

Public Utility District No. 1 of Chelan County

Please find attached. Thank you.



PUBLIC UTILITY DISTRICT NO. 1 of CHELAN COUNTY

P.O. Box 1231, Wenatchee, WA 98807-1231 • 203 Olds Station Rd., Wenatchee, WA 98801

(509) 663-8121 • Toll free 1-888-663-8121 • www.chelanpud.org

June 20, 2024

Via Ecology's Online Comment Portal

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

Re: Comments on Ecology's 2nd Public Review Draft POL-2030 Update (April 2024)

Dear Mr. Melcher:

Public Utility District No. 1 of Chelan County (Chelan PUD) appreciates the Department of Ecology's effort to produce a second public review draft update of Policy 2030, Ecology's interpretive and policy statement on the Municipal Water Law (Laws 2003, 1st sp.s. c.5) ("MWL"). We are disappointed that Ecology's second draft fails to respond in any substantive way to the concerns expressed by Chelan PUD and other municipal utilities. Accordingly, we are reiterating and re-submitting our September 2023 comment letter (attached).

We are concerned that Ecology continues to pursue an "interpretation" of the MWL that is fundamentally at odds with the Legislature's intent to provide certainty and flexibility for municipal water rights. Twice, the Washington Supreme Court has explained (in *Lummi Indian Nation v. State*, 170 Wn.2d 247, 256 (2010) and *Cornelius v. Ecology*, 182 Wn.2d 574, 587-88 (2015)) that the MWL was enacted to resolve ambiguities in the Water Code, clarify the status of municipal water rights, and remedy the confusion and uncertainty generated by Ecology's response to the *Theodoratus* decision.

The actual bill title for the MWL is "An Act Relating to Certainty and Flexibility of Municipal Water Rights and Efficient Use of Water." In fact, Ecology's policy seems to offer these MWL goals to the contrary; instead, it focuses on restricting use of municipal "pumps and pipes" water right certificates which the Legislature has already declared to be rights in good standing. By interposing new restrictions and inventing new requirements without any basis in the statute, Ecology is abandoning its responsibility to carry out the Legislature's intent. This approach would leave municipal water rights less flexible, less secure, and less reliable.

Chelan PUD endorses the Washington Water Utilities Council's response to the latest iteration of POL-2030. We hope Ecology will rethink its approach, take seriously the concerns expressed by the municipal utility community, and administer the MWL consistent with the Legislature's intent.

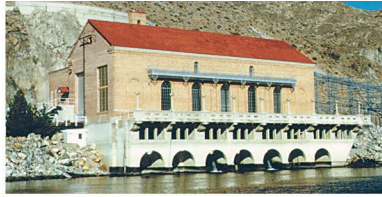
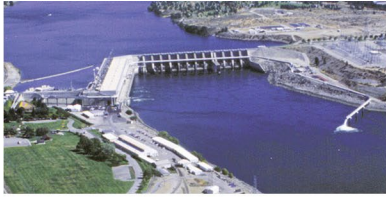
Sincerely,

A handwritten signature in black ink, appearing to read "Alene Underwood". The signature is written in a cursive style and is positioned to the left of a vertical line.

Alene Underwood

Director of Natural Resources

Enclosure



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September 29, 2023

Via Ecology's Online Comment Portal

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

Re: Comments on Ecology POL-2030 Update (June 2023)

Dear Mr. Melcher:

Public Utility District No. 1 of Chelan County (Chelan PUD) is a municipal water supplier that holds and exercises numerous water rights for public water supply, fish propagation, wildlife enhancement, public parks and other recreational facilities, hydropower generation, reservoir management, instream flows, and other purposes.

Chelan PUD shares the concerns of the Washington Water Utilities Council (WWUC) and the Washington Public Utility Districts Association (WPUDA) with Ecology's Municipal Water Law Policy (POL-2030), and endorses the comments submitted by WWUC and WPUDA on Ecology's draft policy update.

Chelan PUD is commenting separately to underscore its concerns with Ecology's incorrect interpretations of the "municipal identification" provision (RCW 90.03.560) and the "municipal water supply purposes" definition (RCW 90.03.015(4)). Ecology's interpretations are contrary to the express language and frustrate the legislative purposes of the Municipal Water Law (Laws 2003, 1st sp.s. c.5) (MWL).

I. Introduction

Ecology's existing Policy 2030 is not the Municipal Water Law, and vice versa. The existing Policy 2030 is contrary to the MWL in many significant respects. Retaining in a policy "update" previously announced positions that are unsupported by the MWL does not make Ecology's updated policy consistent with the statute.

Chelan PUD's recent inquiry to Ecology about obtaining "municipal" identification of its water rights for the Rock Island Hydroelectric Project offers a real-world illustration of Ecology's ongoing incorrect interpretation of the MWL. Citing existing Policy 2030 in its May 16, 2022 letter to Chelan PUD, Ecology staff indicated they could not conform as "municipal" water rights originally issued to a private utility, even though the entire hydroelectric project was acquired by Chelan PUD many years before enactment of the MWL and the water rights are beneficially used for a

governmental or governmental proprietary purpose. The draft Policy 2030 update repeats this erroneous interpretation in Sections 2 and 3.¹

Moreover, the draft policy update compounds this error by including for the first time a pronouncement to the effect that non-consumptive water rights cannot be identified as municipal.² This apparently gratuitous *non sequitur* is possibly in response to Chelan PUD's inquiry about identifying as "municipal" its water rights for the Rock Island Hydroelectric Project. Ecology's statement simply makes no sense in light of the fact that there are numerous partially and completely non-consumptive beneficial uses under water rights for municipal water supply – a fact of which the Legislature was well aware.

Finally, Ecology's interpretation of the "municipal water supply purposes" definition improperly attempts to constrain the extremely broad category of "governmental or governmental proprietary purposes" in RCW 90.03.015(4)(b) to a limited list of beneficial uses "generally associated with the use of water within a municipality" appearing later in the definition in an entirely different context.³

Even though Chelan PUD has significant objections to Ecology's interpretations of the MWL, we recognize and appreciate the time and effort expended by Ecology staff to respond to the PUD's inquiries and to explain Ecology's initial positions. We hope that Ecology will give careful consideration to the as-applied impacts of its policy on municipal water suppliers and understand that its initial positions will only make it harder to meet our obligations.

Chelan PUD also acknowledges that Ecology faces competing political pressures from various stakeholders whose opposition to the MWL has not abated since the Washington Supreme Court decided *Lummi Indian Nation v. State*, 170 Wn.2d 247 (2010). Chelan PUD urges Ecology to resist demands to undermine the MWL, take seriously the

¹ "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." (Draft POL-2030 Update at 4)

"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. In this situation, its purpose of use can be changed to municipal water supply purposes through the change application process under RCW 90.03.380, which includes a tentative determination of the extent and validity of the water right." (Draft POL-2030 Update at 6)

² "Purposes of use that can be conformed to a municipal water supply purpose generally include those identified in RCW 90.03.015 and RCW 90.03.550. However, only consumptive uses are included in the types of water uses authorized under rights for municipal purposes." (Draft POL-2030 Update at 6)

³ "Governmental and governmental proprietary purposes 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." (Draft POL-2030 Update at 4)

concerns expressed by the municipal utility community, and reconsider its initial interpretations before finalizing its Policy 2030 update.

II. Municipal Water Law Intent, Structure, and Language

The Legislature enacted the MWL in 2003 to provide clarity on the nature of water rights for municipal water supply purposes, provide certainty and flexibility to municipal water suppliers in exercising their water rights, require conservation and water use efficiency by municipal water suppliers, and ensure that municipal rights are correctly identified as such.

In the first section of the MWL, the Legislature defined “municipal water supply purposes” for the first time. RCW 90.03.015(4). The definition consists of three sentences.

Sentence 1: “‘Municipal water supply purposes’ means a beneficial use of water: (a) For residential purposes through [specified service connection and nonresidential population thresholds]; (b) **for governmental or governmental proprietary purposes by a city, town, public utility district, county, sewer district, or water district**; or (c) indirectly for the purposes in (a) or (b) . . . through the delivery of treated or raw water to a public water system for such use.”

Sentence 2: “If water is **beneficially used** under a water right for the purposes listed in (a), (b), or (c) . . . **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 [non-exclusive list of purposes].”

Sentence 3: “If a **governmental entity holds a water right** that is for the purposes listed in (a), (b), or (c) . . . **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 [non-exclusive list of purposes].”

RCW 90.03.015(4) (Laws 2003, 1st sp.s. c.5 §1) (emphasis added).

In the second section of the MWL, the Legislature explicitly recognized that beneficial uses of water under a “municipal water supply purposes” water right can include water withdrawn or diverted and used for environmental benefits and mitigation, including compliance with hydropower license obligations imposed by the Federal Energy Regulatory Commission (FERC). RCW 90.03.550 (Laws 2003, 1st sp.s. c.5 §2).

In the third section of the MWL, the Legislature enacted the municipal identification provision:

When requested by a municipal water supplier or when processing a change or amendment to the right, the department shall amend the water right documents and related records to ensure that water rights that are for municipal water supply purposes, as defined in RCW 90.03.015, are correctly identified as being for municipal water supply purposes. This section authorizes a water right or portion of a water right **held or acquired** by a municipal water supplier **that is for municipal water supply purposes** as defined in RCW 90.03.015 to be identified as being a water right for municipal water supply purposes. However, it does not authorize any other water right or other portion of a right held or acquired by a municipal water supplier to be so identified without the approval of a change or transfer of the right or portion of the right for such a purpose.

RCW 90.03.560 (Laws 2003, 1st sp.s. c.5 §3) (emphasis added). The Washington Supreme Court has characterized this provision as “the amendment that allows for water rights to be relabeled using the new definition of ‘municipal

water supply purposes.” *Cornelius v. Dep’t of Ecology*, 182 Wn.2d 574, 591 (2015); *see also Lummi Indian Nation v. State*, 170 Wn.2d 247, 260-63 (2010).

That “new definition of ‘municipal water supply purposes’” includes, **without limitation**, any “governmental or governmental proprietary purposes” by a public utility district. RCW 90.03.015(4)(b).

III. Chelan PUD’s Rock Island Hydroelectric Project

In 1931, the Legislature authorized the establishment of public utility districts “to conserve the water and power resources of the State of Washington for the benefit of the people thereof, and to supply public utility service, including water and electricity for all uses.” Laws 1931, c.1 §1. PUDs are municipal corporations. RCW 54.04.020. PUDs have broad powers, including the following:

A district may purchase, within or without its limits, electric current for sale and distribution within or without its limits, and construct, condemn and purchase, purchase, acquire, add to, maintain, conduct, and operate **works, plants, transmission and distribution lines and facilities for generating electric current**, operated either **by water power**, steam, or other methods, within or without its limits, for the purpose of furnishing the district, and the inhabitants thereof and any other persons, including public and private corporations, within or without its limits, with electric current for all uses, . . .

RCW 54.16.040 (emphasis added).

In 1936, the citizens of Chelan County voted to create a local public utility, and Chelan PUD was formed thereafter. Over time, Chelan PUD acquired several generating assets; today, it operates three hydroelectric projects that deliver clean, renewable, low-cost energy to local residents. One of those projects is the Rock Island Project, located near Wenatchee in Chelan and Douglas Counties.

Puget Sound Power & Light Company, a privately-owned utility, began construction on the Rock Island Project in 1930. The Rock Island Project is the first dam to span the Columbia River. The project is a run-of-the-river hydroelectric facility with a total installed generating capacity of 622.5 MW. After acquiring the project, Chelan PUD completed additional construction and expansion in the 1950s and 1970s. Chelan PUD operates the Rock Island Project under a hydropower license issued by FERC under FERC Project No. 943.

Chelan PUD’s operation of the Rock Island Hydroelectric Project is indisputably a “governmental or governmental proprietary” activity. Chelan PUD’s use of water for the Rock Island project is indisputably a beneficial use of water for “governmental or governmental proprietary purposes” by a public utility district.

Chelan PUD holds thirteen water rights for the Rock Island Project. Nine water rights are used for power generation and reservoir management, including maintenance of spill volumes for fish passage and downstream flows. Four water rights are used for supporting activities at the dam including domestic supply, shaft seal water, and heat exchange purposes; one of those four rights was explicitly issued by Ecology for “municipal supply” purposes.

Chelan PUD exercises its reservoir and power generation rights consistent with the Rock Island Project FERC license to implement specific environmental obligations, including management of spill volumes for fish passage, provision of downstream flows for spawning and rearing protection, and maintenance of FERC-required reservoir elevations. These beneficial uses to meet Chelan PUD’s environmental obligations do not have separate water rights but are

instead supplied under the Rock Island Project's power generation and reservoir rights – precisely as the Legislature envisioned in RCW 90.03.550.

The earliest water rights for the Rock Island project were issued to Puget Sound Power & Light Company. Chelan PUD acquired those earlier water rights when it acquired the Rock Island Project. From 1970 onward, water rights for the Rock Island project were issued directly to Chelan PUD – including one right explicitly identified as for municipal water supply purposes.

Ecology and its predecessor agencies were aware of Chelan PUD's lease of the Rock Island Project from Puget Sound Power & Light Company and Chelan PUD's subsequent acquisition of the project. However, Ecology's individual water right records continue to identify Puget Sound Power & Light Company as the water right owner. Except for one right issued for "municipal" purposes, all project water rights identify uses such as power generation, domestic, commercial and industrial, fire protection, and heat exchange as the authorized purposes of use.

At the time the MWL took effect in 2003, Chelan PUD held and exercised each of the Rock Island Project water rights for the Rock Island Project, as it has done continuously since Chelan PUD acquired the project from Puget Sound Power & Light Company. Chelan PUD beneficially uses these water rights for hydropower generation, reservoir storage, FERC-required environmental mitigation, and other purposes related to the project. Chelan PUD is continuing to exercise these water rights for the Rock Island Project, just as it has for decades before and after enactment of the MWL in 2003.

Chelan PUD has not proposed any changes in how its Rock Island project water rights are used. In 2021, Chelan PUD inquired about updating Ecology's records to reflect Chelan PUD's ownership of the water rights and beneficial use of water for governmental or governmental proprietary purposes at the Rock Island Hydroelectric Project.

In response to Chelan PUD's inquiry, Ecology staff indicated that the water rights for hydropower generation acquired by Chelan PUD from Puget Sound Power & Light Company could not be identified as "municipal" under RCW 90.03.560. Citing existing POL-2030, Ecology staff stated that "acquisition of these rights by the PUD, as one of the six types of entities granted special status under the Municipal Water Law in RCW 90.03.015(4)(b), does not automatically convey municipal status to these rights" and that Chelan PUD "would need to apply for a change of purpose of use for the water rights to add municipal water supply purposes."

Additionally, Ecology stated that even if the hydropower rights had been originally granted to Chelan PUD rather than Puget Sound Power & Light Company, "we do not believe that conformance of the rights to municipal water supply purposes is authorized based on the definition of the term 'municipal water supply purposes' in RCW 90.03.015(4), and fits the legislative intent behind the Municipal Water Law." Ecology's response did not address whether Chelan PUD's beneficial use of water at the Rock Island Hydroelectric Project is for "governmental or governmental proprietary purposes" under category (b) in the first sentence of the definition. Citing a separate non-exclusive list of uses "generally associated with the use of water within a municipality" that appears in a different context in the second and third sentences in the definition, Ecology explained:

While the list of uses 'generally associated with the use of water within a municipality' is not exclusive, hydroelectric power generation is distinct from the more prevalent uses typically associated with municipal water suppliers. Thus, Ecology believes that if the Legislature had intended for hydropower generation to fall within the list of municipal uses, it would have expressly included it.

Letter from Ecology to Chelan PUD, May 16, 2022.

Chelan PUD hoped that Ecology's update of Policy 2030 would furnish an opportunity for the agency to undertake a robust statutory construction effort, and that Ecology's initial MWL interpretations would be revised as a result. Unfortunately, that has not occurred to date. Ecology's draft Policy 2030 Update continues to misinterpret RCW 90.03.560 and RCW 90.03.015(4).

IV. A PUD's Beneficial Use of Water for Hydropower is "Municipal"

Chelan PUD is a public utility district, one of the six governmental entities explicitly listed in RCW 90.03.015(4)(b), which defines as "municipal" the beneficial use of water for "governmental or governmental proprietary purposes" by any of the six listed entities.

The Legislature did not define "governmental" or "governmental proprietary" purposes in RCW 90.03.015(4)(b). In the context of taxation, contract enforcement, and tort law, Washington courts have drawn distinctions between governmental and proprietary functions of governmental entities. Typically, governmental activities involve the government's role as a sovereign, and proprietary activities involve "nonessential aspects of government administration, including those intended to generate profits." 25 Wash. Practice §5:19. For example, "Washington decisions have held that the operation of a water system or other utility serving billed customers is a proprietary function." *City of Wenatchee v. Chelan Co. Public Utility District No. 1*, 181 Wash. App. 326, 342 (2014).

Inclusion of the phrase "governmental or governmental proprietary purposes" in RCW 90.03.015(4)(b) is evidence of legislative intent to include in the "municipal" category any conceivable legitimate purpose for which the six enumerated governmental entities might use or supply water – including uses that might be characterized as "proprietary" activities.

When it included public utility districts in the list of governmental entities in RCW 90.03.015(4)(b), the Legislature was aware of the broad powers conferred on PUDs under the 1931 enabling statute, RCW Title 54, including the explicit authorization for PUDs to generate and supply hydroelectric power.

Power generation with hydropower water rights is a "governmental" or "governmental proprietary" purpose performed by numerous members of the "special six" municipal entities identified in RCW 90.03.015(4)(b). The Legislature must be presumed to have been aware of this fact when it included PUDs and their use of water for any "governmental or governmental proprietary purposes" in the MWL definition of "municipal water supply purposes."

The Legislature also understood that PUDs and other municipal water suppliers use their hydropower water rights to implement environmental obligations under FERC hydropower licenses, and explicitly recognized such uses as municipal water supply purposes in RCW 90.03.550. If the Legislature did not consider beneficial use of water for hydropower generation by public utility districts "governmental or governmental proprietary purposes" and thus municipal, there would have been no need to enact a provision – RCW 90.03.550 – clarifying that municipal water rights may be used to satisfy FERC obligations or provide other environmental benefits.

Finally, there is no basis in RCW 90.03.015(4) or elsewhere in the MWL for Ecology's suggestion that the non-exclusive list of beneficial uses "generally associated with the use of water within a municipality" in the second and third sentences of the definition operates as a limitation on the category of beneficial uses of water for "governmental or governmental proprietary purposes" in subsection (4)(b). The Legislature deliberately chose the

words “governmental or governmental proprietary purposes” to describe the broadest possible category applicable to PUDs and the other 5 listed entities. If Ecology believes that category is too broad, the remedy lies in the Legislature. Ecology has no authority to ignore or rewrite the statutory definition.

V. Ecology’s Interpretations are Contrary to the Municipal Water Law

When interpreting a statute, the courts’ “fundamental objective is to ascertain and carry out the Legislature’s intent.” *Dept. of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9 (2002). The “surest” indicator of legislative intent is the statute’s text, so if the statute’s meaning is plain on its face, a court must “give effect to that plain meaning.” *State v. Ervin*, 169 Wn.2d 815, 820 (2010) (internal quotation marks omitted) (quoting *State v. Jacobs*, 154 Wn.2d 596, 600 (2005)).

A statute should be read to give each word and clause effect, so no part is rendered meaningless or superfluous. *City of Bellevue v. Lorang*, 140 Wn.2d 19, 25 (2000). “To be reasonable, an interpretation must, at a minimum, account for all the words in a statute.” *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 312 (2011). Each part or section of a statute should be construed in connection with every other part or section so as to produce a harmonious whole. If possible, every word, clause, and sentence must be given effect; no part should be rendered inoperative. *In re Easton*, 110 Wn.2d 892, 901 (1988); *State v. Akin*, 77 Wn.App. 575, 580 (1995). Similarly, the courts will not add words where the Legislature has not included them. *Fode v. Dep’t of Ecology*, 22 Wn. App. 2d 22, 31-32 (2022).

Legislative definitions provided in a statute are controlling. *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 148 Wn.2d 224, 239 (2002).

Finally, an agency interpretation which conflicts with the language of the statute is not entitled to any deference. *Waste Management of Seattle v. Utilities & Transp. Comm’n*, 123 Wn.2d 621, 628 (1994) (rejecting WUTC’s contention that regulatory statute provides for only temporary pass-through of certain disposal fees in rates charged to customers); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 813-15 (1992) (rejecting Ecology’s “implausible argument” that the term “development” under the Shoreline Management Act includes bridge removal).

Here, the applicable statutory language is plain and not ambiguous. Ecology ignores the plain language in four key areas that affect Chelan PUD.

First, the Legislature has required Ecology to “amend the water right documents and related records to ensure that water rights that **are for** municipal water supply purposes, **as defined** in RCW 90.03.015, are correctly identified as being for municipal water supply purposes.” RCW 90.03.560 (emphasis added).

The Legislature used the present tense in RCW 90.03.560, as it did in the statutory definition. “Usage of this tense presumes a legislative intent to adjudge the character of the water right in the present.” *Crown West Realty, LLC v. Pollution Control Hearings Bd.*, 7 Wash.App.2d 710, 738, review denied 193 Wn.2d 1030 (2019); see also *Scott Cornelius, et al. v Ecology and Washington State University*, PCHB No. 06-099, Order on Summary Judgment (As Amended on Reconsideration) (2008) at 11.

What this means in the context of RCW 90.03.560 is that the identity of the original or historical permittee or water right holder does not matter. The only relevant question is whether, at the time Ecology is being asked to correctly identify a water right, the right is presently held by a municipal water supplier and used for municipal water supply

purposes as defined in RCW 90.03.015(4). If the Legislature had intended to limit municipal identification to water rights “issued to” rather than “held or acquired by” a municipal water supplier, it would have said so.

Second, Ecology’s interpretation of RCW 90.03.560 and 90.03.015(4) to preclude non-consumptive water rights from being recognized as “municipal” is equally untethered to legislative intent as expressed in the plain language of the MWL. If the Legislature had intended to define as “municipal water supply purposes” only beneficial use for “**consumptive** governmental or governmental proprietary purposes” by the six special entities, it would have said so.

Moreover, Ecology’s position cannot be reconciled with RCW 90.03.550, which explicitly endorses use of municipal water rights to benefit “instream resources,” i.e., for non-consumptive purposes, or with explicitly recognized municipal uses in RCW 90.03.015(4) such as water system maintenance, fire flow, and indeed even residential supply, all of which are at least partly nonconsumptive.

Ecology perhaps believes that its approval should be required before the percentage of consumptive use increases or decreases within a municipal water supplier’s system (which is something that happens frequently in the exercise of water rights for municipal water supply purposes). However, that is a policy question for the Legislature. Ecology is free to persuade the Legislature to adopt its preferred approach; but Ecology has no authority to decree that only “consumptive” rights can be recognized as “municipal” under the MWL.

Third, Ecology’s attempt to limit “governmental or governmental proprietary purposes” to the non-exclusive list of beneficial uses of water “generally associated with the use of water within a municipality” is not consistent with the plain language of the statute. Where a PUD or one of the other subsection (4)(b) special entities is involved, the proper inquiry is whether the beneficial use is for governmental or governmental proprietary purposes. That category is not circumscribed by any concept of uses generally associated with the use of water within a municipality. If the Legislature had intended to define as “municipal water supply purposes” only those beneficial uses for governmental or governmental proprietary purposes “generally associated with the use of water within a municipality,” it would have said so.

Moreover, “governmental proprietary” purposes inherently include the provision of domestic water supply to residential and non-residential customers, and nothing in the MWL suggests that the Legislature did not understand this. The MWSP definition does not restrict domestic water supply by the entities listed under subsection (4)(b) to systems that meet the connection or population thresholds in subsection (4)(a). If the Legislature had wanted to do so, it could have established category (b) as “for **any other** governmental or governmental proprietary purposes . . .”.

Fourth, Ecology fails to recognize the difference in legislative language in the second and third sentences of RCW 90.03.015(4). The second and third sentences are catchall provisions for beneficial uses “generally associated with the use of water within a municipality.”

The second sentence addresses “**any other beneficial use of water under the right . . .**” – referring to a single right that **is beneficially used** for the purposes listed in (a), (b), or (c). The second sentence applies to any such water right, regardless of the holder of the right.

However, for a “governmental entity” (an undefined term in the MWL that obviously includes the six entities listed in category (b) but could very well be broader than that), the third sentence uses different language. The third sentence refers to the use or delivery of water by a governmental entity that “**holds** a water right that **is for the purposes**

listed in (a), (b), or (c).” The third sentence requires only that a water right be **held** for the purposes listed in (a), (b), or (c); it does not refer to the right being beneficially used.

The third sentence also does not include the language “under the right” to modify “its use of water or its delivery of water for any other beneficial use generally associated with the use of water within a municipality.” This broader language encompasses such use of water or such delivery of water under a governmental entity’s other rights, not just under the same right. It is impossible to conclude that the Legislature intended the same meaning for two adjacent sentences using substantially different language; yet Ecology’s draft policy ignores the express language in the third sentence.

Ecology’s existing POL-2030 and its existing Policy 2030 Update ignore the context, structure, and plain meaning of the definition of “municipal water supply purposes” in RCW 90.03.015(4) and the requirement for municipal identification in RCW 90.03.560, adding words to the statute that the Legislature did not include.

VI. Conclusion

As a hydropower generator, Chelan PUD is not unique. Other entities identified as “municipal” in RCW 90.03.015(4)(b) beneficially use water for hydropower generation and other non-consumptive purposes. The Legislature was aware of that fact when it enacted the “municipal water supply purposes” definition and the municipal identification provision.

An agency should not use an “interpretive and policy statement” to substitute its (or other stakeholders’) policy preferences in place of the plain meaning of a statute. Chelan PUD urges Ecology to rescind its existing Policy 2030 and to administer the Municipal Water Law consistent with the Legislature’s intent.

We wish to reiterate our appreciation for the courtesy and professionalism displayed by Ecology staff as we have engaged on these issues during the past few years. Thank you for your consideration of these comments.

Sincerely,

Alene Underwood

A handwritten signature in black ink, appearing to read "Alene Underwood". The signature is fluid and cursive, with the first name being more prominent.

Director of Natural Resources
Chelan County PUD