

October 15, 2024

TO: Members of the Washington State Legislature

FROM: Association of Washington Cities
Regional Water Cooperative of Pierce County
Washington Association of Sewer & Water Districts
Washington Public Utility Districts Association

RE: Court Decisions & Ecology Policies Preventing Municipal Water Suppliers from Obtaining Necessary Water Supply in Urban Growth Areas

SUMMARY

Washington State is growing, the Legislature is passing policies to meet the increased demand for housing and infrastructure – but water supply needs must be addressed. Despite passage of historic housing legislation in the last two years, and continued population growth, the Legislature has not adequately contemplated the state’s water needs.

- Recent land use and housing legislation and local Growth Management Act plans are driving more population growth into urban areas, but many utilities (cities, water district, public utility districts, and others) who serve water in these areas cannot ensure the water supply needed to serve this growth will be available because of state of water law and policy.
- Approximately 70 municipal water providers will need additional water supply within the next 10 years. (See attached list based on recent survey)

Climate change and water quality impacts are increasing: Municipal water suppliers are anticipating further water availability challenges due to impacts from climate change. In addition, potential water quality impacts from PFAS and other emerging contaminants will force utilities to seek alternative water supplies. These will be costly issues for the state and municipal water suppliers, and state water law is an obstacle to find cost-effective solutions that address climate change and protect public health.

Despite unprecedented growth and projected water shortages, Department of Ecology’s Municipal Water Law Policy 2030 and the absence of a fix to the State Supreme Court’s *Foster* decision exacerbate the problem:

- Ecology’s recent proposed update to its municipal water policy, combined with agency permit decisions on municipal water rights conflict with the Municipal Water Law passed by the Legislature in 2003. These agency actions will prevent municipal utilities from supplying water for future growth inside Urban Growth Areas.
- Until the *Foster v. City of Yelm* court decision is modified by the Legislature, permitting of both new water rights and changes and transfers of existing water rights will be greatly limited. Current law prevents water right permit decisions that are necessary to protect human health or that result in an overall net benefit to fish.

- While Ecology’s municipal water policies and the *Foster* decision limit water supply in urban areas, state water policy and state funding are enabling rural growth through more exempt wells. This rural growth using private exempt wells benefits from a flexible water right mitigation standard for exempt wells adopted by the Legislature that municipal water suppliers cannot use because of the *Foster* decision.

Municipal Water Systems Projecting Need for Additional Water Supply

The following is a list of municipal water suppliers, and legislative districts, who project needing additional water supply in the next 0-5 years or 5-10 years. This list is based on information as of the date of this memo from water utility and local government organizations and will likely change over time.

Municipal Purveyors Projecting Need for Water Supply Within 0-5 Years

Chehalis (20 th LD)	Newport (7 th LD)	Spokane Water Dist. #3 (4 th LD)
Douglas PUD (13 th LD)	Pasco (15 th LD)	Stevens PUD (7 th LD)
Ellensburg (13 th LD)	Port Orchard (26 th LD)	Sumner (31 st LD)
Fife (27 th LD)	Pullman (9 th LD)	Tumwater (22 nd LD)
Harrah (14 th LD)	Reardan (9 th LD)	Wahkiakum PUD (19 th LD)
Irvin Water Dist. (4 th LD)	Ridgefield (20 th LD)	Yelm (<i>Foster Pilot</i>) (2 nd LD)
Kitsap PUD (23 rd LD)	Ritzville (9 th LD)	
Mason PUD No. 1 (35 th LD)		
Moses Lake (13 th LD)		

Municipal Purveyors Projecting Need for Water Supply Within 5-10 Years

Airway Heights (6 th LD)	Ferndale (42 nd LD)	Prosser (16 th LD)
Battle Ground (18 th LD)	George (13 th LD)	Quincy (13 th LD)
Brewster (7 th LD)	Glacier Water Dist. (42 nd LD)	Rainier (20 th LD)
Camas (17 th LD)	Irvin Water District (4 th LD)	Rock Island (7 th LD)
Carbonado (31 st LD)	Kittitas (13 th LD)	Rockford (9 th LD)
Castle Rock (19 th LD)	Lyman (39 th LD)	Sammamish Plateau Water (41 st LD)
Cedar River W&SD (5 th LD)	Lynden (42 nd LD)	Snoqualmie (5 th LD)
Chewelah (7 th LD)	Mabton (14 th LD)	Soap Lake (7 th LD)
Cle Elum (13 th LD)	Malden (9 th LD)	Springdale (7 th LD)
College Place (16 th LD)	Mansfield (7 th LD)	Steilacoom (28 th LD)
Connell (9 th LD)	Maple Valley (5 th LD)	Toledo (20 th LD)
Davenport (9 th LD)	Mattawa (15 th LD)	Thurston PUD (22 nd LD)
Deer Park (7 th LD)	Naches (13 th LD)	Wapato (14 th LD)
Electric City (7 th LD)	North Beach W.D. (19 th LD)	West Richland (16 th LD)
Ephrata (7 th LD)	North Bend (12 th LD)	West Sound Utility Dist. (26 th LD)
Fairfield (9 th LD)	Othello (15 th LD)	Yacolt (20 th LD)
	Poulsbo (23 rd LD)	

MEMORANDUM

Court Decisions & Ecology Policies Preventing Municipal Water Suppliers from Providing Necessary Water Supply

This memorandum provides more detailed background on existing state water law and Ecology policies that prevent municipal water purveyors from having adequate water supply to serve future growth.

The foundation of municipal water supply in Washington State is the Municipal Water Law passed by the Legislature in 2003. However, Ecology is not following this law as evidenced by recent agency decisions and by a proposed municipal water law policy that conflicts with the statute. These two actions prevent existing, valid municipal water rights from being available to serve growth in Urban Growth Areas.

In addition, the State Supreme Court's *Foster v. City of Yelm* decision determined that water rights mitigation for new water rights and changes or transfers of existing water rights required mitigation of impacts to state adopted instream flows to perfectly match the quantity, location, and timing of the impact. Mitigation that creates an overall net benefit to fish or aquatic habitat is no longer allowed under state law.

Understanding the Municipal Water Law Adopted in 2003

The State Legislature adopted the Municipal Water Law in 2003 in response to prior court and Ecology decisions creating uncertainty as to whether municipal water rights could be used or transferred to serve future urban growth. The Municipal Water Law was titled an act "relating to certainty and flexibility of municipal water rights and efficient use of water." Key provisions of the legislation now in statute include:

- Defining "municipal water supply purposes," a previously undefined term in the water code, to ensure that municipal water rights would not be lost to relinquishment for non-use.
- Declaring that municipal water right certificates issued based on system capacity ("pumps and pipes") were legally "in good standing."
- Prohibiting Ecology from reducing or diminishing any municipal water right certificates except in specific situations identified in statute.
- Allowing municipal water providers to serve water in the entire service area approved by the Department of Health, not just in the more limited area of a water right's place of originally established by Ecology.
- Requiring water conservation and use efficiency for municipal water rights, through regulations adopted by Health.

- Allowing the change and transfer of unperfected (yet to be fully used) municipal surface water rights in certain circumstances, as an exception to the general rule prohibiting changes to unperfected surface water rights. (Changes to unperfected groundwater rights have always been allowed under the groundwater code; in the 1999 *R.D. Merrill* decision, the State Supreme Court rejected Ecology's attempt to restrict certain groundwater changes of use.)

The Municipal Water Law is one of only two major water law reforms passed by the State Legislature in the past 30 years. The other major new water law was the 2018 “Hirst Fix” legislation (2018 SB 6091) to restore the ability to drill new exempt wells in areas not served by municipal water systems, and to provide hundreds of millions of dollars to mitigate exempt well impacts.

Ironically, the “Hirst Fix” exempt well SB 6091 created a mitigation standard for exempt wells that is not allowed under *Foster* for Ecology permit decisions. The State will ultimately spend hundreds of millions of dollars to enable and mitigate for rural exempt wells – using a mitigation standard that municipal water suppliers cannot use under the *Foster* decision.

Ecology’s Denial of the Burbank to Pasco Water Right Transfer – A Case Study On the 2003 Municipal Water Law

A recent Ecology water rights decision and ongoing appeal is illustrative of how Ecology’s interpretation of the Municipal Water Law will prevent the use and transfer of municipal water rights. Burbank Irrigation District (“Burbank”) is the municipal water provider in Burbank, located across the Snake River from and adjacent to the City of Pasco. Both Burbank and Pasco hold a series of municipal water rights, but Pasco is inside the fast-growing Franklin County Urban Growth Area (“UGA”), and is in the group of larger cities that have the most significant housing supply requirements under recent legislation on Middle Housing and Accessory Dwelling Units. Burbank, which is unincorporated, has grown more slowly and so has available municipal groundwater rights deemed by the Legislature to be in good standing under the 2003 Municipal Water Law.

To address this imbalance between the location of growth (Pasco) with the location of existing and valid water rights issued by Ecology (Burbank), Burbank agreed to sell a portion of its water rights to Pasco. The local Water Conservancy Board approved the proposed water right transfer, but Ecology reversed the Board’s approval.

Ecology’s rationale for denying the transfer was based on newly created and non-statutory agency criteria as to: (1) whether the transfer met the “original intent” of the water right; (2) whether Burbank could show “reasonable diligence” in using its water rights; and (3) whether the transfer would amount to “speculation” by the District and therefore be detrimental to the public interest. Notably, Ecology approved a very similar water right transfer by Burbank in 2009 – and the law has not changed since then. But in 2009, Ecology had not yet created its recently proposed (and non-statutory) criteria of “original intent,” “reasonable diligence,” and “public welfare.”

The notions of “original intent,” “reasonable diligence,” and “public welfare” created and used by Ecology in denying the Burbank/Pasco water rights transfer are not statutory requirements for groundwater right transfers or the Municipal Water Law adopted in statute by the Legislature. Further, it is hard to understand Ecology’s conclusion that it is somehow “detrimental to the public interest” to meet the requirements of the Growth Management Act by transferring existing, valid water rights from a slower growing area to a faster growing Urban Growth Area.

Proposed Policy 2030 – Ecology Policy Conflicts with Municipal Water Law

Ecology is proposing to enshrine in statewide agency policy the same non-statutory concepts used to deny the Burbank/Pasco water right transfer. Ecology’s Water Resources Program has adopted a series of policy interpretations to govern agency permit decisions. Policy 2030 is Ecology’s municipal water law policy, and this policy has existed in different forms since 2007. Because such policy interpretations are not adopted by rulemaking, Ecology issues policy interpretations without any oversight or judicial review standards. Notably, in a number of water right appeals Ecology has sought to have appellate courts endorse the agency’s policy, but no appellate court that has directly considered Policy 2030 has sanctioned Ecology’s approach.

Ecology’s existing Policy 2030 and its Proposed Policy 2030 update are fundamentally inconsistent with basic provisions of the Municipal Water Law adopted by the Legislature. The change or transfer of municipal groundwater rights is governed by RCW 90.44.100 and RCW 90.03.380, and those statutes established specific legal requirements for changes and transfers. But in the Proposed Policy 2030 update Ecology purports to grant itself additional legal authority to review municipal water right transfers based on a subjective review of “original intent,” “reasonable diligence,” and “public welfare” – requirements that the Legislature did not put in statute for water right transfers.

These additional non-statutory criteria created by Ecology conflict with a State Supreme Court decision upholding the Municipal Water Law, which held that “[c]onfirming existing rights was a legislative policy decision.” *Lummi Indian Nation v. State*, 170 Wash.2d 247, 264-65 (2010).

Further, the State Supreme Court has also previously ruled that the requirements for water right transfers are those adopted in statute by the Legislature, and that Ecology cannot create additional non-statutory water right permitting requirements. See *Pend Oreille PUD v. Ecology*, 146 Wn.2d 778, 795–96 (2002). And yet, that is exactly what Ecology is doing by creating non-statutory water right permitting requirements in Policy 2030 that prevent the transfer of municipal water rights to where water supply is needed.

Foster v. City of Yelm State Supreme Court Decision – Prohibition Against Mitigation Limits Water Right Permitting, Even Permit Decisions That Would Achieve Net Ecological Gains to Benefit Fish Habitat.

The *Foster* case was an appeal of new groundwater rights issued to the cities of Olympia, Lacey, and Yelm that included a comprehensive mitigation plan to address any impacts to stream flows during the critical low flow time periods of summer and early fall. In approving these water rights, Ecology used its statutory authority to find that “overriding considerations of public interest” (“OCPI authority”) were met by the new water rights, as all impacts to instream flow levels were fully offset during the low flow time periods, and any instream flow impacts during non-critical times (late fall, winter, spring) were more than mitigated by habitat improvements. Ecology describes the mitigation as: “Overall, the mitigation package improved habitat conditions for aquatic species and wildlife, as compared to the status quo.” *Ecology Publication 20-11-083, July 2020, at 1.*

However, a local resident appealed the water right decision as to the City of Yelm under the theory that Ecology’s OCPI authority did not allow the use of “out-of-kind” mitigation. That is, instream flow impacts during non-critical times (winter or spring, when flows are higher) could not be mitigated with habitat restoration actions even if an overall net ecological benefit to fish was achieved. The State Supreme Court agreed, concluding that Ecology’s statutory OCPI authority did not allow for out-of-kind mitigation. The *Foster* decision effectively stopped all new groundwater permitting in Washington State, as described by in a Department of Ecology publication:

“The Court’s ruling made it clear that water right mitigation must address flow impairment, even *de minimus* impairment, both in-time and in-place. For new groundwater uses, **mitigating all flow impairment from all affected waterbodies can literally be impossible.**” *Id.*, at 3.

Ecology has also acknowledged that the *Foster* decision can prohibit water right decisions that improve conditions for fish:

“... in watersheds where instream flows have been adopted, **Ecology cannot approve water right changes that benefit the environment and endangered salmonids** if there is any impairment on flow levels at any time of the year.” *Id.*

The *Foster* decision also limits changes to existing water rights. For example, if a municipal water system sought to drill deeper wells in response to PFAS contamination in a shallower aquifer, the use of deeper wells could modify the impact on instream flows from that deeper groundwater use. Unless mitigation can perfectly offset that new or different impact (even though the water system has not increased water use), the *Foster* decision prevents this type of well replacement to avoid PFAS contamination.

Recent Legislative Efforts to Address the Foster Decision

SB 6091, the 2018 legislation reversing the Supreme Court's *Hirst v. Whatcom County* exempt well decision also included a section authorizing five "Foster Pilot Projects" – water right applications that could be processed by Ecology using a flexible mitigation standard similar to that used by Ecology, but ultimately invalidated in the *Foster* case. Of the five Foster Pilot projects, four were for municipal water suppliers seeking new groundwater rights. Of the five pilot projects, one has been completed (City of Yelm), while others are still ongoing but slowly, as the pilot projects struggle through complex issues of groundwater modeling and whether modeled impacts result in legal impairment of Ecology's adopted instream flow levels.

The 2018 legislation also created the Joint Legislative Task Force on Water Resource Mitigation ("Foster Task Force") to review the *Foster* decision and its impacts and the progress of the Foster Pilot Projects, and issued a report and recommendations to the Legislature. The Foster Task Force concluded its work in 2022, with recommendations for legislative action on a number of topics relating to the Foster decision. SB 5517 (Warnick/Van De Wege) was introduced in the 2023 Session and included a number of the Foster Task Force recommendations. SB 5517 did not pass during the 2023-24 Legislature.

Two issues in the Foster Task Force report and included in SB 5517 were the subject of budget provisos in the 2024 Session. The Supplemental Operating Budget directed Ecology to convene a technical advisory committee to develop guidance on how groundwater models should be created, modified, or used as part of water right permitting. A separate budget proviso created a review of the state's municipal water conservation requirements adopted as part of the 2003 Municipal Water Law. These reviews will be ongoing during 2024 and 2025.

State Laws and Policies (Including the Municipal Water Law) Encourage and Support Urban Growth, while State Law and Ecology Water Policy is Promoting Rural Growth.

Nearly every recent land use, housing, environmental, infrastructure, or transportation policy or budget program supports and directs growth into urban areas and seeks to limit rural growth. But state water law and policy have gone in the opposite direction for the past 10 years by encouraging and funding rural water use while constraining urban water supply. Under the 2018 *Hirst* exempt well legislation and funding, state water policy encourages exempt wells to promote rural growth as the State spends hundreds of millions of dollars through Ecology for mitigation using a "net ecological gain" mitigation standard.

Meanwhile, the *Foster* Supreme Court decision prevents new municipal water rights from being issued – by prohibiting the same type of "net ecological gain" mitigation that the Legislature authorized to enable exempt wells and rural growth. Ecology could follow the letter of the Municipal Water Law to ensure that municipal water rights have the flexibility needed to serve urban growth – but as evidenced by the Burbank/Pasco transfer decision and the Proposed Policy 2030 update, Ecology will not do so. It is unclear how the State envisions ensuring that municipal water systems have the water supply needed to support future population and economic growth.