



CLEAN, FLOWING WATERS FOR WASHINGTON

The Center for
Environmental Law & Policy

6/19/2024

Washington State Department of Ecology
Water Resource Division
Attn: Austin Melcher, Municipal Water Law Policy Lead
300 Desmond Drive SE
Lacey, WA 98503

Dear Mr. Melcher,

Thank you for the opportunity to provide comments on the 2nd Draft Municipal Water Law Interpretive and Policy Statement (POL-2030). After careful review CELP has concerns with this new draft and its impact on stream flows and fish. In this draft Ecology is putting the water needs of municipalities over the protection of instream resources. This policy does nothing to account for the future realities of water availability due to the impacts of Climate Change. We are seeing dramatic changes to the amount of precipitation resulting in less snowpack and ground water recharge resulting in less water availability. Many of these permits were granted many years ago and are unused, and the water availability of these rights are unknown. More needs to be done to make sure that any municipal inchoate water rights that are consolidated and/or transferred do not impair existing rights.

General comments – under the references, you inexhaustibly list (and correctly so) the sections of chapter 90.03 Revised Code of Washington (RCW). Then under the purpose, the stated purpose is to implement the Municipal Water Law (MWL). The purpose of the policy should be to implement the statutory requirements identified in the references, many of which, but not all, were created by the MWL. After a couple of decades, perhaps it is not necessary to cite the MWL legislation. In the Purpose section, it states the policy addresses “part of” the MWL. An understanding of what parts of the MWL are not addressed would be helpful. The following are comments on specific sections of the draft.

Section 1: Definitions and Background

Under definitions, we suggest you state or add that “Pumps and Pipes Certificates” were issued prior to 2003. The sentence, “These water right certificates may include inchoate quantities of water that have not yet been exercised.” is not a definition of a pumps and pipes certificate, but rather speculation on a future; the pumps and pipes certificates may also not reflect inchoate water. In the definition of “Inchoate” please add the use of water for the intended project. Intent of the applicant for water use expressed on the water right application is a fundamental part of the right created, at least for those rights created prior to 2003. A permit for water is also an inchoate right, does this definition apply to permits for water use?

Section 2.2: Municipal Water Supply Purposes

The policy states, “The number of residential service connections is determined for each water system plan approval, water system plan update, or small water system management program.”

The sentence implies, and could be more explicit that, that a Department of Health approved document is a necessary part of a municipal supply water right. In King County, for example, there are many Group A water systems with more than fifteen residential connections with no current water system plan or small water system plan approval. Are water rights held by public water systems with more than fifteen connections that lack DOH approval of the stated two documents municipal water rights?

Section 5: Changing Municipal Water Rights

Related to changing municipal water rights and that part addressing Tentative determination of Extent and Validity, there is a sentence that reads, "Specifically, this refers to the quantity of water necessary to supply this geographic area at full buildout." This sentence seems out of place or context, please provide an explanation. It also calls out that claims for water rights under chapter 90.14 RCW may be changed if they were established prior to 1917 or 1945. You might want to state such claims would undergo a tentative determination of extent and validity. It would also be helpful to mention the Sinking Creek decision and the ramification of that case on any Ecology decision for an unadjudicated water right.

Section 6: Service Area Expansions and Water Rights' Place of Use

It addresses the expansion of a water right place of use for municipal water by Department of Health approval of certain documents. One of the requirements reads, "The municipal water supplier is in compliance with the terms of its water system plan or small water system management program, including water conservation requirements". Given the recent Auditor's assessment of DOH, *Assessing the Effectiveness of Washington's Water Use Efficiency Regulations*, is Ecology going to independently confirm water conservation requirements are met?

Section 7: Water System Consolidation of Connected Municipal Water Suppliers

It states the following, "A municipal water supplier under RCW 90.03.015(3) may acquire a community or multiple domestic supply water right that has fewer than fifteen residential service connections through a water system consolidation with another water system. In that case, the number of connections specified on the water right is not limiting (only the Qi and Qa of the water right is limiting)..." This policy statement raised extremely important issues from both expansion of public water systems to water right law. We agree that expansion of large public water to serve and take over existing small Group A system or Group B system is beneficial for overall public health and development. We know it is expensive to take over small systems and integrate them into a larger system. We acknowledge that post the effective date of the MWL, and for a new water right application, the identified demand in connections or population has a different meaning than for those water rights issued prior to the MWL. See RCW 90.03.260. Finally, we know that larger utilities need an incentive to take over the smaller systems, but inflating and consolidating old paper to avoid a new water right application for new uses is not the answer.

What we do not agree with is large public water systems harvesting old water rights with annual water duties of 1, 2 or 3 acre-feet per hook-up and Ecology magically saying those "rights" are not limited by the approved number of connections on the original permit or certificate. All water rights are limited to that water beneficially used to meet the intent expressed on the application. RCW 90.03.290(4) provides, "Any application may be approved for a less amount of

water than that applied for, if there exists substantial reason therefor, and in any event shall not be approved for more water than can be applied to beneficial use for the purposes named in the application." (underline for emphasis). Any group or community domestic water right issued prior to September 2003 may or may not have inchoate water, it depends on if they satisfied the original intent in the application or not and what due diligence has been shown. We believe that Ecology lacks a statutory foundation to state that the intent expressed on an application for water right is not bearing on the subsequent right created.

We are aware of the economic hardships of municipalities, but this should be dealt with the use of public funding, not relying on pulling more water out of our rivers and streams, many of which are home to already endangered fish.

Section 9: Using Municipal Water Rights for Mitigation

It contains the following sentence, "It may be possible to use perfected or inchoate portions of municipal water rights for mitigation under this RCW 90.03.550 pathway." Please explain how inchoate water might be used for mitigation when RCW 90.03.550 states, the water must be withdrawn or diverted.

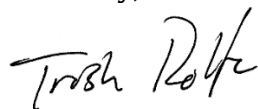
We also have concerns with how inchoate rights used for mitigation could impact instream flows for fish and other instream uses and impair water rights holders. Inchoate water by definition is already in stream, and therefore it can't be used to mitigate what it already is. Using water already in the TWRP for mitigation does not help fish or other instream resources. A full analysis of the out of stream use of perfected portions needs to be completed, and consultation with Washington Fish and Wildlife and any Washington Tribes to ensure the mitigation would not impair senior water rights or harm fish.

Section 10 Coordination with Department of Health

We fully support that Ecology will consider compliance with conservation standards when reviewing development schedules for water right permits for municipal water supply purposes instead of relying on The Department of Health for that information. DOH isn't tracking the information or making sure these requirements are met as mentioned in the audit report. We encourage you to also look for compliance with conservation standards for consolidations of systems and the several other places in chapter 90.03 RCW where cost-effective water conservation is called out regarding water right decisions or documentation.

Again, we appreciate the opportunity to provide input on the 2nd Draft Municipal Water Law Interpretive and Policy Statement (POL-2030). Feel free to contact me if you have any questions or concerns.

Sincerely,



Trish Rolfe Executive Director