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*City of Bonney Lake*

*Camino Water Association*

*Covington Water District*

*City of Fife*

*Firgrove Mutual*

*Fox Island Mutual Water Association*

*Fruitland Mutual*

*Graham Hill Mutual*

*Lake Josephine Riviera*

*Lakewood Water District*

*City of Milton*

*Mt. View-Edgewood Water Co.*

*City of Pacific*

*Parkland Light and Water*

*Peninsula Light*

*Pierce County Public Works and Utilities*

*City of Puyallup*

*Town of Roy*

*Spanaway Water*

*Town of Steilacoom*

*Summit Water & Supply*

*City of Sumner*

*City of Tacoma Water*

*Public Utility District No. 1 of Thurston County*

*Valley Water District*

*Washington Water Service Co.*

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

September 27, 2023

Dear Mr. Melcher and the Water Resources Program, Department of Ecology,

The twenty-six members of the Regional Water Cooperative of Pierce County appreciate the opportunity to comment on the draft Policy 2030 Municipal Water Law Interpretative and Policy Statement update. The Cooperative is made up of municipal water suppliers serving a population of over 850,000 in Pierce County and 104,000 in eight additional counties. The diversity of our public water systems is also reflected in the governance under which the individual systems operate including cities, public utility districts, special purpose districts, non-profit mutual, cooperatives, for profit companies, and association systems. The policy is of great importance to our membership, the public we currently serve, and the population growth for which we must plan water supply.

The Regional Water Cooperative of Pierce County, as a member of the Washington Water Utilities Council (WWUC), endorses and supports the draft Policy 2030 update comments made on behalf of the WWUC. Our membership also includes a PUD and we endorse and support the comments provided the department by WPUA. In order to minimize repeating the comments made in the WWUC's and WPUA's comment letters we will focus our comments to the degree possible to those which most directly impact the RWCCP's membership. We also recognize and acknowledge the outreach efforts made by the department. Input from stakeholders is essential to developing an understandable and supported policy.

The implementation of the intent of the 2003 Municipal Water Law (MWL) to provide certainty and flexibility to municipal water suppliers is critical to allowing the cooperative members to address growth over the next thirty years. The Office of Financial Management (OFM) projects that Pierce County's population will grow between 16 and 50 percent over the next 30 years. (OFM Forecasting & Research Division December 2022). With the passage of E2SHB 1110 and EHB 1337 requiring permitting of greater housing densities and the acknowledged shortage of housing

in the Puget Sound, the higher growth projection is likely more realistic. Historically, thirty percent growth over the past twenty years has stressed Pierce County water suppliers' ability to meet demand. Even with required conservation efforts, future growth of this magnitude will be difficult or impossible to address. Though municipal water suppliers do not direct or regulate growth or growth patterns, they do have a duty to serve. Further, to address Growth Management Act requirements, public water systems must plan to provide water supply concurrent with growth. The draft Policy 2030 update restricts and hinders municipal water suppliers' ability to meet these requirements and the water demands of a growing population.

An overview of the draft policy shows that the policy, rather than providing certainty and flexibility, increases uncertainty and restricts flexibility in the utilization of municipal water supply water rights. In multiple locations throughout the policy, determinations and exceptions are to be addressed on a "case by case basis". Such determinations and exceptions are subject to variations between Ecology regions or even between individual permit writers. This potential for inconsistency begs for litigation, judicial review, and unnecessary costs. Such an outcome is not desired by municipal suppliers or the departments of ecology and health.

Indirectly, due to the policy's apparent limitations and restrictions on the flexible use of municipal water rights, the policy also seems to lend unintended support for the use of exempt wells. This unintended consequence is contrary to the goal of minimizing the creation of small water systems. The policy's use of "original intent" when considering change applications, limits the use of existing rights to address growth driven development over which public water systems have no control. Small water systems often have limited resources and management capacity to address and fund increases in required water treatment and long term infrastructure maintenance, repair, and replacement. The Kapowsin water system failure is an example of this problem and its major expenses to Pierce County and tax payers in general! Ultimately this can lead to the need for water system consolidation which is hindered under the proposed policy.

**Specific comments:**

With respect to water supply for the members of the RWPC, flexibility in the use of water rights is a very high priority. In the environment where new water rights are difficult if not impossible to obtain, changes, transfers, amendments, and consolidations of water rights are often the most viable means to address water supply needs. Looking specifically at the proposed policy update, in section 5 Changing Municipal Water Rights and section 7 Consolidation, the department introduces a definition of "original intent" in section 1 and adds "original intent" as one of the determining test in sections 5 and 7. "Original intent" is not found in statute and as used in the policy conflicts with the MWL's clear legislative intent to provide certainty and flexibility for municipal water supply and suppliers. If carried to its logical end point, "original intent" for a city would be interpreted as only the area served by the city or the city limits in the year a water right was granted. Obviously the city's original intent was dynamic for population and place of use with the intent to grow "and

change” as needed. Under RCW 90.44.100 both perfected and inchoate groundwater rights may also be changed. RCW 90.44.100 does not include a review, consideration, or constraint based upon “original intent” as identified in sections 5 and 7 of the draft policy 2030 update.

Section 5 also includes a determination whether a change to a municipal water right would be “contrary to the public welfare”. The policy is unclear on how such a determination is to be made and how this relates to “public interest” as used in the draft policy. Policy 1010 Administration of the Statewide Trust Water Rights Program defines “public interest” under guidance of RCW 90.54.020. RCW 90.54.020(1) provides: “*Uses of water for **domestic**, stock watering, **industrial, commercial**, agricultural, irrigation, hydroelectric power production, mining, fish and wildlife maintenance and enhancement, recreational, and thermal power production purposes, and preservation of environmental and aesthetic values, and all other uses compatible with the enjoyment of the public waters of the state, are declared to be beneficial.*” RCW 90.54.020(5) further states: “*Adequate and safe supplies of water shall be preserved and protected in potable condition **to satisfy human domestic needs.***” (emphasis added). Satisfying human domestic needs is clearly in the public interest and the purpose for which municipal water rights are issued. If a change is to be made to an original municipal water supply water right that was issued after satisfying the four part test, water was available, for a beneficial use, existing rights were not impaired, and there was no detriment to the public welfare, is not the change also in the public interest and not contrary to the public welfare?

Section 2 on page 4 includes two requirements to qualify as municipal water supply purposes which are not included in statute. First, the policy states that to meet the municipal water supply purpose definition based on nonresidential population served, the nonresidential population served must be the same 25 people for at least sixty days. RCW 90.03.015(4) does not require “the same” twenty-five people. If the legislators intended that it be the same 25 people, the statute would clearly state “at least the same twenty-five people...” Second, the policy states: “If one purpose of use of a water right is for municipal water supply purposes, then other purposes of use generally associated with a municipality that are listed on the same water right are also considered to be for municipal water supply purposes.” RCW 90.03.015(4) provides if water is beneficially used for purposes under (a), (b), or (c), any other uses associated with the use of water within a municipality are also for municipal water supply purposes and then continues with a non-exclusive list of other beneficial uses that are also considered municipal water supply purposes. There is no requirement to list those or any other potential uses generally associated with a municipality is required under the statute.

The policy’s discussion of governmental and governmental purpose in Section 2 is an example of lack of certainty in the draft policy. Under the policy, a water right held by a county for irrigating a park and supplying domestic water for outdoor cooking spaces and restrooms would qualify as a municipal water supply purpose right under RCW 90.03.015(4)(b). Under the policy, if the right were later acquired by a city or other entity listed in (4)(b) then the right would qualify as municipal water supply purpose. However, would that right also retain its municipal water supply purpose if acquired

by another municipal water supplier that is not a government entity listed in (4)(b)? In both cases the right was issued to a (4)(b) entity for a municipal water supply purpose and continues to be used for a governmental purpose. Would this issue potentially be before a court? RCW 90.03.560 provides that when requested by a municipal water supplier, the department shall amend the water right documents and records to ensure the right is correctly identified as a municipal water supply purpose right. The statute further states that a right or portion thereof that is held or acquired by a municipal supplier that is for a municipal supply purpose be identified as being a municipal supply purpose right. This RCW indicates the legislature's intent that any right or portion thereof held or acquired by any municipal water supplier shall be amended to ensure the right is identified as a municipal water supply purpose right. The policy lacks certainty and clarity in this and many other areas.

Section 3 on page 6 states that "only consumptive uses are included in the types of water uses authorized under rights for municipal purposes." Again, there is no basis in statute that limits municipal water supply purposes to consumptive uses. Under existing practice, as requested by Washington Department of Fish and Wildlife, the flow of Chambers Creek is supplemented by a municipal water supplier to assist in fish passage. How such a consumptive only limitation, even if such a limitation were in statute, might be applied is unclear. How would return flows from park irrigation or septic recharge be addressed? Municipal water supply is utilized for many and varied non-consumptive purposes.

We agree with section 4 on relinquishment on all but two points, request clarification on a third, and that the policy should give recognition to the full text of RCW 90.14.140(2) and (2)(d). Per multiple discussions with the department item a. should be modified by including the descriptive word "any" before municipal beneficial once every five years. Under b. the word "properly" should be removed as it is undefined and there is no guidance on how to "properly" identify a water right in a Department of Health approved water system plan. While footnote 3 is helpful, Item c. should be expanded and clarified with examples of how a primary right, even with a decommissioned well, may be exercised at a different source under the other sources non-additive right.

The relinquishment statute, RCW 90.14.140, provides that there shall be no relinquishment of any water right "... (d) If such right is claimed for municipal water supply purposes under chapter 90.03 RCW;". Under this statute, an unused municipal supply purpose right claimed for a such use is on its face exempt from relinquishment unless abandoned with intent to abandon per policy 1060 and Okanogan Wilderness League v. Town of Twisp, 133 Wn.2d 769, 947 P.2d 732 (1997)

The draft policy section 6 correctly identifies the processes under RCW 90.03.386(2) which permit service area expansions and automatic revisions to water right's place of use.

The use of "original intent" in section 7 consolidations as evaluation tool was addressed earlier. With regard to sections 5 changes, 7 consolidations, and 8 transfer/sale of municipal water rights,

the legislative intent expressed in the RCW 90.03.380 findings is informative and appropriate. RCW 90.03.380 Findings – Intent- 2011 c 112: *"The legislature finds that because it is increasingly difficult for water users to acquire new water rights, transfers are a valuable and necessary water management tool."* Similarly, RCW 90.54.020(8) *"Development of water supply systems, whether publicly or privately owned, which provide water to the public generally in regional areas within the state shall be encouraged. Development of water supply systems for multiple domestic use which will not serve the public generally shall be discouraged where water supplies are available from water systems serving the public."* These legislative statements are not supported by the language and spirit of these draft policy sections.

The Burbank Irrigation District case provides an example of the issues within the draft policy and in a broader sense regarding changes, consolidations, and transfers/sales of municipal rights. In that case Burbank sought to sell a portion of their water rights to the City of Pasco. The department objected to this direct sale as an enlargement of the right and not in the public interest. Ironically, this process could likely have been completed differently. Section 6 and RCW 90.03.386(2) allows a municipal water supplier to update their service area through a water system planning process. Burbank could have added a wholesale service area through a water system plan update and then, utilizing its inchoate water, simply sell that wholesale quantity to the City of Pasco. There are many examples of this type of utilization of municipal water supply purpose water rights being wholesaled across the state. The practical feasibility, cost effectiveness, and developed but unused inchoate quantity (demonstrated reasonable diligence) of the potential wholesale supply are determining factors in such a process. Unlike water right changes under RCW 90.03.380, developed surface inchoate water can be and is used for new wholesale supply.

Sections 5 and 7 both require the exercise of "reasonable diligence" to complete a project. For both surface and ground water, a municipal water system has clearly demonstrated "reasonable diligence" when infrastructure is installed with the capacity to utilize the full volume of a water right. Municipal water suppliers do not control growth, changes in growth patterns, or create demand for water and as such should not be determining factors when considering "reasonable diligence". RCW 90.03.320 correctly notes that *"...In fixing construction schedules and the time, or extension of time, for application of water to beneficial use for municipal water supply purposes, the department shall also take into consideration the term and amount of financing required to complete the project, delays that may result from planned and existing conservation and water use efficiency measures implemented by the public water system, and the supply needs of the public water system's service area, consistent with an approved comprehensive plan under chapter 36.70A RCW ..."* Policy 2030 should clearly reflect this flexibility when considering "reasonable diligence" in sections 5 and 7.

Overall, sections 5, 7, and 8 require the department to include a determination of a water right's "good standing" if a change, consolidation, or transfer/sale of a water right certificate is desired. RCW 90.03.330(3) clearly does not require this analysis: *"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.”* The policy should reflect the plan language of the statute.

In summary, regarding the case of a change, consolidation, or transfer/sale of municipal water supply water rights, foundationally, the department and its policy should apply the basic four part test. Because the water right was originally issued, the department had determined that at the original point of diversion or withdrawal water was available, for a beneficial purpose, which did not impair existing rights, and was not detrimental to the public welfare. Clearly, as discussed earlier, public water supply is in the public interest and a beneficial statutory beneficial purpose. So long as the point of diversion or withdrawal is within the same body of water the department had determined that water was available. Thus, the only analysis would be, will the change, consolidation, or transfer/sale impair existing rights issued prior to the right for which the change, consolidation, or transfer/sale. See RCW 90.03.380(1) and 90.44.100 which both state that there is no loss of a right holder’s priority under statute.

Section 9: “Using Municipal Water Rights for Mitigation” complicates the use of municipal water rights for mitigation. RCW 90.03.550 cited in the policy clearly states: “**Beneficial uses** of water under a municipal water supply purposes water right **may include** water withdrawn or diverted under such a right and used for: (1) Uses that benefit fish and wildlife, water quality, or other instream resources or related habitat values;” The statute does not differentiate whether the use of the water right also provides mitigation so long as there is a benefit to “fish and wildlife, water quality, or other instream resources or related habitat values”.

The memorandum of understanding currently being developed to establish coordination between the departments of ecology and health may have some bearing on the language of this draft policy in not only section 10 but also in the body of the policy. The MOU and policy 2030 section 10 should reflect acceptance of department of health determinations upon whether a municipal water supplier is in compliance with conservation standards.

In conclusion, is there a current or immediate need for an updated policy 2030? As discussed in this comment letter and those of other municipal water suppliers and in light of the current on-going municipal water law litigation and development of the departments of health and ecology MOU, the draft policy update only increases uncertainty, decreases flexibility, increases the likelihood of future litigation, and restricts the full utilization of municipal water supply water rights and municipal water supplier’s ability to address the state’s future needs. Lastly, should the issues addressed in the policy

be addressed through a rule making process? Please feel free to contact the Cooperative if you have additional questions or comments.

Sincerely and respectfully submitted,

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Jeff Johnson

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