City of Seattle

VIA Email
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June 10, 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 Austin,

On behalf of Seattle Public Utilities and Seattle City Light ("Seattle"), we are providing comments on the Second Draft Municipal Water Rights Policy 2030 ("Draft Policy"). It is critical for the City of Seattle, as the largest municipal water supplier in the state and operating a complex water supply, that the Department of Ecology ("Ecology") facilitate and support Seattle's ability to meet its governmental obligations in managing and using our existing water rights and serving the public. This includes changes to points of diversion and multiple uses of the water to meet our communities' needs. The legislature recognized this need in enacting the Municipal Water Law ("MWL"). We believe more strongly than ever that this Draft Policy needs to be revised to avoid unintended consequences that could inhibit Seattle from responding to existing needs and future challenges. As we stated in our original comment letter, Seattle seeks a policy that supports the certainty and flexibility of municipal water rights intended by the Legislature as provided for in statute.

Seattle appreciates the efforts of Ecology to clarify the policy language, but we are disappointed to see the Draft Policy does not address most of Seattle's concerns described in our original comment letter and does not meet our interests stated above. Without a response to our comments, it's not clear why they weren't addressed. To continue further dialogue on the issues most important to Seattle, we provide additional analysis below. We greatly appreciate Ecology's attention to these concerns and ask that the final policy adequately address the substantive issues from our first comment letter and the points reiterated below.

Governmental Purposes.

When the legislature originally enacted the MWL, their intent was that "governmental or governmental proprietary purposes" includes all purposes for which a city has been given authority under the State Constitution and as contained in Title 35 RCW and specifically Seattle's authority for utilities and power under Ch. 35.92. RCW. This intent is evidenced by the MWL House Bill Report including 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."[1] Government and governmental proprietary purposes are a distinct and separate definition of municipal water supply purposes. This is an important distinction because Seattle has rights for governmental purposes that do not explicitly state the use is for municipal purposes and so may not be on the list of "any other beneficial use generally associated with the use of water within a municipality". Seattle's authority clearly includes its hydropower operations and domestic water supply used to support Seattle's projects and operations that may not meet the definition under RCW 90.03.015(4)(a). **We request that the definition of "governmental or governmental proprietary purposes" be modified to fully reflect all of a city's legal authorities, as noted above.**

Relinquishment -- Good Standing and Active Compliance.

There is no basis in the law, nor within the intended policy of the MWL, to apply a "good standing" standard for the purpose of applying relinquishment to all water right certificates. The MWL *only* applies the term "good standing" to pumps and pipes certificates in RCW 90.03.330(3)[2]. The relinquishment statute cannot apply to pumps and pipes certificates because the MWL already states these are, as a matter of law, in good standing.

Importantly, the criteria used in the Draft Policy defining "good standing" do not have any basis in law. The first criteria has been referred to as "active compliance", which purports to require a perfected municipal water right to continue to be put to use once every five years for municipal purposes as defined in RCW 90.03.015(4). However, the concept of "active compliance" has no legal or policy weight. When a water right has already been put to beneficial use, it does not lose its status as a municipal water right and lose its exemption from relinquishment pursuant to RCW 90.14.140(2)(d). The Draft Policy's application of good standing is also contrary to 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.

Ecology's reliance on the decision in *Crown West Realty* case[3], is misplaced. The Court did not approve active compliance. While the Court noted that its ruling may conflict with POL-2030 Section 9d (discussing "active compliance"), the court reserved approval or disapproval of POL-2030 for another day as it ruled on other grounds.[4] In addition to being inconsistent with the MWL, using a

[1] The common law has in the past made a distinction between governmental purposes and governmental proprietary purposes; here the legislature intended both (effectively all city purposes) to count as municipal water supply purposes.
[2] The Courts have also used the term "good standing" for water right permits that are diligently being developed. In *Cornelius v. Department of Ecology,* 182 Wn.2d 574, 344 P.3d 199 (2015), the Supreme Court described a water right permit as an incomplete appropriative water right in "good standing" if the system is developed with reasonable diligence and only discussed "good standing" regarding certificates related to "pumps and pipes" certificates under RCW 90.03.330(3)).
[3] *Crown West Realty, LLC v. Pollution Control Hearings Board*, 7 Wash.App.2d 710 (2019)
[4] 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:

water supply source solely to satisfy the concept of "good standing" contradicts the State policy goal of efficient water use and City policy to minimize utility costs to rate payers. **The active compliance requirement should be removed from the Draft Policy, both in name and concept as it seeks to diminish existing rights without legal authority**.

Ecology's second criteria of "good standing" purportedly saves a municipal water right from relinquishment if that water right does not otherwise meet the first criteria of active compliance. This is known as the "safe harbor" which provides that the water right certificate remains in good standing if the municipal provider identifies the certificate in water system planning documents approved by the Department of Health. There is no legal basis for this, and it creates a false sense of security. The Draft Policy's application of good standing and its stated criteria are contrary to the MWL. **Ecology should remove Section 4 from the policy.**

Change Applications -- Good Standing -- Due Diligence and Original Intent

There is no legal support for applying any criteria as conditions to processing a change application for inchoate portions of water right certificates in good standing in RCW 90.03.330(3). In passing the MWL, the legislature declared these certificates in "good standing" and made it clear Ecology did not have the authority to revoke or diminish these certificates. RCW 90.03.330(2) states *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.*

Yet, the Draft Policy seeks to do just that as it diminishes or potentially revokes rights the municipal water provider has in a pumps and pipes water right certificate. Under the Draft Policy Ecology considers: 1. whether the water right certificate holder has exercised reasonable diligence to complete the original project described in the water right documents; and 2. the original intent described in the documents in the record for the original authorization. These criteria impose unlawful conditions on these certificates, contrary to RCW 90.03.330(2) and (3). This is also a disincentive for change applications that could benefit the region by building resiliency and protecting the environment, as well as undermining the certainty and flexibility provided to municipalities in water supply management as intended by the legislature. Please review the Court's analysis regarding Ecology's attempt to condition water rights in *Burbank Irrigation District v. Ecology,* 27 WN. App 2d 760 (2023).

Pumps and pipes certificates are 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

"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."

(2015). While the Cornelius Court also considered the fact these were changes to groundwater rights under RCW 90.44.100, which authorizes limited changes to inchoate water, 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. If Ecology intends to apply the standards in RCW 90.03.570 to these surface water certificates, it will conflict with RCW 90.03.330(2) because it would result in diminishing and revoking the perfected nature of these certificates. **Ecology should not seek to use Policy 2030 to redefine what good standing means in regard to changing inchoate municipal water rights.**

Mitigation

Seattle maintains that mitigation is a governmental purpose, whether from water that has been put to beneficial use or any inchoate quantity. In the Draft Policy, Ecology does not clarify how it will process a water right application for a use to be mitigated with inchoate quantities under RCW 90.03.550. Utilizing municipal water rights for mitigation provides the necessary flexibility for Seattle to exercise its portfolio of rights for multiple purposes, including providing water to Seattle residents and water to other municipalities in the region.

The proposed policy is also flawed regarding the option 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. The Draft Policy states that Ecology must 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). 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 available for mitigation. This is not the intent of the MWL. As discussed above, this interpretation 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. See *Cornelius*. **Ecology cannot diminish an existing right when processing an application to change that right.** This proposed policy seeks to inappropriately limit the flexibility of Seattle to effectively use its portfolio of water rights.

Finally, Seattle disagrees with the very broad definition of public interest in using the Trust Water Rights program for mitigation. Consideration of extended periods of nonuse of a valid municipal water right directly conflicts with the RCW 90.03.330(2). This consideration significantly and inappropriately limits and revokes a critical element of a valid water right.

Climate Change

The Draft Policy still fails to recognize municipalities' needs for greater flexibility in water supply management because of impacts of climate change on water supply and water demand. For example, a simple change of a point of diversion to address the impacts of varying water supply from climate change could result in the risk of losing portions of the water right, such that Seattle could potentially have to forego the change application, resulting in an inability to meet municipal water demands or to implement environmentally beneficial changes.

There is a common theme in our comments regarding the necessity to more accurately interpret the MWL with the intent of providing the certainty and flexibility required in meeting needs for growth, to address climate change, and to serve the public with the varying demands and multiple uses required of the municipality. Seattle disagrees with how Ecology is interpreting the MWL and several key aspects of general water law in this Draft Policy. Seattle is committed to managing its water rights consistent with the MWL to meet its obligations to the public for multi-faceted water use. We respectfully ask that Ecology revise this Draft Policy to address our requested changes.

Seattle appreciates the constructive relationship it has with Ecology and recognizes the challenges of water rights and water availability in our state. 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 (Jun 11, 2024 16:12 PDT)

Alex Chen, Deputy Director of Water Line of Business & Shared Services Branch
Seattle Public Utilities

Andrew Strong (Jun 14, 2024 08:29 PDT)

Andrew Strong, Interim Environmental, Engineering and Project Delivery Officer
Seattle City Light

cc:
Carrie Sessions, Governor's Policy Office
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