

**2003 Municipal Water Law Interim Guidance and Interpretive and Policy Statement**

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Contact: Policy and Planning Section

Effective Date: May 14, 2009

References: Chapter 90.03 Revised Code of Washington

Purpose: To provide guidance to the Water Resources Program staff when administering the Municipal Water Law during the interim between the June 11, 2008 King County Superior Court decision and the resolution of appeals. This interim guidance and interpretive and policy statement supersedes or replaces certain sections of POL 2030, the 2003 Municipal Water Law Interpretive and Policy Statement.

Application: This interim guidance and interpretive and policy statement applies to the review of applications for new water rights and water right changes, and to the review of water system planning documents.

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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](http://www.ecy.wa.gov/programs/wr/rights/Images/pdf/2E2SHB_1338.pdf)

On June 11, 2008 the King County Superior Court struck three sections of the 2003 Municipal Water Law, declaring three sections of the law unconstitutional. (The law, the legal challenges, related briefs, and the Court's decision are on the Municipal Water section of the Water Resources website: [Water Right Information - Municipal Water Law](#).) This interim guidance is to implement the 2003 Municipal Water Law (MWL) following the June 11, 2008 King County Superior Court decision.

This is interim guidance because the State filed an appeal to the state Supreme Court on July 7, 2008 seeking to overturn parts of the Superior Court's decision. The state Supreme Court has agreed to hear the case, and the case will be heard during the Court's fall 2009 term or its winter 2009-2010 term. This guidance applies until the Court issues a decision .

The Department of Ecology (Ecology) has chosen to develop this Interim Guidance as an Interpretive and Policy Statement (IPS) for carrying out the 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 during the interim between the King County Superior Court decision and the resolution of appeals.

This document's primary audience is Ecology staff and 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 its 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 June 11, 2008 King County Superior Court decision but is not a formal rule adopted through a rulemaking process. Thus, pursuant to RCW 34.05.230(1) this interpretive and policy statement is advisory only.

## **GENERAL**

1. We will administer the law as it exists, until and unless the King County Superior Court decision is modified. At this time, three sections of the MWL, RCW 90.03.015(3) (definition of “municipal water supplier”) and (4) (definition of “municipal water supply purposes”) and RCW 90.03.330(3) (the “good standing” provision), are no longer valid and are in effect erased from the Water Code.
2. We will not amend decisions we made between September 9, 2003 and June 11, 2008 that were based on the sections of the MWL the Superior Court declared invalid unless compelled to do so by a court decision.

We will proceed cautiously because of the uncertainty introduced by invalidation of the sections of the statute defining the terms “municipal water supplier” and “municipal water supply purposes,” and the section of the statute providing that certificates for municipal water rights issued based on system capacity are in “good standing”. An additional uncertainty is the possibility the King County Superior Court decision could be reversed or substantially changed on appeal. Until the final resolution of the case, we will not be reexamining previous assessments of municipal water rights or the prior associated decisions. We will continue to review water rights self-assessments in the water system planning process based on the law after the King County Superior Court decision.

3. Despite the decision being made in a single county Superior Court (*i.e.* King County Superior Court), the decision is binding on Ecology throughout the state because Ecology is a defendant in the case and the plaintiffs brought a declaratory judgment action that challenged the facial constitutionality of the MWL.
4. For new water rights issued to private water systems, we will describe the purpose of use on water right documents as being for “community domestic”, multiple domestic”, or “group domestic” purposes. For changes to water rights held by private systems issued as municipal or previously conformed as municipal, the purpose of use will remain as “municipal.”

## **WATER RIGHTS ADMINISTRATION**

### **Tracking**

Beginning June 11, 2008, Ecology Regional Offices will keep a record of all decisions with potential municipal water implications for both public and private entities.

If the Superior Court decision is reversed, water rights issued for multiple domestic, community domestic, or group domestic purposes may qualify as being rights for municipal purposes by operation of law, and the documents could be conformed to indicate the rights are for municipal purposes.

### **”Good Standing” Guidance**

Prior to the June 11, 2008 King County Superior Court decision, water right certificates issued prior to September 9, 2003 for municipal water supply purposes based on system capacity (so-called “pumps and pipes” certificates) were in “good standing” under the MWL. Subsequent to the Superior Court decision, the “good standing” status of water rights held by both public municipal water suppliers and private water suppliers is in question and is currently pending before the state Supreme Court.

The Superior Court ruled as unconstitutional the “in good standing” provision found in RCW 90.03.330(3) and the definitions for “municipal water supplier” and “municipal water supply purposes” (RCW 90.03.015 (3) and (4)). Under RCW 90.03.330(2) Ecology is prevented from revoking or diminishing water rights for municipal water supply purposes, as defined in RCW 90.03.015, except for when it processes water right change or transfer applications and in the context of general water rights adjudications, or if the certificate was issued with ministerial errors or obtained through misrepresentation. Although RCW 90.03.330(2) was not declared

unconstitutional, its functionality is questionable and its viability currently suspect because it refers back to the definitions that were deemed unconstitutional. Until the appeal is resolved by the Supreme Court, we will take no action relating to the status of inchoate quantities associated with "pumps and pipes" certificates unless pursuant to processing a water right change or transfer application (as described below), a general adjudication, correction of misrepresentation or ministerial errors.

### **Water Rights Changes**

When a change to an existing municipal supply, multiple domestic, community domestic, or group domestic water right that is not completely put to beneficial use (documented by a so-called "pumps and pipes" certificate), is requested by either a public or private entity, we will provide the following options:

1. The applicant can **withdraw the application** and then reapply if they so choose when the law is finally clarified.

or

2. The entity can request that its **certificate be rescinded**. The certificate would be replaced with a superseding permit provided the entity has been perfecting the water right with reasonable diligence consistent with the original intent. The superseding permit would include a new development schedule.

or

3. The entity can request that we **divide the certificate**. The portion of water that has been put to beneficial use would be certificated, and a superseding permit would be issued for the inchoate portion. A new development schedule would be included.

or

4. The applicant could request that we **skip the application**. The applicant would step aside for a period of time or in a specific circumstance (or other specified condition) and let "juniors" pass them in the priority date line. The priority date would be preserved. This could enable the applicant to wait to see if RCW 90.03.330(3) is restored before their application is processed, while retaining their existing application.

Because the status of these water rights is uncertain and could change pending the outcome of the appeal, the following language should be inserted in decisions on change applications or conservancy board changes when dealing with "good standing" and rescinding a certificate to permit:

King County Superior Court Judge Jim Rogers provided an oral ruling on June 11, 2008 in Lummi Indian Nation, *et al.* v. State, the facial challenge to the constitutionality of the 2003 Municipal Water Law. The Court ruled that three MWL provisions violate separation of powers under the state Constitution: RCW 90.03.015(3) and (4), (definitions) and RCW 90.03.330(3) ("good standing"). Because this decision is under appeal, there is uncertainty as to the ultimate status of these statutory provisions and it is possible that they may be reinstated by the Supreme Court in the future.

In light of this decision, and given that a portion of Certificate (number) is inchoate at this time, and that (name of entity) has provided data demonstrating diligence in developing the inchoate portion of this right, (groundwater/surface water) [specify which] Certificate (number) shall be rescinded and concurrently replaced with Superseding Permit No. (number).

[NOTE: the language in the preceding paragraph would apply in situations where the applicant chooses to only receive a superseding permit. If they choose to also receive a superseding certificate, the language would state

that it is also replaced with the superseding certificate to document the portion that has already been perfected through actual use.]

**”Municipal Water Supplier” Definition**

The following table describes those water suppliers we believe are currently municipal water suppliers, in accordance with the King County Superior Court decision, and which are not. We have also noted with an asterisk and gray shading, entities where a generalization of their status is difficult and which might or might not be considered municipal water suppliers, depending on the specific situation.

<b>Municipal Water Suppliers: PUBLIC ENTITIES</b>	<b>NOT Municipal Water Suppliers: PRIVATE ENTITIES</b>
Cities and towns	Private developments
Counties	Privately owned water systems
Public utility districts	Water associations
Water and/or sewer districts	Home owner association
Irrigation districts <sup>1</sup>	Investor-owned water companies
Port districts <sup>1</sup>	
Certain institutions ( <i>e.g.</i> prisons, public hospitals, public colleges and universities, etc.) <sup>1</sup>	
<sup>1</sup> <b>Whether these entities are municipal water suppliers depends on the specific facts.</b> If it is not clear if a particular water system is a “municipal water supplier”, consult Don Davidson or Doug Rushton.	

The effect of the King County Superior Court’s ruling excludes private entities from being municipal water suppliers. For example, a water right for a private development, issued for ”community domestic” (or similar) purposes with 50 connections, would not be considered to be a water right for municipal purposes and the entity would not be considered to be a municipal water supplier.

If a private entity was issued a municipal water right or a water right was conformed as a municipal water right (*i.e.* designated as “municipal” on the water right document), the water right will still be considered to be a municipal water right pending the final outcome of the litigation. The private entity would not be considered to be a municipal water supplier, and would not have either the benefits or obligations of a municipal water supplier.

RCW 90.03.260(4) provides that “for a municipal water supplier that has an approved water system plan under chapter 43.20 RCW or an approval from the department of health to serve a specified number of service connections, the service connection figure in the application or any subsequent water right document is not an attribute limiting exercise of the water right as long as the number of service connections to be served under the right is consistent with the approved water system plan or specified number.” As a result of the litigation before the state Supreme Court, it is uncertain as to whether, for water systems that are not municipal water suppliers, the maximum number of connections designated in the water rights documents are limiting attributes of those water rights. Therefore, a cautious approach is warranted during the interim period before the Supreme Court issues its decision in the case, and Ecology will tentatively view connections limits as binding during this period to ensure that water rights will not be expanded in the event that the Court rules that connections limits are binding limitations.

**Place of Use/Service Area**

If an entity no longer qualifies as being a “municipal water supplier,” they lose the service area benefit under RCW 90.03.386(2) that allowed them to change their water right place of use through water system planning, and must apply to Ecology to change their place of use. If an entity no longer qualifies as a municipal water

supplier but prior to June 11, 2008 received approval for a service area change through an approved water system plan, the modified place of use will be honored by Ecology pending the final outcome of the litigation.

**”Community Domestic”, ”Multiple Domestic”, or ”Group Domestic”.**

Some private entities would have been deemed municipal water suppliers by meeting the definition under the Municipal Water Law prior to the June 11, 2008 King County Superior Court decision. Water rights held by these entities will be regarded as being for “community domestic”, “multiple domestic”, or “group domestic” purposes (unless originally issued for “municipal” purposes). If the Supreme Court reverses or modifies the Superior Court decision, the community, multiple or group domestic suppliers will be municipal water suppliers by operation of law, and water rights that serve 15 or more connections, can then be conformed to indicate that they are for municipal purposes.

We will inform private water systems who receive the community/multiple/group domestic purpose of use designation, of the uncertainty surrounding these documents (pending the outcome of the appellate case). We will use the following language in these water rights documents:

Please be aware the definitions of “municipal water supplier”, “municipal water supply purposes”, and the inchoate water right ”in good standing” provision in the Municipal Water Law of 2003 have been deemed unconstitutional by King County Superior Court. Ecology has appealed this decision to the Washington State Supreme Court. A final decision on the appeal to the Supreme Court may not be issued for some time. Therefore, your water rights purpose of use is considered to be "community domestic" pending the final outcome of the legislation. If the law is reinstated on appeal, your community domestic right will automatically be for municipal water supply again by operation of law. From that time forward, you would have the choice of requesting Ecology to conform your document by having the words "community domestic" changed to "municipal water supply".

RCW 90.03.560 provides that: “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. . . . *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.*” (Emphasis added.) Until a final decision is made by the Supreme Court in the Municipal Water Law case, Ecology will be unable to amend (conform) any community domestic, multiple domestic or group domestic water right held by a municipal water supplier (as defined above) to be identified as a right for municipal water supply purposes pursuant to RCW 90.03.560. This is because the definition of municipal water supply purposes in RCW 90.03.015, referenced in RCW 90.03.560 for purposes of conformance, has been declared unconstitutional by the King County Superior Court. However Ecology could, upon request, process a change application to change the purpose of use to municipal water supply.

**WATER SYSTEM PLANNING**

We will continue to review water system plans (WSPs). Because no response from Ecology on WSP reviews results in the Department of Health not having information to use in their approval process, Ecology will continue review of WSPs in consultation with the Department of Health.

**When a water system is not a ”municipal water supplier”:**

- Where a water system no longer meets the definition for “municipal water supplier”, the plan review letter should include the above caveat language for “multiple domestic”, “community domestic” or “group domestic” water right documents.

- Private entities can no longer meet the definition of being a municipal water supplier. As explained above, as a result of the litigation before the state Supreme Court, it is uncertain as to whether, for non-municipal water suppliers, the maximum number of connections designated in water rights documents are limiting attributes of those water rights. Therefore, a cautious approach is warranted during the interim period before the Supreme Court issues its decision in the case, and Ecology will tentatively view connections limits as binding during this period to ensure that water rights will not be expanded in the event that the Court rules that connections limits are binding limitations. The service area cannot exceed the place of use designated under the water right document(s). The private entities may be required to apply to change the place of use if they cannot wait until the final outcome of the litigation.
- If we identify that a connections limit is specified in a water right for a non-municipal water supplier, we will notify the Department of Health and advise them that such a specification exists, that there is uncertainty as to whether the limit is binding during the pendency of the Supreme Court case, and that, out of caution, they should not approve a higher number of service connections. However, we shall inform the Department of Health that, if appropriate, they may preliminarily determine a higher number of connections for the water system that would become effective in the event that the Supreme Court’s decision determines that the connections figures are not limiting attributes of the water right.

**”Good standing” of pumps and pipes certificates in the context of water system plan review.**

Based on the uncertainty over the status of water rights documented by certificates that include quantities of inchoate water, when submitting a plan review letter the following should be inserted as a comment:

According to our analysis of the self-assessment in the proposed (name) Water System Plan, your water system may have XXX gpm and XXX.X acre-feet per year of water that has not yet been perfected through actual use of the water. The status of the undeveloped, or inchoate, portion of the water right certificate(s) is uncertain based on the King County Superior Court decision in Lummi Indian Nation, *et al.* v. State of Washington. The court ruled that RCW 90.03.015 (3) and (4), the definitions for the terms “municipal water supplier” and “municipal water supply purposes,” and RCW 90.03.330(3), which declares that municipal water rights documented by pumps and pipes certificates are rights “in good standing,” violate the separation of powers under the Washington Constitution.

The King County Superior Court decision has been appealed by all involved parties to the State Supreme Court, which has accepted the case, and it may be one or more years before the Court issues a ruling. The State is urging the Supreme Court to reverse the King County Superior Court ruling and find that all parts of the 2003 Municipal Water Law are constitutional. Meanwhile, the King County Superior Court decision is the current law.

If you have concerns or questions regarding the status of any of your water right certificates that could be affected by the Municipal Water Law case you should consult your legal counsel.

If you have questions regarding Ecology’s review of your water system plan or if you wish to discuss options, please contact (name and phone number) .

**Water rights self-assessments.**

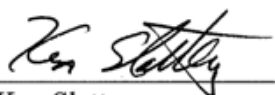
Water rights self-assessments are important parts of the water system plan review process. There is uncertainty regarding “pumps and pipes certificates” and concerning which entities are “municipal water suppliers” and which are not. Because of that uncertainty, it is imperative the Departments of Health and Ecology coordinate during review of water system plans.

***More information***

Information and documents related to the 2003 Municipal Water Law, including the statutory language, the legal challenges and the King County Superior Court decision, and documents related to the appeal to the State Supreme Court are on the Municipal Water Law [website](http://www.ecy.wa.gov/programs/wr/rights/muni_wtr.html) at – [http://www.ecy.wa.gov/programs/wr/rights/muni\\_wtr.html](http://www.ecy.wa.gov/programs/wr/rights/muni_wtr.html).

For general questions about the Municipal Water Law, contact Don Davidson at (360) 407-6636 or [ddav461@ecy.wa.gov](mailto:ddav461@ecy.wa.gov).

For questions about the Municipal Water Law legal challenges, contact Doug Rushton at (360) 407-6513 or [drus461@ecy.wa.gov](mailto:drus461@ecy.wa.gov).



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**Special Note:** *These policies and procedures are used to guide and ensure consistency among water resources program staff in administering laws and regulations. These policies and procedures are not formal administrative regulations adopted through a rule-making process. In some cases, the policies may not reflect later changes in statute or judicial findings, but they indicate Ecology'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.*