City of Seattle

VIA Email
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September 27, 2023

Austin Melcher, Municipal Water Law Policy Lead
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PO Box 47600
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Re: Comment Letter on Ecology Draft Policy 2030.

Dear Austin,

On behalf of the Seattle Public Utilities and Seattle City Light ("the City") we are providing comments on the draft Municipal Water Rights Policy 2030 ("Draft Policy"). We appreciate the difficult task of drafting a policy regarding the implementation of a complex area of municipal water law and appreciate the opportunity to review and comment on it.

We believe the City and Ecology share the goal of interpreting and implementing the Municipal Water Law ("MWL") with consistency, clarity, and as intended by the legislature. This approach is critical for the management of water resources for a city such as Seattle that has a large portfolio of water rights for municipal purposes and a complex water supply system. As the City responds to the impacts on water resources from climate change, increased growth, and increased demand for drinking water and non-consumptive uses, including hydropower needs and hatchery management, Policy 2030 should facilitate the City's ability to meet its governmental obligations. To do so, it is critical that municipal water providers have the highest level of flexibility in managing and using their existing water rights, including changes to points of diversion and multiple uses of the water to meet their needs. We are providing these comments and seeking changes to the draft to ensure the updated policy does not have unintended consequences that could inhibit the City from responding to existing needs or to future challenges. The City seeks a policy that supports the certainty and flexibility of municipal water rights intended by the Legislature.

Generally, the Draft Policy interprets and seeks to apply the MWL in an unnecessarily restrictive manner. Some significant points, which are discussed below in more detail, are summarized as follows:

- The Draft Policy inappropriately limits the definition of government and governmental proprietary purposes as municipal purposes under RCW 90.03.015(4)(b). Government and governmental proprietary purposes should be defined as those purposes authorized by the City under Title 35 and specifically the City's authority for utilities and power under Ch. 35.92.

RCW. Any water that provides for these governmental purposes should be allowed to be conformed to municipal purposes without complying with RCW 90.03.015(4)(a).

- The definition of "good standing" in the Draft Policy places limits on inchoate water right certificates that are contrary to the very clear legislative intent that these rights are in good standing under RCW 90.03.330(2) and cannot be revoked, diminished, or adjusted, even when the water right is subject to a change application. There is not and never has been a limitation in the law to have used the water right at least every 5 years under RCW 90.03.015(4). Although the revised policy has removed the term "active compliance", it continues to embrace the concept. This concept should be removed from the Draft Policy as it diminishes the City's existing rights without authority. In addition to being inconsistent with the MWL, using a water supply source solely to satisfy the "good standing" requirement contradicts the State requirement of efficient water use and City policy to minimize utility costs to rate payers.

- The inclusion of "original intent" in regard to changing a municipal water right certificate does not comply with the law and the appellate courts' application of original intent. Original intent should be limited to interpreting the purpose of specific conditions placed on the original water right and not an interpretation of the quantities in the water right as determined by the original place of use. Limiting municipal water rights based on the original authorized place of use directly conflicts with the MWL which provides that the place of use is dynamic and changes with the approved service area in recognition of the fact the growth of a municipality and its water demand should not be confined but rather should follow growth patterns.

- Inchoate portions of surface water right certificates should not be limited, in a change application process, to an extent and validity analysis or RCW 90.03.570.

- The Draft Policy inappropriately restricts the use of inchoate water rights for mitigation. Mitigation can be a governmental purpose regardless of whether it qualifies as an instream use under RCW 90.03.550.

As the largest public water supplier in the state, the City appreciates the constructive relationship it has with Ecology. The City hopes its comments below will assist Ecology in creating a clear and defensible policy that will meet Ecology's responsibilities, the City's obligations for multi-faceted water use, and best serve the public. In this regard, the MWL should be liberally construed to provide necessary flexibility and certainty for retention and growth into water rights.

1. Governmental and Governmental Proprietary Purposes

Under RCW 90.03.015(3), the City is a "municipal water supplier" that supplies water for municipal water supply purposes as defined by governmental and governmental proprietary purposes in RCW 90.03.015(4)(b). Under RCW 90.03.015(4)(b), the government and governmental proprietary purposes are a distinct and separate definition of municipal water supply purposes. The definition is not limited to or otherwise defined by the other language in RCW 90.03.015. This is important because the City has rights for governmental purposes that do not explicitly state the use is for

municipal purposes and may not be on the list of "any other beneficial use generally associated with the use of water within a municipality". But these uses are for governmental purposes. Examples of these governmental uses include hydropower and community domestic use that may not meet the definition of RCW 90.03.015(4)(a) but are supplied water from the City.

The Draft Policy improperly limits the definition of government and governmental proprietary purposes, by stating that they "include, but are not limited to providing water for commercial, industrial, irrigation of parks and open spaces, institutional, landscaping, fire flow, water system maintenance and repair, and related uses." This definition simply repeats what purposes the statute already recognizes for governmental entities, and in so doing it fails to give meaning to government and governmental proprietary purposes as an independent definition that qualifies for municipal water supply purposes. The law requires an interpretation of a statute that at a minimum, accounts for and gives meaning to all the words.[1]

The governmental and governmental proprietary purposes for a city are those purposes for which the city has been given authority under the State Constitution and as contained in Title 35 RCW, specifically including public works for utilities and power in Ch 35.92 RCW. In regard to the City, its water rights that supply water for purposes that (i) do not explicitly state the use is for municipal purposes, (ii) are not on the list of "any other beneficial use generally associated with the use of water within a municipality" in RCW 90.03.015(4) and (iii) would not qualify under RCW 90.03.015(4)(a) are municipal water supply purposes nonetheless because they are being used for governmental purposes.

The Draft Policy also states that a water right does not qualify as a municipal water supply purpose if an entity listed in RCW 90.03.015(4)(b) acquires the water right from a non-governmental entity. The City disagrees. Any water right owned by the City, regardless of how it was obtained, that is used for governmental and governmental proprietary purposes is water supplied for municipal water supply purposes. There is nothing in the law that supports Ecology's interpretation of the MWL as laid out in the Draft Policy. The City does not understand the basis and reasoning for this interpretation.

The final Policy should recognize that governmental and governmental proprietary purposes are those that are contained in Title 35 for cities, and the requirement that any rights acquired and used by the City for governmental or governmental propriety purposes must also meet the definition in RCW 90.03.015(4)(a) should be removed in the final Policy.

2. Consumptive Use

The Draft Policy makes a blanket statement that municipal water rights are limited to consumptive uses for municipal purposes. There is no legal basis for this. Water rights for municipal purposes will have a non-consumptive portion. For example, many cities discharge a portion of the water back into the natural system after treatment through wastewater treatment facilities. That non-consumptive portion is clearly part of the water right and should be considered as a valid portion of the water right,

[1] *Five Corners Family Farmers v. the State of Washington* 173 Wn.2d 296 (2011)

including in an application to change the water right. Omitting non-consumptive uses of a municipal water right may functionally limit the quantity of water that is certificated for use.

3. Good Standing

The Draft Policy places conditions on the water right certificates that the legislature deemed as being in "good standing" under RCW 90.03.330. These conditions include a requirement that a water right for municipal water supply be based on the beneficial use of the water once every five years. If the water right is not actively used in a manner defined by RCW 90.03.015(4), it is subject to relinquishment.

This requirement, referred to as *active compliance* in the current Policy 2030, diminishes without reason or good cause the ability of the City to manage its portfolio of water rights. This requirement is not an authorized standard in the statute and the City disagrees with Ecology's assertion that it has been adopted by the courts. A*ctive compliance* removes the flexibility and certainty the City requires in providing water throughout its service area. There is no authority for this requirement.

Under RCW 90.03.330, the legislative intent is to consider the entire water right when processing an application to change the water right. The MWL allows changes of inchoate water in pumps and pipes certificates for municipal water supply purposes. RCW 90.03.330 states:

> *Except as provided …, 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.*

Ecology must accept the pumps and pipes certificates as legitimate water rights for the full quantities, which the Supreme Court deemed as perfected rights for the purpose of changing inchoate water rights. See *Cornelius v. Department of Ecology,* 182 Wn.2d 574, 344 P.3d 199 (2015).

Imposing new conditions in defining these rights is beyond the scope of Ecology's authority and would unlawfully diminish the water rights when an application is filed to change the water right.

4. Changes to Water Rights

The Draft Policy provides for additional requirements in determining whether any inchoate quantities in municipal water right certificates are valid for change. These include the concept of original intent and the exercise of reasonable diligence. The Draft Policy also states that any inchoate surface water rights are limited to changes authorized in RCW 90.03.570. The Draft Policy sections that place new requirements to change water rights are as follows:

a) Original Intent

The Draft Policy defines original intent as:

> *The nature of the project as described in the original water right application, which are captured in the original water right documents. This generally means the quantities of water necessary to supply the place of use of the water right at full buildout of the geographic area identified in the original water right authorization.*

We are concerned that the Draft Policy suggests that in changing a municipal water right, Ecology would look at the place of use of the water right and will seek to determine the quantities that were likely intended for that place of use at full build-out as first intended at the time the water right application. Under the Draft Policy, *Original intent* would also be applied when an application is filed with Ecology to consolidate water rights of two municipal water suppliers that are also connected through their infrastructure. (See Section 6).

There is no legal support or authority for applying this notion of *original intent* to an application to change a municipal water right. It does not comport with the recent Court of Appeals decision in *Burbank Irrigation District v. Ecology,* No. 38897-2-III (Aug 17, 2023). It is also inconsistent with the MWL that provides the place of use of the City's water rights changes to the City's water service area when it is approved by the Department of Health, and it is not limited to the place of use of the original application. In applying original intent, Ecology ignores this important part of the MWL.

We also do not understand Ecology's purpose in invoking the *original intent* concept. The legislature, in passing the MWL, recognized that municipal water supply is dynamic, and as such, a municipal supplier of water with an approved water system plan is not limited to the population figures and the place of use in the water right documents. It is nonsensical to now interpret the MWL to limit quantities based on the service area originally contemplated when the application for the water right was filed and as contained in the original permit.

The application of original intent as defined in the Draft Policy is an unsupported requirement for defining those certificates recognized by the legislature as being in good standing. The statutes, regulations and case law do not require such reviews. The City is concerned about the potential application of this concept to its water right claims, which have been validated in agreements where Ecology has been a signatory. Again, these conditions appear to invoke the common law prohibition against speculation and fail to recognize that the legislature, in passing the MWL, intended to specifically protect these rights.

b) RCW 90.03.570

An application to change the inchoate portions of surface water right certificates should not be limited in a change application process to an extent and validity analysis or RCW 90.03.570. At a minimum, these inchoate portions should be allowed to be diverted from a downstream point under RCW 90.03.390.

c) Safe Harbor

The Draft Policy also significantly limits the important concept of the *safe harbor*, by stating that water rights listed in a water system plan may have already been relinquished based on the failure to have been actively used every five years. This limits the benefits of the *safe harbor* provision and creates great uncertainty. Further, there is uncertainty with the legality and enforceability of the *safe harbor,* which is to address the impacts of Ecology's *active compliance* policy. With the removal of legally unsupported *active compliance* requirement from the Draft Policy, the *safe harbor* provision should also be removed.

5. Mitigation

Using municipal water rights for mitigation provides the necessary flexibility for the City to exercise its portfolio of rights for multiple purposes, including supplying water to Seattle residents and other municipalities in the region and hydropower. However, the Draft Policy limits that flexibility. Under the Draft Policy, municipal water rights may be used to provide mitigation to enable the approval of a new water right, or the change of an existing water right in the following ways:

a. Using the municipal water right in a manner consistent with RCW 90.03.550.
b. Applying for a change to the water right to add mitigation as a purpose of use under RCW 90.03.380.
c. Using the Trust Water Rights Program (TWRP).

It is the City's position that mitigation is a governmental purpose, whether from water that has been put to beneficial use or any inchoate quantity. The Draft Policy properly recognizes that a municipal water supply water right that is physically withdrawn or diverted water may be used for instream flow purposes listed under RCW 90.03.550 without requiring a change application. However, it is not clear how Ecology has determined that without applying for a change to a water right, the use of mitigation with inchoate water can only fall under RCW 90.03.550. That section does not mention anything about mitigation.

Notwithstanding the City's position that mitigation is a governmental purpose under RCW 90.03.015(4)(b), it is unclear how Ecology will apply its proposed language regarding the use of RCW 90.03.550 for mitigation. While the City may use the water rights for the enumerated instream uses without Ecology approval, the Draft Policy allows Ecology to determine the validity of using the municipal water right for mitigation under RCW 90.03.550 when it reviews the application for a mitigated permit. The Draft Policy states that in determining uses that fall under RCW 90.03.550, Ecology will look at it on a case-by-case basis identified through the Report of Examination ("ROE") associated with the mitigated water right (not the municipal water right being used as mitigation). This appears to allow Ecology authority to deny an application for a mitigated permit if it does not agree with the municipal provider's use of water under RCW 90.03.550. This would be additional authority Ecology has inappropriately granted itself.

The second option for using a municipal water right for mitigation in the Draft Policy provides that an application to change the municipal water right could be filed to add instream flows for mitigation of new out-of-stream use as a purpose of use. The Draft Policy states that this process requires Ecology to make a tentative determination of the extent and validity of the water right which would trigger

calculating Annual Consumptive Quantity ("ACQ") under RCW 90.03.380(1) to ensure that approval of the change would not cause any increase in consumptive water use. This would only allow the consumptive portions of the municipal water right certificate that have been historically beneficially used to be valid for change and able to be used for mitigation. This is not the intent of the MWL. As discussed above, this ignores the fact that pumps and pipes certificates are in good standing and can be changed, including the inchoate portion of the water rights. Ecology cannot diminish an existing right in processing an application to change that right. Again, this proposed policy seeks to inappropriately limit the flexibility of the City to effectively use its portfolio of water rights.

Listing the Trust Water Rights Program as an option is not helpful because it's hard to use/already limited.

6. Unlawful Rulemaking

The Draft Policy is subject to a challenge for unlawful rulemaking under the Administrative Procedures Act. The APA makes a distinction between agency policy statements and rules. A policy is the current approach of an agency for the implementation of a statute. A rule is an agency order, directive, or regulation of general applicability, which among other actions, establishes, alters, or revokes any qualification or requirement relating to the enjoyment of benefits or privileges conferred by law. A policy that falls within the definition of a rule is null and void.

Ecology should reconsider the elements of the current policy as well as new elements in the Draft Policy that fall within the definition of a rule. These include *original intent*, the definition of a certificate in *good standing,* and the requirement of *active compliance,* as well as *safe harbor* protection. These are directives and regulations which alter if not revoke the benefits of municipal water suppliers conferred by the MWL. Therefore, these are subject to being null and void, if not directly in violation of the MWL which even following the rulemaking procedure cannot cure. If Ecology is seeking these new conditions to regulate municipal water rights, it should be going through rulemaking at a minimum, if not proposing legislation.

7. Climate Change impacts on municipal water supply must be recognized.

The City is already seeing the impacts of climate change on water supply and water demand. As described above, the limitations the Draft Policy seeks to place on the City's water rights improperly propose to significantly remove the flexibility the City requires to address the changes in water supply and demand. A simple change of a point of diversion to address the impacts will result in the risk of losing portions of the water right, such that the City could potentially have to forego the change application, resulting in an inability to meet municipal water demands.

In conclusion, the City asks that Ecology revisit the Draft Policy based on the City's comments. There is a common theme in the comments regarding the necessity to liberally construe the MWL with the intent of providing the certainty and flexibility the City requires in meeting its needs for growth, to address climate change, and to serve the public with the varying demands and multiple uses required

of the municipality. The final policy must be legally and statutorily supported but several of the definitions and limitations placed on municipal water suppliers in the Draft Policy are not in the MWL and go beyond existing authority.

Thank you again for the opportunity to comment on the Draft Policy. Please do not hesitate to reach out to clarify anything we've included in our letter.

Sincerely,

Alex Chen (Sep 27, 2023 06:48 PDT)

Andrew Strong
Andrew Strong (Sep 27, 2023 06:32 PDT)

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