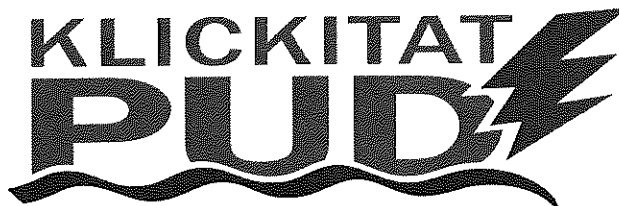


# Klickitat PUD

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Department of Ecology

JUN 24 2024

Water Resources Program

June 13, 2024

Austin Melcher, Municipal Water Law Policy Lead  
Washington State Department of Ecology  
PO Box 47600  
Olympia, WA 98504-7600

Re: Comment Letter on Ecology Second Draft Policy 2030.

Dear Mr. Melcher,

As the manager of the Klickitat Public Utility District ("KPUD"), I am providing the KPUD's comments on the Second Public Review Draft Municipal Water Rights Policy 2030 ("Draft Policy"). The KPUD recognizes that the Draft Policy is based on Ecology's interpretation of the Municipal Water Law ("MWL").

The KPUD provides electric power, water and wastewater services to a customer base throughout Klickitat County. The KPUD owns and operates 8 municipal water systems and 5 wastewater systems that provide service to over 2,000 customers and we service over 14,000 electric customers. The KPUD's supplies water to customers that include, but are not limited to, residential, commercial, industrial, and power purposes. The KPUD has a portfolio of a variety of water rights that authorize these uses. In particular, the KPUD has a large water right from the Columbia River that was changed from industrial to municipal purposes. The portion of this water right that is not being used is in the State Trust Water Program and has, over the years, been used for mitigation of other permitted uses.

Based on its interest in the clear and lawful implementation of the MWL, the KPUD has the following comments related to its water systems and portfolio of water rights.

As a public utility district, we provide municipal water for government and governmental proprietary purposes under RCW 90.03.015(4)(b). These government and governmental proprietary purposes are defined by those activities and purposes that legislature has given the Public Utility Districts under Title 54 RCW, and specifically the KPUD's authority regarding water management under Ch. 54.16 RCW. The House Bill Report for the MWL (HB 1338) includes testimony stating that the Bill answered the question of which of a municipality's water rights were for municipal use, with the answer that "any rights they hold "are for a municipal purpose." Further, RCW 54.16.410 specifically applies to the KPUD's authority to provide water for electric power.

It must be clear in the policy that government and governmental proprietary purposes are a distinct and separate definition of municipal water supply purposes under in RCW

90.03.015(4)(b). A governmental purpose is not further defined or limited by subsections (4)(a) and (4)(c), or any of the other language in subsection (4). The statute separates the subsections with an “or”, indicating they are separate a distinct definitions of municipal water supply purposes. This is important to understand, because the KPUD 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”. The KPUD requests the final policy affirm that any water used by the PUD is defined as government and governmental proprietary purposes as a matter of law as the words in RCW 90.03.015(4) state, and is therefore a municipal water right.

The KPUD also disagrees with the Draft Policy application of “good standing” and relinquishment to municipal water right certificates. First, the Draft Policy applies “good standing” to all existing municipal water right certificates, which can be interpreted to include the pumps and pipes certificates recognized in RCW 90.03.330(3). These pumps and pipes certificates are in good standing as a matter of law, and there is no need or authority to condition these. This also directly conflicts with RCW 90.03.330(2) that specifically provides that Ecology cannot revoke or diminish or adjust any water right certificate for municipal water supply purposes.

Second, there is simply no authority to apply good standing with the intended result of applying relinquishment laws to a municipal right, which is specifically exempt from relinquishment by statute. The key definition of good standing is the determination of whether a municipal water right continued to be put to use once every five years for municipal purposes as defined in RCW 90.03.015(4). This is generally referred to as “active compliance”. If a water right is for municipal water supply purposes as defined in RCW 90.03.015(4), it does not lose its status as a municipal water right and does not lose its exemption from relinquishment guaranteed pursuant to RCW 90.14.140(2)(d), as a result of not being exercised at least once every 5 years. Ecology cannot rely on the decision in *Crown West Realty, LLC v. Pollution Control Hearings Board*, 7 Wash.App.2d 710 (2019) to apply this active compliance standard. In its ruling, the Court specifically stated that it would not be deciding the legality of “active compliance” and Policy 2030, and it ruled on the issues on separate grounds.<sup>1</sup> It should also be noted that the exemption from relinquishment was in the law before the MWL became law, and now Ecology seeks to significantly limit the exemption based on the definitions in the MWL. This was clearly not the intent of the legislature in passing the MWL.

It is not helpful that the Draft Policy includes an exception to the requirement of active compliance if the municipal provider identifies the certificate in water system planning documents approved by the Department of Health. Again, there is simply no authority for this standard. This cannot be relied on by the PUD. It only creates a false sense of security of water rights that Ecology would

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<sup>1</sup> As the court stated in the *Crown West Realty* case, “the legislature wishes municipal purveyors to be capable of meeting future municipal needs despite a lack of exercise of the entire amount of the water right.” RCW 90.14.140(2) states:

“Notwithstanding any other provisions of RCW 90.14.130 through 90.14.180, 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.” The legislative history confirms this intent. The Senate Report summarized the MWL bill as follows: “Municipal water rights are protected from relinquishment through nonuse and are allowed to expand up to authorized annual quantity limits as demand within a service area grows.”

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otherwise declare nonmunicipal under its active compliance standard. Ecology should simply remove this section 4 of the Draft Policy.

The KPUD also disagrees with the criteria of “good standing” for the unused or inchoate portions of a water right certificate when considering applications to change water rights. These criteria are original intent and due diligence. There is no legal support for applying any criteria as conditions to processing a change application for inchoate portions of water right certificates defined as being in good standing in RCW 90.03.330(3). These are further not justified criteria as part of an extent and validity analysis of the water rights in processing an application to change these rights. The legislature in passing the MWL unconditionally declared these certificates in “good standing” as a matter of law, and Ecology must accept the pumps and pipes certificates as legitimate water rights for the full quantities. Because these rights are in “good standing”, for the purpose of change applications, inchoate portions in these certificates are considered perfected rights. See *Cornelius v. Department of Ecology*, 182 Wn.2d 574, 344 P.3d 199 (2015). The Court was clear that the legislative intent was to treat the inchoate portions of the pumps and pipes certificates as perfected for the purpose of change applications. Further, application of these criteria ignores the language and the intent of the MWL and specifically the statutory requirement on Ecology to not revoke or diminish these water rights under RCW 90.03.330(2). We recognize due diligence and actual beneficial requirements would be conditions in a change authorization, but any such criteria cannot define the existing validity of the pumps and pipes certificate.<sup>2</sup> Ecology should remove the requirements of original intent and due diligence in defining pumps and pipes certificates in processing applications to change these water rights.

Finally, in regard to mitigation part of the Draft Policy, the KPUD requests Ecology recognize that mitigation is a governmental purpose, whether from water that has been put to beneficial use or any inchoate quantity. In particular, the policy to use a municipal water right for mitigation by applying to change the municipal water right to add instream flows for mitigation of new out-of-stream use, should not require a determination of the extent and validity of the water right which would trigger calculating Annual Consumptive Quantity (“ACQ”) under RCW 90.03.380(1). 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 as fully perfected rights. This proposed policy regarding mitigation seeks to inappropriately limit the flexibility of KPUD to effectively use its portfolio of water rights.

The KPUD also questions the very broad definition of public interest in using the Trust Water Rights program for mitigation. Under the Draft Policy, Ecology uses public interest to limit municipalities’ management and use of its water supplies. Ecology would consider impairment to other interests resulting from extended periods of nonuse of the water right, even though it is a valid water right and Ecology determined the change of the water right for mitigation will not impair existing water rights. Consideration of the extended periods on nonuse of a valid municipal

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<sup>2</sup> Further, Ecology cannot apply the standards in RCW 90.03.570 to these surface water certificates because it will conflict with RCW 90.03.330(2), which does not allow Ecology to in any manner diminish these certificates which includes the inchoate portions and treat these as fully perfected.

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water right directly conflicts with the RCW 90.03.330(2). This consideration significantly limits and revokes a critical element of a valid water right.

In conclusion, the KPUD asks that Ecology revisit the Draft Policy based on the KPUD's comments. There is a common theme in our comments regarding the necessity for the Policy to accurately reflect and intent of the legislature in passing the MWL, with providing the certainty and flexibility the KPUD's water systems require in meeting its needs for growth 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 and should not be included into the final Policy.

Thank you again for the opportunity to comment on the Draft Policy. Please do not hesitate to contact me regarding any comments and questions regarding these comments.

Sincerely,

  
Jim Smith  
Manager  
Klickitat Public Utility District

cc:

Klickitat Public Utility Board of Commissioners

Carrie Sessions, Governor's Policy Office

Laura Watson, Director of Washington State Department of Ecology

Ria Berns, Water Resources Program Manager, Washington State Department of Ecology

Dave Christensen, Deputy State Water Resources Program Manger

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