

2003 Municipal Water Law Interpretive and Policy Statement

Contact: Policy and Planning Section Effective Date: February 5, 2007

References: Chapter 90.03 Revised Code of Washington

Purpose: To describe and provide interpretation of parts of the Municipal Water Law, and describe generally applicable procedures that Ecology will use in managing municipal water rights.

Application: This interpretive and policy statement is a review of the applicable sections of the state Water Code (Ch. 90.03 RCW) that were amended or added by the 2003 Municipal Water Law. The document describes how Ecology intends to apply the various sections of the law to municipal water management.

The 2003 Municipal Water Law (SECOND ENGROSSED SECOND SUBSTITUTE HOUSE BILL 1338; Chapter 5, Laws of 2003; 58th Legislature; 2003 1st Special Session; MUNICIPAL WATER SUPPLY--EFFICIENCY REQUIREMENTS) clarifies municipal water rights. http://www.ecy.wa.gov/programs/wr/rights/Images/pdf/2E2SHB_1338.pdf

Ecology has chosen to develop this Interpretive and Policy Statement (IPS) for carrying out the 2003 Municipal Water Law under the authority of the Administrative Procedure Act ([RCW 34.05.230](#)). This IPS clarifies the Department of Ecology’s position and management approach for carrying out that law.

This document’s primary audience is those interested in, and affected by, management of water rights for municipal supply purposes. It clarifies Ecology’s approach in interpreting and implementing the law. It enables Ecology staff to have a common understanding and consistency of application.

Wherever possible, Ecology’s goal is to be consistent in review and decisions on municipal water supply issues. While the following statements address many situations, exceptions based on case-by-case review may arise that do not conform to these statements. This interpretive and policy statement interprets the 2003 Municipal Water Law but is not a formal rule adopted through a rulemaking process. Thus, pursuant to RCW 90.05.230(1) this interpretive and policy statement is advisory only.

This document is organized by sections of the Water Code (Ch. 90.03 RCW) added or amended by SESSHB 1338. Each of the sections states what Ecology believes the section addresses, what it means, and how Ecology will apply that section.

RCW 90.03.015(3) & (4) DEFINITIONS of “Municipal Water Supplier” and “Municipal Water Supply Purposes”. This section defines water rights that are for municipal water supply purposes.

1. Municipal water suppliers can hold water rights for municipal water supply purposes.
2. Municipal water suppliers can hold water rights that are not for municipal water supply purposes.
3. Ecology evaluates conformance with the definitions in this section on an individual water right basis.
4. If one purpose of use on a water right is for a municipal water supply purpose, then another purpose of use (beneficially used by the municipal water supplier) under the same water right is for a municipal water supply purpose when it is a use generally associated with a municipality.
5. Beneficial purposes of use generally associated with a municipality are described in RCW 90.03.015(4) and in RCW 90.03.550.
6. If a municipal water supplier holds one water right that is for municipal water supply purposes, other water rights held by the municipal water supplier may or may not qualify as rights for municipal water supply purposes.
7. If a municipal water supplier holds or acquires a water right not for municipal water supply purposes, the purpose of use may be changed to municipal water supply purposes under RCW 90.03.380. The statutory tests for a change must be satisfied. Also, the beneficial use following the change must meet a definition in this section. Changes under RCW 90.03.380 require a tentative determination of the extent and validity of the water right proposed for transfer or change.
8. In general, agricultural irrigation purpose of use and dairy purpose of use water rights held or acquired by a municipal water supplier cannot be conformed as rights for municipal water supply purposes. These purposes are not generally associated with the use of water within a municipality. Water rights for other purposes of use may also fall into this exclusive group. These situations will be considered by Ecology on a case-by-case basis. [See “conformed water right” definition in section for RCW 90.03.560, below.] Water rights for non-municipal purposes that cannot be conformed can still be changed to municipal purposes by filing and having approved an application for a water right change or amendment.
9. Ecology interprets the statute as requiring active compliance with the beneficial use definitions in RCW 90.03.015(4).
 - If a water right holder’s actual use of water does not meet the definition of a water right for municipal water supply purposes (e.g. by serving less than the residential connection or nonresident population thresholds under RCW 90.03.015), then the water right no longer qualifies as a right for municipal water supply purposes. The exception to relinquishment for municipal water supply purposes under RCW 90.14.140(2)(d) does not apply in such instance.
 - If a water right holder’s use of water does not meet the definition of a water right for municipal water supply purposes for 5 or more years, then the water right would be valid only to the extent it had been beneficially used during that period, with any nonuse resulting in relinquishment of the right unless the non-use is excused by one of the other exemptions to

relinquishment. [See RCW 90.14.140: "Sufficient cause" for nonuse defined — Rights exempted.]

RCW 90.03.015(4)(a) DEFINITIONS – Defines Required Number of Residential Connections and Non-Residential Population for Municipal Water Supply Rights. The statutory definitions in this subsection do not exactly match the Department of Health rules for Group A water systems under WAC 246-290-020.

1. In this section, we provide examples of water systems that might or might not be considered municipal water suppliers holding water rights for municipal water supply purposes. Whether or not the particular system is considered municipal or not depends on the specific fact pattern.
2. RCW 90.03.015(4)(a) provides statutory definitions for municipal water suppliers holding water rights for municipal water supply purposes. These definitions overlap Department of Health rules for Group A water systems, but they are not exactly the same.
3. All municipal water suppliers under this section are Group A water systems. However, not all Group A water systems are municipal water suppliers.
4. One difference between the definition in this section and Department of Health rules for Group A water systems is the statute requires 15 or more *residential* connections. The Department of Health rules consider both *residential* and *non-residential* connections. Therefore, a water right serving 15 homes would be for municipal water supply purposes but a water right serving 14 homes and a business would not. It does not meet the “municipal” definition, because it does not meet the “*residential*” criterion. However, both would be Group A water systems.
5. The statute does not define the term *residential service connection*. Ecology considers this term to be as defined in Department of Health rules for Group A community water systems in WAC 246-290-020. The definition reads: “service connections used by year-round residents for one hundred eighty or more days within a calendar year”. This is a subset of Department of Health’s general definition of a service connection in WAC 246-290-010, i.e. a connection to a public water system serving both residential and non-residential populations. By contrast, the municipal water law only considers residential service connections.
6. Ecology interprets the term “connection” in a manner consistent with Department of Health rules. This includes provisions for alternative means of calculating the number of connections for a Group A water system. This can include counting residential “units” within a building. The determination on number of residential units (connections) is done on a case-by-case basis.
7. In general, the following Group A water systems could be examples of municipal water suppliers because the statutory definitions are equivalent to those adopted in rule by the Department of Health: a city, subdivision, mobile home park, or water association. The decisions on whether systems hold water rights for municipal supply purposes depend on the particular factual situations.
8. Another difference between the statutory definition and Department of Health rules for Group A water systems is the statute does not include a definition for *residential populations* but Department of Health rules do.

For example, under WAC 246-290-020, a water system can be classified as a Group A community system if it serves at least 25 residents for 180 or more days within a calendar year. This is regardless of the number of connections. A water right serving such a system would not be for municipal water supply purposes under this section because the statute does not contain an equivalent definition. There are stand-alone Group A community water systems that, under particular factual situations, may not be municipal water suppliers because of this difference. These types of systems could include some colleges, nursing homes, or other residential facilities.

9. The municipal law does not include a minimum service connection requirement for nonresidential connections. RCW 90.03.015(4)(a) defines a water right for municipal water supply purposes in terms of nonresidential populations (residential use of water for a nonresidential population of, on average, at least twenty-five people for at least sixty days a year). Therefore, this category includes some Group A non-community systems and excludes others, depending upon particular factual situations.
10. Ecology interprets the phrase “residential use of water for a nonresidential population” to mean that the full range of residential water uses (e.g. drinking, cooking, cleaning, sanitation) are provided under the water right. Further, such service is for temporary domiciles for non-residents (an average of 25 or more people living there for more than 60 days per year). Examples of Group A non-community systems that might hold water rights for municipal water supply purpose under this section under particular factual situations could include vacation homes and temporary farm worker housing.
11. The following Group A non-community systems would not typically hold rights under RCW 90.03.015(4) (a) for municipal water supply purposes under the residential water use for a non-resident population definition:
 - schools,
 - daycares,
 - churches,
 - campgrounds,
 - fairgrounds,
 - restaurants,
 - businesses and
 - factories.

Actual determination of whether such systems hold water rights for municipal supply purposes will depend upon the particular factual situations.

12. Group B water systems are also defined in WAC 246-290-020 and are public water systems smaller than Group A systems, either in terms of connections or population. Water rights serving Group B water systems do not qualify as water rights for municipal water supply purposes under RCW 90.03.015(4)(a).

RCW 90.03.015(4) (b) *Governmental Entities and Governmental Purposes.* Defines water rights for municipal water supply purposes based on beneficial use by a specific group of governmental entities.

1. The governmental entities listed in this subsection constitute an exclusive list. Those entities are:

- cities,
- towns,
- public utility districts,
- counties,
- sewer districts, or
- water districts.

If an entity is not on the list, it is not a municipal water supplier for the purpose of this subsection. For example, neither a port district nor an irrigation district qualify as municipal water suppliers under RCW 90.03.015(4)(b)).

2. Governmental and governmental proprietary purposes generally refer to those purposes listed at the end of RCW 90.03.015(4), including, but not limited to, beneficial use for:

- commercial,
- industrial,
- irrigation of parks and open spaces,
- institutional,
- landscaping,
- fire flow,
- water system maintenance and repair, or
- related purposes.

3. A governmental or non-governmental entity not qualifying as a municipal water supplier under this subsection (e.g. a port district) may qualify under another subsection of RCW 90.03.015. However, domestic use rights issued to or acquired by a city, town, public utility district, county, sewer district, or water district that do not qualify as municipal under the more specific requirements of RCW 90.03.015(4)(a) cannot qualify under the more general “governmental or governmental proprietary purposes” standard of RCW 90.03.015(b).

For example, a water system with nine connections issued to or acquired by a water district is not municipal under the more specific domestic requirements of (a) or the more general requirements of (b), and cannot be conformed to a municipal purpose of use. [See definition of “conformed water right” under section for RCW 90.03.560 below.]

4. When considering whether a water right qualifies for a governmental purpose under this section (e.g. irrigation of parks), Ecology considers the entity that was originally issued the water right, as well as the current owner of the right.

If, for example, a water right was issued for irrigation of parks (or another governmental purpose) to a “governmental entity”, then the right is for municipal water supply purpose. However, if the same right were issued to a non-governmental entity (e.g. a private developer) and later acquired by a “governmental entity”, then the right would need to be changed to municipal water supply

purposes under RCW 90.03.380. The right as issued did not then qualify as a municipal water supply purpose water right.

5. Municipal water rights held by entities listed in RCW 90.03.015(4) (b) may include agricultural irrigation as a governmental purpose under an existing municipal water supply purpose water right, if such an entity has statutory authority to provide agricultural irrigation water and the entity has used the right, at least in part, for agricultural irrigation since the time the right was issued.

RCW 90.03.260(4) & (5) Applications - Numbers of Connections and Population. These subsections provide that the maximum population or number of connections specified on an application or any subsequent water right documents for a municipal water supply right is no longer a limitation of the water right. The municipal water supplier must have an approved water system plan or an approval from the Department of Health to serve a specified number of service connections to not be subject to this limit. These subsections do not relate to water rights documented by statements of claims.

1. If a water system serving 15 or more existing residential service connections has a water right for community or multiple domestic supply, and the number of connections has been authorized by the Department of Health, the water right is for municipal water supply purposes and any population or connection limitations that may appear in water right documents are not limiting. Rather, the maximum instantaneous quantity (Q_i) and annual quantity (Q_a) are the controlling numbers.
2. If a water system serving less than 15 existing residential service connections has a water right that issued for a project proposing more than 15 residential service connections, then such a water right may be conformed as a right for municipal water supply purposes under RCW 90.03.560. This conformance must follow actual physical service to at least 15 residential service connections.
3. If a water system serving less than 15 existing residential service connections has a water right that issued for a project proposing fewer than 15 residential service connections, then the number of connections intended to be served by the water right is a limitation on the water right. Only a sufficient quantity of water necessary to serve those connections is authorized.
4. If a water system is providing water for residential use to a nonresidential population numbering *less* than an average of 25 people for sixty or more days per year, under a water right issued for a project proposing residential use of water to a nonresidential population for an average of *greater* than 25 people for sixty or more days per year, then such a water right may be conformed as a right for municipal water supply purposes under RCW 90.03.560 following actual service to an average of 25 or more people for sixty or more days per year.
5. If a water system is providing water for residential use to a nonresidential population numbering *less* than an average of 25 people for sixty or more days per year, under a water right issued for a project *proposing* residential use to a nonresidential population for an average of *less* than 25 people for sixty or more days per year, then the population intended to be served by the water right is a limitation on the water right and only a sufficient quantity of water necessary to serve that population is authorized.

RCW 90.03.330(2) Appropriation Procedure – Water Right Certificate: Exceptions to Prohibition of Revocation or Diminishment of a Municipal Water Supply Purpose Water

Right. This section provides that Ecology may not revoke or diminish a water right for municipal water supply purposes documented by a certificate covered under RCW 90.03.330(3) except:

- when issuing certificates under RCW 90.03.240,
 - issuing certificates following changes, transfers, or amendments under RCW 90.03.380 or 90.44.100, or
 - if Ecology determines a certificate was issued with ministerial errors or obtained through misrepresentation.
1. Apart from the exceptions listed in this section, Ecology cannot rescind or diminish a certificate for municipal water supply purposes and/or revert a certificate to permit status.
 2. A certificate for municipal water supply purposes may be revoked or diminished if the revocation or diminishment results from a general adjudication of water rights in superior court conducted pursuant to RCW 90.03.110 - 245.
 3. When processing an application for change, transfer, or amendment of a water right documented by a certificate covered under RCW 90.03.330(3), Ecology may revoke the certificate, or issue a certificate for a quantity less than that on the original certificate. Revocation or diminishment may occur based on:
 - the tentative determination of validity and extent of the water right,
 - to prevent impairment of other existing water rights, or
 - to prevent detriment to the public welfare (for ground water changes under RCW 90.44.100).

[See RCW 90.03.330(3), below, for discussion relating to tentative determination of validity and extent.]
 4. Upon determining that a certificate for municipal water supply purposes has been issued with ministerial errors, Ecology may revoke the certificate and issue a superseding certificate containing modifications only to the extent necessary to correct the ministerial errors.
 5. Upon determining that a certificate for municipal water supply purposes has been issued through misrepresentation, Ecology may revoke the certificate and issue a superseding certificate containing modifications only to the extent necessary to correct the misrepresentation.

RCW 90.03.330(3) *Appropriation Procedure – Water Right Certificates.* This subsection provides that water rights for municipal water supply purposes documented by certificates issued prior to September 9, 2003 with maximum quantities based on system capacity (known as “pumps and pipes” certificates) are “rights in good standing.”

1. “Pumps and pipes” certificates were issued based on the system capacity measure, rather than on the basis of actual beneficial use. These water rights include inchoate quantities that have not yet been exercised. *See Department of Ecology v. Theodoratus*, 135 Wn.2d 582, 957 P.2d 1241 (1998). Such rights may continue to be exercised to serve new growth. Ecology is not authorized to revoke or diminish water rights for municipal supply purposes documented by such “pumps and pipes” certificates, except under the circumstances set forth in RCW 90.03.330(2), discussed above.
2. RCW 90.44.100 authorizes changes of points of withdrawal and places of use for inchoate ground water rights. In the context of exceptions provided under RCW 90.03.330(2), such as when a conservancy board or Ecology evaluates an application for change or transfer of a water right documented by a “pumps and pipes” certificate and must perform a tentative determination of the validity and extent of the water right; an assessment must be performed to determine whether any of the inchoate quantity specified in the certificate remains valid. This requirement is based on the proposition that by including the term “in good standing” for such certificates, the Legislature intended that Ecology’s issuance of certificates based on system capacity did not take the water rights *out of* good standing, but that holders of such rights would still have to meet other water law principles, such as due diligence in project development, to keep the rights in good standing.

In assessments to determine if inchoate quantities remain in good standing, the conservancy boards and Ecology will consider at least the following parameters:

- a. The original intent described in water right documents, including the nature of the project that the applicant sought to pursue through issuance of the permit;
- b. Whether the water right holder has exercised due diligence to complete the project sought to be developed through the water right, and
- c. Whether or not approval of the change would be contrary to the public interest. Public interest analysis can involve consideration of whether the proposed change or transfer is speculative in nature. As an example, evidence of speculation could be no continued involvement by the selling municipal water supplier in the water use served by the receiving entity. Additional evidence could be no discussion or rationale for the transfer indicated in planning documents, such as a water system plan.

Inchoate portions of water rights for municipal supply purposes found to be in good standing through this assessment (mentioned above), are eligible for change or transfer. This approach may, among other things, allow for the inchoate portion to be transferred to another municipal water supplier or integrated into a regional water system.

For inchoate surface water rights, the additional requirements in RCW 90.03.570 must be met before changes and transfers may be approved. Further, RCW 90.03.380 and 90.44.100 authorize changes and transfers of perfected surface and ground water rights for municipal supply purposes when the criteria of those statutes are met.

RCW 90.03.330(4) ***Issuance of Certificates – Beneficial Use Requirement.*** This section requires that for water rights represented by permits, after September 9, 2003, water right certificates may only be issued that document maximum quantities based on actual beneficial use of water.

1. Ecology will issue certificates, upon proof of appropriation by permit holders, based only on actual beneficial use of water, rather than system capacity. Such certificates will not include quantities of inchoate water.
2. Ecology will consider a permit holder’s request to split a partially developed permit by issuing a certificate for the developed portion and issuing a superseding permit for the inchoate portion with a development schedule. The permit holder must demonstrate due diligence in working toward full development.
3. In reports of examination authorizing changes and transfers of water rights for municipal supply purposes, Ecology may specify development schedules. The schedule may include an estimated date of final development. Extensions may be granted as described in Ecology Policy 1050. Upon completion of development, Ecology will issue superseding water right certificates.

RCW 90.03.386(1) ***Coordination between Department of Health and Department of Ecology.*** This section requires coordinated review and approval procedures to ensure compliance and consistency with water system plans/small water system management programs. Ecology and the Department of Health are working on a Memorandum of Understanding (MOU) to outline the agencies’ roles and responsibilities.

RCW 90.03.386(2) ***Place of Use and Determinations of “Not Inconsistent” with Specified Local Plans.*** This section provides that a municipal water supplier’s authorized place of use on its water right or rights can change to its current service area, provided that:

- a planning or engineering document describing the service area has been approved by the Department of Health;
- the municipal water supplier is in compliance with the terms of its water system plan or small water system management program; and
- the alteration of the water right place of use is “not inconsistent” with other local planning documents (see 5(2) Policy Statement created by DOH and Ecology relating to implementation of this section http://www.ecy.wa.gov/programs/wr/rights/muni_wtr.html).

Ecology and the Department of Health will include detailed implementation and coordination information from this 5(2) Policy Statement into an MOU that will clearly outline the agencies’ roles and tasks.

RCW 90.03.386(3)

Water Conservation as a Part of an Approved Water System Plan / Small Water System Management Program. This section describes the responsibility for a municipal water supplier to implement a water use efficiency/water conservation program. It directs Ecology to consider such implementation when considering development schedules for municipal water supply rights.

1. Ecology supports the Department of Health's rule on water use efficiency/water conservation for municipal water suppliers. Ecology generally intends to be consistent with the Department of Health's water conservation requirements, but believes there may be exceptions when more stringent requirements may be necessary.
2. Ecology has statutory mandates to encourage conservation and eliminate waste. In some cases, Ecology may base water allocation decisions on conservation criteria more stringent than those in the Department of Health's rule. Such instances may include, but are not limited to:
 - o evaluations of applications for water right permits under RCW 90.03.290,
 - o waste of water determinations under RCW 90.03.005,
 - o coordination with watershed planning efforts under Chapters 90.54 and 90.82 RCW,
 - o drought permitting under Chapter 43.83B RCW,
 - o general adjudications of water rights, or
 - o settlements of administrative appeals and court cases.

Many factors could come into play when making the determination for more stringent conservation requirements. Ecology will address these instances on a case-by-case basis.

Example: Ecology could require more stringent conservation measures when issuing a new water right permit authorizing a withdrawal from a watershed with instream flows established by rule. In its decision, Ecology could determine that water is not available, or that it would impair other existing water rights or be contrary to the public interest, to allow water use at a level that would be allowed under the DOH rule. With proper mitigation and a requirement to conserve additional water over what the DOH rule might require, Ecology could be able to approve the application and issue a permit.

3. In its review of water system plans and related documents, Ecology might comment on those areas within its jurisdiction, including those listed above in number 2.
4. When Ecology believes it must be more stringent than DOH's water use efficiency rules, Ecology will consult with DOH before imposing more stringent conditions.
5. Ecology POL-1050 provides guidance on the agency's criteria for extending development schedules for all water rights, including those for municipal water supply purpose. Under this policy, Ecology may require additional conservation provisions and conditions at the time of a permit extension for a municipal water supply purpose right. [See the policy at: <http://www.ecy.wa.gov/programs/wr/rules/images/pdf/pol1050r.pdf>]

RCW 90.03.550

Municipal Water Supply Purposes – Beneficial Uses.

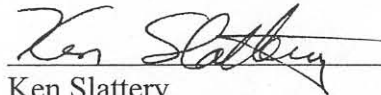
1. Beneficial uses of water under a municipal water supply purposes water right can include:
 - benefits for fish and wildlife, water quality, or other instream resources/values;
 - implementation of environmental obligations from:
 - a watershed plan under Ch. 90.54 RCW or Ch. 90.82 RCW,
 - a federal habitat conservation plan,
 - a hydropower license of the federal energy regulatory commission, or
 - a comprehensive irrigation district management plan.

However, water must be specifically diverted or withdrawn from the authorized source for such purpose.

RCW 90.03.560

Municipal Water Supply Purposes – Identification. “Conforming Documents” and Municipal Water Right Changes and Transfers. Water rights meeting the definition under RCW 90.03.015 are for municipal water supply purposes. The water right documents can be conformed to correctly identify the purpose of use.

1. A “conformed water right” is one in which water right documents have been amended by the department to properly indicate it is for municipal water supply purposes. For a qualifying right, this can occur during the process of changing some other attribute of the water right under RCW 90.03.380 or 90.44.100. This can also occur when a municipal water supplier requests a correction of the listed purpose of use, pursuant to this section and not just during a change or transfer.
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.
3. A municipal water supplier can hold or acquire water rights for non-municipal purposes (e.g. agricultural irrigation and dairy purposes of use). However, these rights may not be conformed to a municipal water supply purpose of use under this section. They must undergo a purpose of use change under RCW 90.03.380 to become municipal purpose rights.



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Special Note: These policies and procedures are used to guide and ensure consistency among water resources program staff in the administration of laws and regulations. These policies and procedures are not formal administrative regulations that have been adopted through a rule-making process. In some cases, the policies may not reflect subsequent changes in statutory law or judicial findings, but they are indicative of the department's practices and interpretations of laws and regulations at the time they are adopted. If you have any questions regarding a policy or procedure, please contact the department.