL and the Draft Policy. The Draft Policy states that its purpose is to "describe and provide interpretation of parts of the Municipal Water Law." And yet, the Draft Policy—the policy meant to describe and interpret the MWL—does not reflect the intent of the MWL. The Draft Policy's failure to recognize and reflect the MWL's correct purposes undermines the entire Draft Policy. The WWUC recommends that the policy properly state the legislative purposes and intent of the MWL, and that any MWL policy honor this purpose and intent.

2. Draft Policy Introduces New "Original Intent" Powers

The Draft Policy's formulation and application of "original intent" exceeds Ecology's enabling legislation. Although the Draft Policy references "original intent" seven times,[5] the term does not appear in the Water Code or the MWL and the Draft Policy fails to cite a legal basis for this claimed authority.

The Draft Policy provides an ambiguous definition of "original intent" and proposes a new test around "original intent." Based on language in the Draft Policy, it is not clear how this test would be applied, leaving the amorphous test open to "case-by-case" decisions. For example, the Draft Policy does not explain at which point "original intent" is to be determined. Is it based on the initial application, permit or certificate, latest change application, latest change approval, latest water system plan, or an ameliorated consideration of the sequence of

[4] *See* RCW 70A.125.170; Chapter 246-290 WAC, Part 8 (Water Use Efficiency).
[5] *See* Draft Policy Sections 1, 5, 7, & 8.

intent? Additionally, based on the Draft Policy, it is not clear whether the new "original intent" test would be limited to change applications.

While "original intent" is a concept in western water law, the Draft Policy's interpretation and proposed application of "original intent" in the Draft Policy has no legal basis. Further, the recent decision in the *Burbank*[6] case is contrary to Ecology's interpretation and proposed application of "original intent."

a. Burbank and a Limited Application of "Original Intent"

The recent Court of Appeals Division III decision in *Burbank* rejects "original intent" as proposed in the Draft Policy.[7] In *Burbank*, the court applies "original intent" as an interpretive tool to understand factual ambiguity in a water right file. The court characterizes the water right file interpretation—specifically determining if a right is alternate or non-additive, or has other terms and conditions—as a question of fact.[8] Accordingly, the *Burbank* Court appropriately applies "original intent" as an interpretive tool, one such tool in the toolbox, to interpret a water right file and reach factual findings regarding a water right and its attributes. As such, "original intent" is a common sense and practical methodology to read and interpret a water right file. This tool is only applicable when assessing whether a proposed change would constitute unlawful enlargement. However, the Draft Policy misapplies this interpretative tool and instead asserts "original intent" as a legal doctrine that empowers Ecology to preclude water right changes and transfers.

Burbank also demonstrates that "original intent," as a tool, has shortcomings and blind spots that preclude "original intent" from becoming a controlling test. As the *Burbank* majority notes, the change application (the 2009 transfer to Hillside) that occurred after the original application is very relevant to interpreting the water right file and making findings of fact. Unlike *Burbank*, the Draft Policy fails to recognize that "original intent" considers broad factual information appropriate to understanding a water right (and not just intent at the time of the original application).

Prior administrative decisions also support this limited application of "original intent" for fact-finding purposes. For example, in *Cornelius v. Washington Department of Ecology*, the PCHB found that the "original intent" of the permit was relevant to determining whether the permit was intended as a supplemental or alternative water source.[9]

Despite this precedent, the Draft Policy appears to assert new powers to make water right determinations based on "original intent." The Draft Policy's fixation on "original intent"

[6] *Burbank Irrigation Dist. #4 v. Washington Dep't of Ecology*, No. 38897-2-III (Wash. Ct. App. Aug. 17, 2023).
[7] *Id.*
[8] *Id.* at 15.
[9] PCHB No. 06-099 (Jan. 18, 2008).

leads to significant risk of overlooking other important factors. Such an approach will result in improperly excluding water rights from municipal status or change applications and will lead to inconsistent decisions between Ecology regions and increased litigation.

b. Change Applications

The Draft Policy's "original intent" requirement for changes or amendments of water rights (Section 5, page 9) is not supported by statute or case law. Logically, a strict "original intent" interpretation would prohibit *any* changes. That is because a change is a request to deviate from the original water right authorization, which is presumably how the Draft Policy intends to determine "original intent." This is likely why the Washington Legislature did not include "original intent" as a statutory requirement for changes.[10] Adding a new "original intent" test to changes would improperly add an additional requirement to the statutory change requirements outlined in RCW 90.03.570, RCW 90.03.380, and RCW 90.44.100.[11]

Applications to change water rights are important for municipal water suppliers to respond to critical issues and evolving conditions that impact provision of drinking water. Water right changes enable municipal water suppliers to respond to pollution, source contamination (including but not limited to PFAS), population growth, economic development in new locations, inability to develop water sources, and other societal developments. Restricting change applications will hinder municipal water suppliers' ability to respond to these critical issues.

3. Good Standing – RCW 90.03.330(2)

In Section 4, the Draft Policy overreaches in asserting a discretionary agency process to determine good standing. Good standing is a legislative declaration and is not subject to Ecology's case-by-case interpretation. The MWL's good standing provision resolved uncertainty about the nature of pumps and pipes certificates. The Washington Legislature resolved this by clarifying that pumps and pipes certificates are rights in good standing.[12]

The Washington Supreme Court has further reinforced this principle through case law. Specifically, in *Cornelius*, the Court states that pumps and pipes certificates "represent rights in good standing, i.e., the water rights are deemed perfected, even if the rights were not actually

[10] *See* RCW 90.03.570, RCW 90.03.380, and RCW 90.44.100.

[11] *See Public Utility Dist. No. 1 of Pend Oreille County v. Dept. of Ecology*, 146 Wn.2d 778, 796, P.3d 744 (2002) (finding Ecology improperly added requirements to the transfer statute where "[t]he statute's meaning appears plain as to what prerequisites must be met in order to obtain a change…").

[12] *See* RCW 90.03.330(3) ("This subsection applies to the water right represented by a water right certificate issued prior to September 9, 2003, for municipal water supply purposes as defined in RCW 90.03.015 where the certificate was issued based on an administrative policy for issuing such certificates once works for diverting or withdrawing and distributing water for municipal supply purposes were constructed rather than after the water had been placed to actual beneficial use. Such a water right is a right in good standing.").

put to beneficial use."[13] Practically, good standing provides certainty as to municipal water rights and their availability for use.

In addition to going against this clear legislative and judicial direction, the Draft Policy is also inconsistent with Ecology's Policy-1120, which correctly provides for a "simplified tentative determination" for changes to an existing right "for a municipal water supply in accordance with RCW 90.03.330(3)." Again, the Supreme Court affirmed this approach in *Cornelius*, stating: "[i]ntuitively, instances where Ecology permits the streamlined policy would include when the water right is for a municipal water supply under RCW 90.03.330(3), since those rights are immune from relinquishment."[14] Both Policy-1120 and *Cornelius* expressly recognize that the "good standing" provision in RCW 90.03.330(3) necessarily limits the scope of Ecology's tentative determination authority. The Washington Legislature did not give Ecology authority to conduct a good standing "assessment" in its place.

Finally, the Draft Policy misconstrues the good standing principle by misapplying *when* it has the discretion to diminish or revoke municipal water rights. Contrary to the Draft Policy's statement that Ecology's discretion to diminish or revoke municipal water rights occurs at the application stage (Section 5, page 9), RCW 90.03.330(2) provides that this decision is made at the "issuance of certificates" stage. By improperly making this review *earlier* in the process than the statute provides, Ecology is truncating the time in which a municipal water supplier must apply the water to full beneficial use. Abbreviating this time is contrary to statute and beyond Ecology's authority.

4. Municipal Exemption to Relinquishment

The Draft Policy misinterprets the municipal exemption to relinquishment and cuts against efforts to promote and improve the efficient use of municipal water. Despite repeated conversations and concerns expressed by the WWUC regarding the "active compliance" policy, this flawed concept continues in the Draft Policy, albeit by a different name. (Section 4(a), page 8). Even as rebranded, "active compliance" is beyond Ecology's legal authority, not supported by case law (including *Crown West*), is potentially wasteful, and destabilizes critical long-range planning. Also, the ambiguity in the "active compliance" requirement will increase case-by-case determinations, inconsistent decisions, and litigation.

Under Washington water law, a water right holder relinquishes a water right if the holder fails to beneficially use any or all its right for five successive years, unless an exemption applies. One exemption to relinquishment is if the water is "*claimed*" for "municipal water supply purposes."[15] The Draft Policy limits the applicability of this exemption by adding requirements not in statute and by manipulating a statutorily defined term into a complex

[13] *Cornelius v. Washington Dep't of Ecology*, 182 Wn.2d 574, 597, 344 P.3d 199 (2015) (internal quotations omitted) (citing RCW 90.03.330(3)).
[14] *Id.* at 595-96.
[15] RCW 90.14.140(2)(d) (emphasis added).

question the agency controls. The Legislature *did not* intend that every municipal water supplier needs to use every water right every five years to qualify for the relinquishment exemption—this is not aligned with the text of the statute or the intent for the MWL to create "certainty" for municipal water rights.

a. Misapplication of Crown West

The Draft Policy appears to rely on the 2019 court decision in *Crown West* for the relabeled "active compliance" approach. Notably, however, *Crown West* does *not* support this approach. In fact, the court expressly states: "[w]e reserve approval or disapproval of POL-2030 for another day and perhaps another court because of its irrelevance to our ruling."[16] The court even went so far as to comment that "one might also wonder" why Ecology changes "beneficial use" to "active compliance" in Policy 2030 and whether "active compliance" conflicts with the Washington Supreme Court's decision regarding Washington State University's water rights in *Cornelius*.[17] The court comments that its opinion "may conflict with" the part of Policy 2030 that asserts "active compliance" applies to past events and can lead to relinquishment.[18] However, the court found that it need not rule on this relinquishment issue because it was not before the court and because "we have not adopted Ecology's position."[19]

b. Municipal Water Efficiency Requirements

The Draft Policy's interpretation of eligibility for the municipal water exemption to relinquishment undermines water rights certainty and works against efficient use of water by requiring use of water to meet policy requirements even when no public use is served. This promotes *inefficient* water use, which runs counter to the statutory efficiency requirements for municipal water suppliers.[20]

For example, this requirement fails to acknowledge the legitimate reasons why a municipal water supplier might not use a water right. Per- and polyfluoroalkyl substances (PFAS) contamination is an emerging issue in our municipal water supplies. PFAS contamination in drinking water presents a number of potential health issues for humans. Removing PFAS from a drinking water supply can be a costly and time-consuming venture. Despite these realities facing WWUC members, this Draft Policy would apparently find that the failure to use PFAS-contaminated water within a five-year period due to the contamination would subject that water to relinquishment.

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[16] *Crown W. Realty, LLC v. Pollution Control Hearings Bd.*, 7 Wn. App. 2d 710, 742, 435 P.3d 288 (2019).
[17] *Id.*
[18] *Id.*
[19] *Id.* at 752.
[20] *See, e.g.,* RCW 70A.125.170 (providing water use efficiency requirements for municipal water suppliers).

c. Draft Policy Sections 4(b) and (c)

The WWUC agrees with and supports sections 4(b) and 4(c). For clarity, the WWUC requests Ecology add the word "or" to clarify that these are alternative ways to qualify for the municipal water supply relinquishment exemption—and not that each must be met to qualify for the exemption. In section 4(b), the word "properly" should be deleted to the extent that it states or implies a new requirement in addition to listing or identifying water rights in a water system planning document. Additionally, the Draft Policy should clarify in a footnote or an additional (d) that these are not the only examples for claiming a right for municipal water supply purposes because the RCW 90.14.140(2)(d) exemption is not limited to just these three scenarios.

5. Acquired Municipal Water Rights – RCW 90.03.560

It is unclear whether the Draft Policy wrongfully excludes acquired water rights from municipal identification under RCW 90.03.560 and from municipal water relinquishment protections. Municipal water suppliers will often need to acquire additional water rights to meet changing demands and growing populations.

Specifically, the WWUC questions the effect of at least two provisions in the Draft Policy, which appear to exclude water rights acquired by a municipal water supplier from municipal water relinquishment protections.

(1) Page 4: "When considering whether a water right qualifies for a governmental purpose, Ecology considers how the water right has historically been used, the entity that was originally issued the water right, as well as the current holder of the right. For example, if a water right was issued for a governmental purpose (e.g., irrigation of parks) to a government entity that can qualify to hold a right under RCW 90.03.015(4)(b) then the right may qualify as being for municipal water supply purposes. However, if the same right was issued to a non-governmental entity (e.g., a private developer) and later acquired by a governmental entity then the right might not qualify as being for municipal water supply purposes."

(2) Page 6: "If a right for a governmental purpose (e.g., irrigation of parks) was issued to a non-governmental entity (e.g., a private developer) and later acquired by a governmental entity then the right does not qualify as being for municipal water supply purposes."

The statutory language is clear and unambiguous that a municipal water right can be "held" *or* "acquired" by a municipal water supplier.[21] There is no legal basis for distinguishing

[21] *See* RCW 90.03.560.

between water rights originally issued to a municipal water supplier versus water rights later acquired by a municipal water supplier. Additionally, the Draft Policy should be revised to make it clear that water "acquired" by a municipal water supplier and used for municipal water supply purposes qualifies for the municipal relinquishment protections.

6. Public Interest and Mitigation

The "public interest" test espoused in the Draft Policy exceeds Ecology's authority under its enabling legislation. The Draft Policy would allow Ecology broad discretion in determining what constitutes "public interest" on a case-by-case basis with minimal limiting parameters.

Although the Draft Policy's discussion of public interest is limited to the mitigation context (Section 9, pages 13-14), it is not clear that Ecology intends to restrict its application to this context. The Draft Policy's assertion of the public interest authority is unprecedented, unsubstantiated, and conflicts with other parts of the Water Code and the MWL. Specifically, the Draft Policy asserts denial authority where there has allegedly been "an extended period of nonuse where environmental, social, economic, and other conditions may have changed." The WWUC understands the Draft Policy to assert authority to exclude valid water rights from accessing basic provisions of the Water Code. Such exclusion would constitute "diminishment" of a municipal water right contrary to the MWL. In addition, there are established statutory provisions that set out requirements for approval of a change application—and the Draft Policy appears to be adding *new* requirements that are not present in existing law. Doing so threatens to destabilize the water rights system and to disregard specific provisions of the MWL.[22]

Further, the public interest test in the Draft Policy would disincentivize the use of the Trust Water Rights Program. Water rights holders (including municipal water suppliers) may be reluctant to use the Trust Water Rights Program for fear of an adverse public interest determination by Ecology.

7. Definition of "Municipal Water Supply Purposes" – RCW 90.03.015(4)

The Draft Policy misinterprets the definition of "municipal water supply purposes" in a manner that limits which water uses qualify for the municipal exemption to relinquishment. This overly narrow reading of the definition is contrary to the Legislature's intent to provide a broad definition of water uses eligible for the municipal exemption. The definition contains multiple provisions that set forth categories that are included in "municipal water supply

[22] Because this public interest proposal signals a change in course from Ecology's previous position, the new position is untenable because Ecology cannot rely on changing social or political circumstances to alter its interpretation of existing law. *See, Kim v. Pollution Control Hearing Bd.*, 115 Wn. App. 157, 163, 61 P.3d 1211 (2003) (finding that an administrative agency cannot "alter the plain meaning of a statute to meet changing societal conditions" and rather "the remedy is for the legislature to amend it"); *see also* Wash. AGO 2005 No. 17 (citing the same).

purposes," and it is essential that each such provision be acknowledged and given meaning in any document purporting to interpret the MWL.

a. Governmental and Governmental Proprietary Purposes – RCW 90.03.015(4)(b)

The Draft Policy improperly collapses two distinct categories of municipal activity into one under subsection (b) of the definition of "municipal water supply purposes."[23] As a result, the Draft Policy would exclude many municipal uses of water from qualifying for "municipal water supply purposes."

The definition of "municipal water supply purposes" includes use of water "for governmental or governmental proprietary purposes by a city, town, public utility district, county, sewer district, or water district."[24] "Governmental or governmental proprietary purposes" are terms of art in municipal law and are two distinct purposes—"governmental" *or* "governmental proprietary." The Legislature knowingly used these terms in the MWL. And yet, the Draft Policy fails to recognize the distinct legal meanings for these terms.

In Washington, a municipal corporation's dual powers are typically described as governmental or proprietary. "The basic concept underlying the governmental / proprietary distinction is that municipalities act in different modes, i.e., sometimes as 'governments' and sometimes 'like businesses,' and that their powers and their legal obligations should be treated differently depending on which of the two modes they are operating in."[25] Additionally, a national treatise on municipal law explains these terms as follows:

> A municipal corporation has a two-fold character and dual powers, which are recognized by the courts. The one is variously designated as public, governmental, political, or legislative, in which the municipal corporation acts an agency of the state. The other is variously designated as municipal, private, quasi-private, or proprietary.[26]

Although these two scholarly sources agree that it can be difficult to predict which category a court may place a particular function or action, Ecology need not enter that scholarly debate. Instead, the Draft Policy should recognize that "governmental" and "governmental proprietary" are distinct categories of municipal functions.

Together, the governmental and governmental proprietary categories include *all functions by a* city, town, public utility district, county, sewer district, or water district. Accordingly, any use of water by one of the listed entities would qualify as either

[23] *See* Draft Policy at page 4.
[24] RCW 90.03.015(4)(b).
[25] Hugh D. Spitzer, *Realigning the Governmental/Proprietary Distinction in Municipal Law*, 40 SEATTLE U. L. REV. 173, 175 (2016).
[26] McQuillin, *The Law of Municipal Corporations*, § 10:5.

"governmental" or "governmental proprietary" and would therefore be a municipal water supply purpose.

Failing to recognize these distinct purposes is especially harmful to water utilities that operate in the governmental proprietary zone. Washington courts have held the operation of a water system or other utility serving billed customers is a proprietary function.[27]

Accordingly, a water utility owned and operated by a city, town, public utility district, county, sewer district, or water district is generally considered a governmental proprietary function. Depending on the specific powers and roles of the listed governmental entities, other governmental proprietary functions include, but are not limited to, power generation, fish propagation, electric power delivery and management, operation of a solid waste utility, waste treatment and disposal, and other enterprises.

The Legislature used specific wording to include all proprietary water uses by the listed governmental entities. The Draft Policy contradicts that plain statutory language. By failing to distinguish between "governmental" and "governmental proprietary," the Draft Policy would improperly limit what is included in these categories. This in turn would limit which uses qualify for the municipal water supply exemption to relinquishment.

Ecology should significantly revise its Draft Policy to acknowledge legislative intent that water "for governmental or governmental proprietary purposes by a city, town, public utility district, county, sewer district, or water district" is categorically for municipal water supply purposes. Ecology should add definitions for "governmental purposes" and "governmental proprietary purposes" that correctly reflect this legislative intent.

b. Other Municipal Uses – RCW 90.03.015(4)

The Draft Policy also improperly restricts the application of the "other uses" clause in the definition. Each sentence in the statute must be given meaning. Nevertheless, the Draft Policy appears to overlook the two sentences following and modifying subsections "(a)-(c)" which provide a broad and inclusive definition of "municipal water supply purposes."

> If water is beneficially used under a water right for the purposes listed in (a), (b), or (c) of this subsection, any other beneficial use of water under the right 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

[27] *See, e.g., City of Moses Lake v. United States*, 430 F.Supp.2d 1164, 1174 (E.D. Wash. 2006) (recognizing that "in Washington, operation of a municipal water system has not traditionally been considered a power or duty which inheres in the sovereign, but rather a proprietary activity for the advantage of each community").

> repair, or related purposes. 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.[28]

By reading the final two catchall sentences out of the definition, the Draft Policy omits from "municipal water supply purposes" other water uses that the Legislature intended to be included, such as municipal water use by irrigation districts. The Draft Policy asserts that "other" municipal water uses must be "listed on the same water right" in contrast to the statutory text "under a water right."[29] Similarly, this broad definition includes water use by Group B water systems held by one of the six listed entities (city, town, public utility district, county, sewer district, or water district) in subsection "(b)" as "municipal water supply purposes."[30]

8. Consumptive and Non-Consumptive Water Uses

The Draft Policy could be read as improperly limiting municipal uses to consumptive uses. Section 3 of the Draft Policy includes a sentence that "only consumptive uses are included in the types of water uses authorized under rights municipal purposes." (Section 3, page 6). The WWUC is confused by this new position presented in a single sentence without any explanation of policy intent or legal authority. Ecology has issued, and WWUC members hold, many water rights for a wide variety of non-consumptive purposes.

Our understanding is that Ecology intends this sentence to be limited to the conformance of non-consumptive to consumptive uses. Certainly, nothing in the MWL limits municipal water supply purpose rights to consumptive uses. In fact, RCW 90.03.550 and .570 expressly authorize use of "municipal" rights for non-consumptive purposes. Ecology cannot ignore that it has issued or approved innumerable municipal water rights for non-consumptive purposes in whole or in part.

Even if it is limited to conformance, the "non-consumptive" element of the Draft Policy requires reconsideration. For example, it is unclear how the Draft Policy would treat water rights that are non-consumptive in part, whether the Draft Policy is only applicable to water rights issued for non-consumptive purposes, and whether this provision distinguishes between how a water right is used versus how it was issued. For example, does the Draft Policy intend

[28] RCW 90.03.015(4).
[29] *See* Draft Policy Section 2, page 4.
[30] Accordingly, the Draft Policy at page 3 stating "[t]here are no Group B public water systems that are municipal water suppliers" is inaccurate.

to revisit the state's approach to in-conduit hydropower as a type of municipal-purpose water use?

The "non-consumptive" element of the Draft Policy appears to be inconsistent with Ecology's Policy 1020. Under Policy 1020, very few uses are entirely non-consumptive. Specifically, Policy 1020 provides that surface water use is non-consumptive when there is "no diversion from the water source or diminishment of the source" and in specific instances where "water is diverted and returned immediately to the source at the point of diversion."

9. Service Area Changes

The Draft Policy should specify that Ecology cannot impact service area changes through comments on water system planning (Section 7, page 11). The Draft Policy simply states that Ecology "may make comments" on consolidations through the water system planning process without providing more context or direction to agency staff. WWUC understands that Ecology and the Department of Health are still negotiating a memorandum of understanding (MOU) to coordinate MWL roles and responsibilities. The Draft Policy section regarding water system planning is premature until completion of the MOU. Based on the past history of comments on water system planning, the Draft Policy should not enable or result in water system planning comments that express new and untested policies or interpretations of the MWL that go beyond the scope of existing law.

10. RCW 90.03.380 and Water Right Changes

The Draft Policy should clarify the language in Section 8 (page 12) that RCW 90.03.380 is not limited to changes to perfected surface water certificates. Rather, RCW 90.03.380 provides that changes can be made to quantities "put to beneficial use" which could include, but are not limited to, a certificated right. *See* Draft Policy at 12. We note that the Draft Policy's discussion of RCW 90.03.380 is not consistent with WAC 508-12-190, which allows for amendments to applications and permits.

11. Rulemaking Issues

The Draft Policy raises concerns regarding rulemaking under the Administrative Procedure Act (APA). First, there is a substantial question as to whether the Draft Policy will function as an illegal rule. A recent decision of the Court of Appeals underscores the rulemaking risks that attend Ecology's development of interpretative documents to guide agency staff.[31] In a challenge to an Ecology document regarding wastewater permitting as to nitrogen pollution, the court held that an Ecology document instructing staff to "include new terms in permits" constituted a rule.[32] The Court of Appeals explained that the Ecology document was a "directive of general applicability" that altered or revoked a "qualification or

[31] *See City of Tacoma v. Dep't of Ecology*, No. 39494-8-III (Sept. 14, 2023).
[32] *Id*. at 2.

requirement relating to the enjoyment of benefits or privileges conferred by law" as stated in the APA. Similarly, in several places as discussed above, the Draft Policy directs Ecology staff to block access to provisions of the MWL and the Water Code enjoyed by municipal water suppliers and municipal-purpose water rights. For example, the Draft Policy's exclusion of water rights from the definition and restriction of inchoate water rights from changes would alter or revoke benefits conferred by law.

In addition to APA compliance issues, the Draft Policy would avoid the public process required by rulemaking. If adopted by rulemaking, Ecology would be required to prepare and provide substantially more description of the intended agency policy, impacts on municipal water suppliers and growing communities, statement of legal authorities, and other elements. In addition, the rulemaking process would require Ecology to review and respond to public comments and concerns, and potentially to have its interpretations tested in judicial review.

12. Definitions

In addition to the concerns noted above, the WWUC also proposes clarifications and additions to the defined terms in the Draft Policy as follows.

a. Reasonable diligence

The definition of "reasonable diligence" in the Draft Policy should state that reasonable diligence is different for municipal water suppliers compared to many other water right holders. Most municipal water suppliers are local governments and/or corporate entities that expand their systems and beneficial use of water to respond to growth in population and customer base. Municipal water suppliers generally do not control the pace of growth and development and most of the land that is served by municipal water systems is privately owned.

b. Consolidation

Ecology should clarify references to "consolidation" throughout the Draft Policy—including by clarifying whether the reference is specific to the consolidation of municipal water supply systems, the consolidation of water rights (such as through a "wellfield" application), or other intended meaning.

c. "Original intent"

As a threshold matter, it is unnecessary to feature "original intent" in an MWL policy and deletion of the definition is recommended. If the policy retains a definition of "original intent," however, that definition should be amended to reflect the limited application of this fact-finding tool. First, the definition should characterize "original intent" as a common-sense tool to determine the facts of a water right's scope and characteristics and not as a legal

doctrine, a permitting test for change applications, or as a grant of authority to the agency. "Original intent" is only applicable when there is a factual question as to whether a water right change will result in unlawful enlargement of the water right, such as from non-additive to additive relating to quantity. Second, a definition of "original intent" must point out that events *after* an original application may also be evidence of a water right's scope and characteristics, which is recognized by the MWL. Such later events include non-water right actions (such as population changes, service area boundary changes, and water system consolidations) and water right actions (such as change applications, exempt well consolidations and administrative decisions). Actions and steps external to a water right may also affect the interpretation of a municipal water supply purposes water right such as actions by land use jurisdictions, property transactions, physical changes to water sources, water system plans, etc. Third, the definition included in the Draft Policy should be amended to not focus on the original location of use. This is because the *Burbank* court did not agree with Ecology's proposed application of "original intent" that focused on the original location of use.

d. Governmental and Governmental Proprietary

The Draft Policy should also provide definitions of "governmental" and "governmental proprietary" that align with municipal law and clearly indicate that *any* water use by the entities listed in statute (city, town, public utility district, county, sewer district, or water district) constitutes either governmental or governmental proprietary use and accordingly is for "municipal water supply purposes" as defined in RCW 90.03.015(4).