

# Municipal Water Law Policy Update

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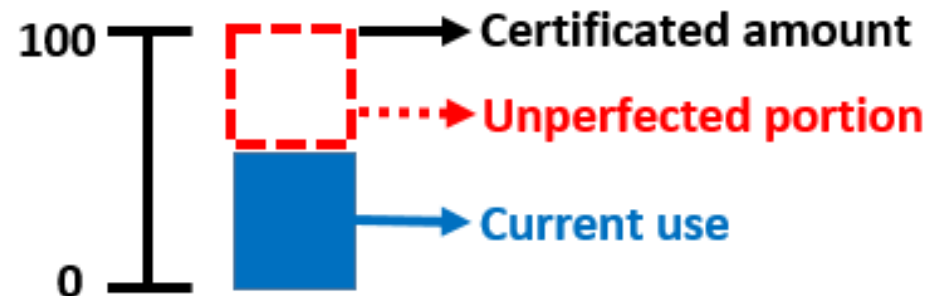
- Municipal Water Law background
- Policy 2030:
  - Goals for policy update
  - Issues that we are focusing on
- Next steps in process to update POL-2030



# Overview

# Municipal Water Law Background

- Water right certificates are relinquished (go back to the public) if they are not used for five years.
- Legislature protected municipal water right certificates from relinquishment since relinquishment law was passed in 1967.
- Up until mid-1990s, Ecology issued water right certificates for municipal uses once the main withdrawal and distribution works had been constructed (based on system capacity) before all of the water was put to use.



## Municipal Water Law Background Continued

- Passed in 2003 in response to the *Theodoratus v. Ecology* decision.
- Protects water right certificates issued to municipal water suppliers based on system capacity (pumps and pipes certificates) from diminishment.
- Allows flexibility for municipal water suppliers to serve new growth throughout their service areas.
- Requires service connection metering and conservation standards to be met.
- Two Supreme Court decisions related to the MWL (*Lummi* and *Cornelius*). Ecology prevailed on both.



# Goals for Policy 2030 Update

- Consistency and transparency in Ecology decisions where no specific direction exists.
  - Active compliance.
  - Utility consolidation.
  - Transferring municipal water rights between utilities.
  - Use of municipal water rights for mitigation.
  - Other issues, such as use in Trust.
- POL 2030 describes current implementation approach of the MWL and is advisory only.



# Active Compliance

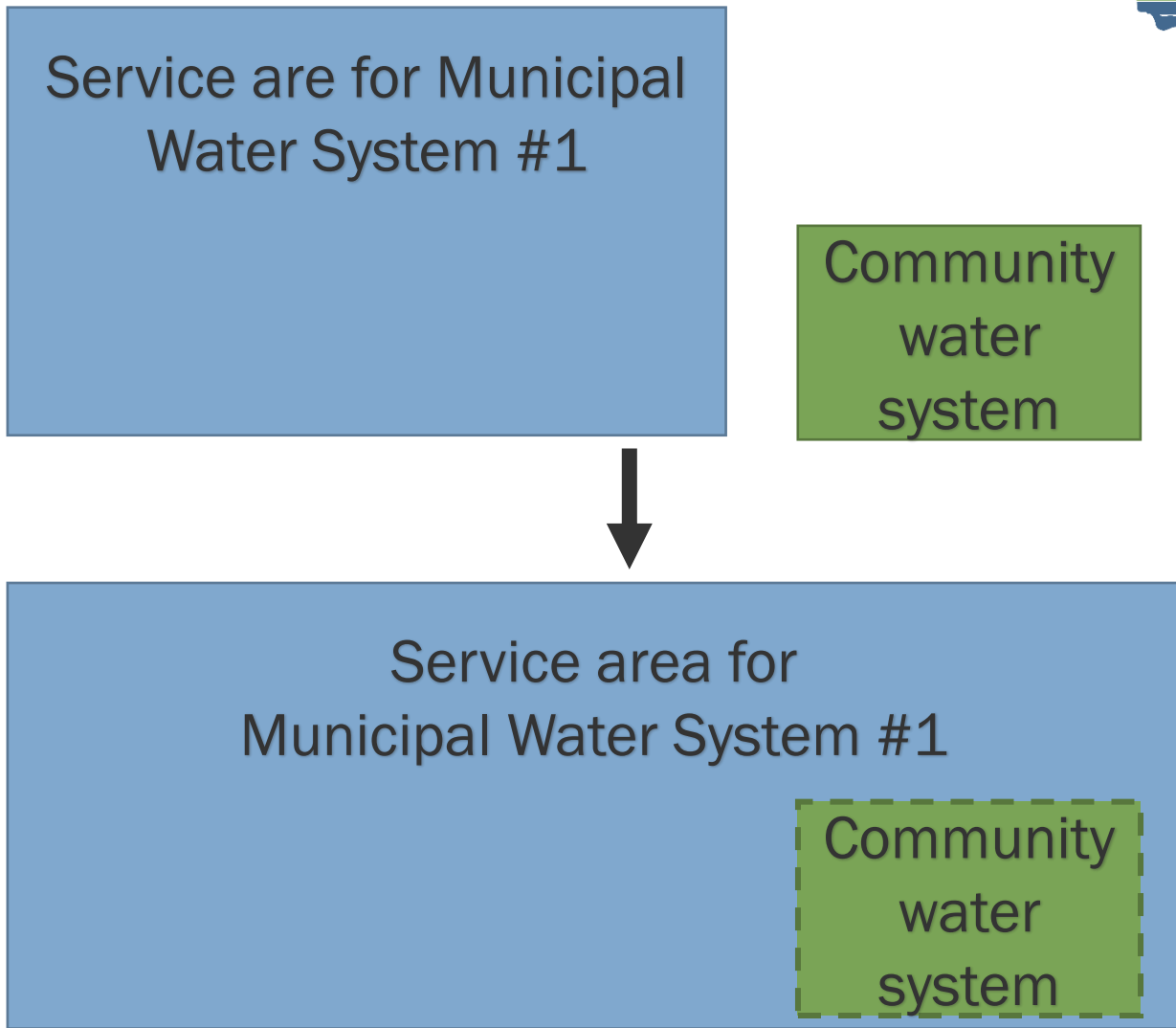
- In what situations are water rights municipal water rights, or not.
- Crown West appeals court decision called out Ecology’s use of the term “Active Compliance” in POL 2030.
- Initial Position:  
A water right qualifies for “municipal supply purposes” if it is:
  - a) Beneficially used consistent with RCW 90.03.015(4); or,
  - b) Identified in a Department of Health-approved Water System Plan for future use.



## Concerns Expressed by WWUC

- Relying on beneficial use as a standard for a municipal water right does not follow the statutory meaning (not reading “plain language” nor logical).
- Even with the Water System Plan “Safe Harbor” provision, there is too much risk for utilities.
- Key issue is how to interpret the definition in RCW 90.03.015: (4) "Municipal water supply purposes" **means a beneficial use of water...**
- Cornelius Supreme Court decision informs the interpretation, but with some conflicting language in the findings.
- Crown West case did not rule on this specific issue.

# Utility Consolidation



What happens to unperfected water rights that were owned by the community water system?



## Utility Consolidation

Initial Position: In a consolidation the unperfected quantities that are valid for change are based on the original intent of the water right.

- The original intent is the quantity necessary to supply the “community water system.”
- There must have been reasonable diligence by the “community water system” to grow into the inchoate quantities.
- If no change in point of withdrawal is needed, then Ecology does not evaluate the water rights.



## Concerns Expressed by WWUC

- This policy approach disincentivizes consolidation and regionalization of water systems.
- Concerns about public health consequences.
- Key question is how broadly RCW 90.03.330 (3) is to be applied. “Such a water right is a right in good standing.”
- Does this apply to the utility’s own growth and use of water right for themselves only? Or,
- Does this apply to the water right no matter if it’s transferred to other utilities or other entities?
- Cornelius case provides some direction, but again has conflicting statements.

## Ecology's perspective on changes

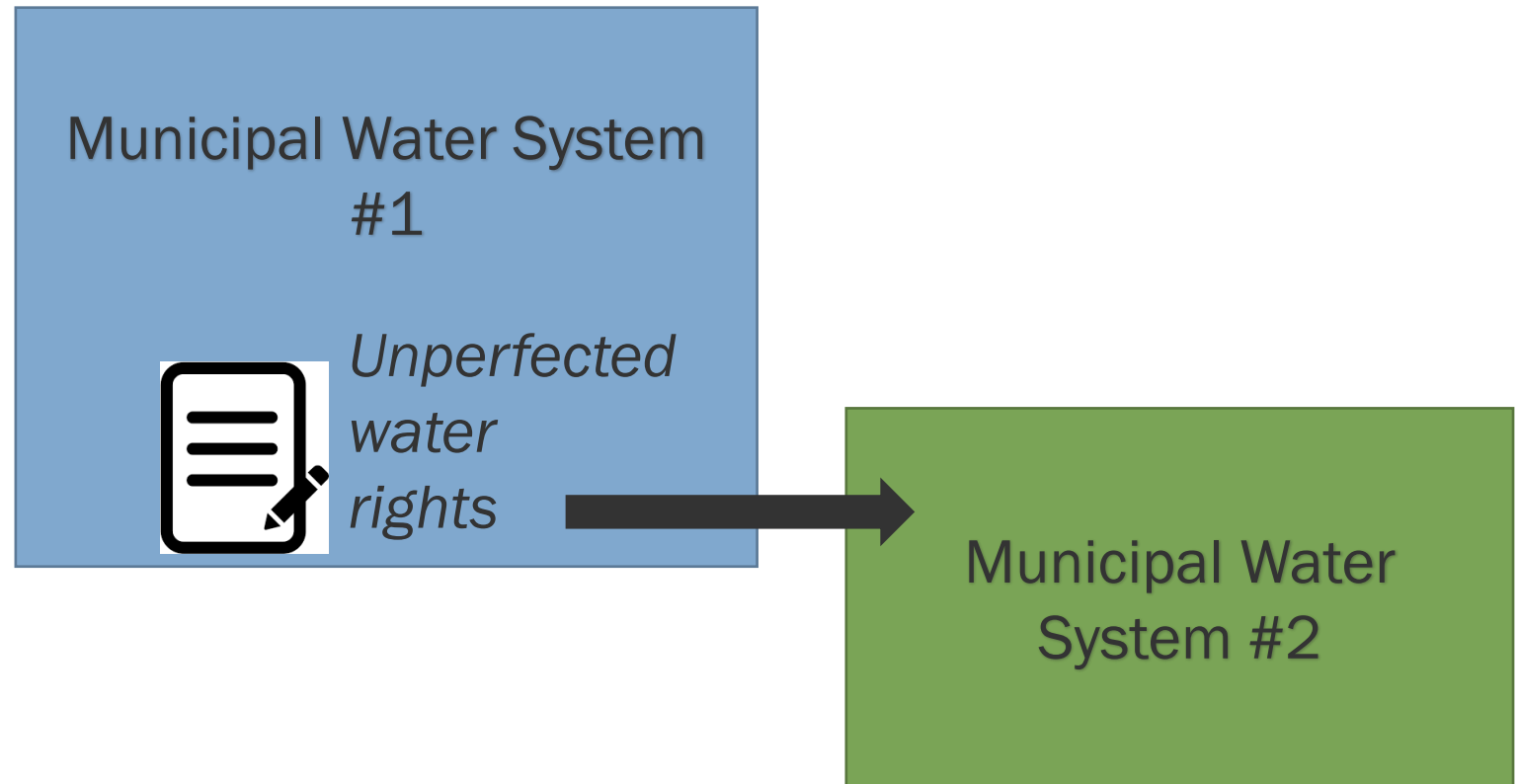
RCW 90.03.330(2) Except as provided for the issuance of certificates under RCW 90.03.240 and for the issuance of certificates following the approval of a change, transfer, or amendment under RCW 90.03.380 or 90.44.100, the department shall not revoke or diminish a certificate for a surface or ground water right for municipal water supply purposes as defined in RCW 90.03.015...

- Creates a statutory obligation for Ecology to conduct a tentative determination of extent and validity.

## How is this applied

- Only upon application for a change under RCW 90.03.380 or RCW 90.44.100.
- No change application to modify service area.
- We evaluate current and future needs for the municipal water system.
- Legislature provided no other direction to Ecology about how to evaluate municipal rights at the time of a change application.
- Note, in the recent Chehalis case, Ecology and Chehalis agreed that 2,051 AF per year has been perfected, and that 3,325 AF per year remains valid and in good standing to serve future growth.

# Transferring Municipal Water Rights



Are inchoate quantities available for transfer/sale?

## Transferring Municipal Rights

### Initial Position – surface water:

RCW 90.03.380(1) The right to the use of water **which has been applied to a beneficial use** in the state...

RCW 90.03.570 Change or transfer of an unperfected surface water right for municipal water supply purposes.

### Initial Position – groundwater:

Unperfected quantities that are valid for change are based on the original intent of the water right.

- If the original intent of the water right includes uses generally described by the uses represented by the change, inchoate quantities may be valid for change.

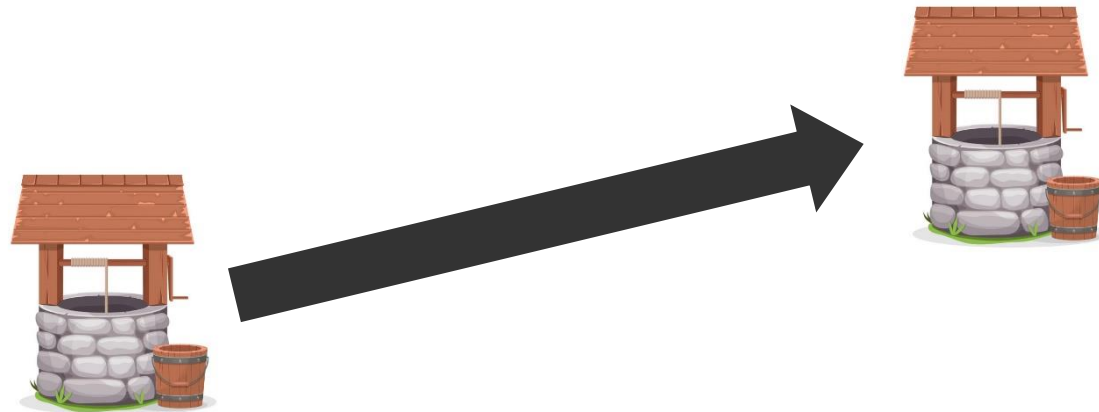
## Concerns Expressed by WWUC

- Amicus brief submitted in Burbank case.
- Oral arguments in March.
- Questions the policy position related to “original intent” stated in the current Ecology position on transfer of inchoate groundwater certificates:

“The ‘good standing provision means that such water rights *will be treated like any other vested right* represented by a water right certificate.” Quoting the Lummi decision.

# Using Municipal Water Rights for Mitigation

Under what conditions can municipal water rights be used for mitigation?



Might include mitigation of one municipal water supplier's own impacts, or mitigation for another entity (municipal supplier or other)



## Mitigation Using Municipal Water Rights

RCW [90.03.550](#) Beneficial uses of water under a municipal water supply purposes water right may include water withdrawn or diverted under such a right and used for:

(1) Uses that benefit fish and wildlife, water quality, or other instream resources or related habitat values

If a mitigation proposal can meet this standard then no additional “purpose of use” needs to be added.



# Using Municipal Water Rights for Mitigation: Initial Position

	Method of Mitigation		
		Active Mitigation	Passive Mitigation
Type of Water Right(s)	Perfected	May be allowed under 90.03.550 or by adding mitigation as a purpose of use	May be allowed by adding mitigation as a purpose of use
	Unperfected	May be allowed under 90.03.550	Not allowed (can only use highest perfected quantity)

## Concerns Expressed by WWUC

- Ecology should not require applicants to add mitigation as a purpose of use when Municipal Water Rights are proposed for use.
- The definition in RCW 90.03.550 provides categorical applicability for use for instream flow purposes, including mitigation proposals.
- Tentative determine of extent and validity and Annual Consumptive Quantity (ACQ) under RCW 90.03.380 should be not required for mitigation proposals.

## Other issues

- Municipal water rights and use of the Trust Program (Darrington).
- Interties vs. consolidations (Mason County PUD No. 1).
- What is the standard or review process under water system plan consistency review?
- Department of Health coordination and dispute resolution process.

# POL 2030 Next Steps

- Completely re-structuring POL 2030 for clarity and ease of use.
- Taking longer than we planned.
- Draft for public review in spring. Current plan is for April 1.
- Staffing challenges and new legislative obligations could impact our plans.
- Our goal is to have a significant public dialog after draft release.





# Thank you

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