Comment from Water Utility Viewpoint:
Proposed Reclaimed Water Rule, Ch. 173-219 WAC (08-23-17 version)

This comment from the water utility viewpoint on the Department of Ecology's proposed reclaimed water rule, dated August 23, 2017 (the "Proposed Rule"), is joined by the utilities and organizations identified in the cover letter. Appended to this comment is a proposed new section to the Proposed Rule that would, if included, be a simple and rational solution.

In the proposed rule, the Department of Ecology ("Ecology") disregards legislative intent in significant ways. Despite the legislature's direction that Ecology and the Department of Health ("Health" or "DOH") "coordinate efforts" on reclaimed water, Ecology is proceeding unilaterally to propose the rule.[1] Ecology's Proposed Rule ignores legislative intent to address adverse impacts of reclaimed water on water utilities and other unintended consequences of the Reclaimed Water Act, chapter 90.46 RCW. Although Ecology may not concur in the solutions proposed by water utilities, it is unacceptable for Ecology to ignore entirely adverse impacts on drinking water sources, supply planning, and ratepayers. In sum, Ecology and Health are ignoring broader public policy issues in their narrowly-framed rules and water utilities are left alone to manage the downstream consequences to the detriment of the ratepayer.

Preliminary Draft Round Rulemaking

On Ecology's encouragement, water utilities submitted detailed comments and specific revisions to the text of the preliminary draft rule, dated May 3, 2017. Cascade Water Alliance and Washington Water Utilities Council submitted detailed comments and revisions proposing a service area agreement modeled after the system in the Public Water System Coordination Act of 1977, chapter 70.116 RCW, for water utility service areas. The Washington Association of Water and Sewer Districts also submitted detailed comments and revisions proposing recognition of and local input about wellhead protection areas for groundwater drinking water sources. These May 2017 proposed rule revisions from water utilities are incorporated by reference in this comment; Ecology could easily add them to the Proposed Rule with minor editing.

Ecology summarily dismisses the water utility sector's comments by distorting their intent. Ecology mischaracterizes the water utility comments as seeking to "prohibit" and "reject" use of reclaimed water. It is convenient for the Proposed Rule to mischaracterize the comments in order to defend Ecology's one-sided interpretation of the statute.

First, Ecology declines a local public water system role in protecting designated wellhead protection areas on grounds that it "does not meet the goals and objectives of the statute of encouraging the production and use of reclaimed water." Ecology fails even to try to explain why aquifer protection rules cannot be reconciled with – instead of overruled by – reclaimed water sales. Second, Ecology rejects the service area proposal on grounds it is "contrary to the purpose and intent of the statute", which Ecology interprets as providing reclaimed water

[1] Symbolic of Ecology's unilateral rulemaking approach, uncoordinated with DOH, is the Proposed Rule's use of the defined term "source water" to mean raw or treated sewage wastewater. DOH regulations already use the defined term "source water" to mean untreated drinking water. WAC 246-290-010 (214).

generators within unfettered power to sell reclaimed water regardless of third-party impacts. Ecology seeks to defend its single-purpose regime with citation to *Cedar River Water and Sewer District v. King County*, 178 Wn.2d 763 (2013) for the point that generators need not become water utilities. It is an irrelevant point. At issue in the *Cedar River* case was whether certain reclaimed water expenditures were properly funded with wastewater utility revenues. No such issue exists here. Water utilities did not argue in the preliminary draft round of rulemaking and do not now contend that a reclaimed water generator needs to become a water utility. Nor was it contended that the Coordination Act provides technically applicable legal authority. Instead, the preliminary draft proposal used the Coordination Act as a policy template for fulfilling legislative intent in the Reclaimed Water Act, including through coordination with DOH rules (which Ecology ignores). Finally, Ecology cannot rely on *Cedar River* to claim it lacks authority to regulate – not prohibit or reject – reclaimed water sales.[2]

If Ecology rejects the proposed revisions proposed here by water utilities as it did the May 2017 comments, then Ecology's Proposed Rule will be silent and inert on adverse impacts to drinking water. This is an untenable position that is inconsistent with legislative intent and sound public policy. If Ecology does not concur with our various proposals to protect ratepayers and drinking water sources, then Ecology must create its own rule provisions.

Lack of Water Utility Representation

Water utility interests and perspectives have not been adequately included in Ecology's rulemaking. To resume work on the reclaimed water rule, we understand that Ecology reconvened the rule advisory committee (RAC) without confirming that its membership was inclusive of all stakeholders. According to the legislation, the "advisory committee shall be composed of a broad range of interested individuals representing the various stakeholders that utilize or are potentially impacted by the use of reclaimed water."[3] The RAC does not appear to have a single representative of a municipal water supplier or Group A water system entity that does not have a reclaimed water project. The state agencies need to address the context where the reclaimed water generator and the water utility are different entities. Reclaimed water is a competing product in this context, and the state agencies have yet to identify this scenario. The RAC has strong and diverse membership and expertise on technical subjects and reclaimed water project development, but the RAC lacks the perspective of stakeholders that will be potentially impacted.

Policy of Holistic Water Management.

Reclaimed water rules should advance comprehensive or holistic water management and should not be organized around traditional agency program boundaries or categories.[4] The

---

[2] We note that, while Ecology claims a lack of authority to regulate sales of reclaimed water, the Proposed Rule would require Ecology review and approval of all "use agreements." WAC 173-219-290 (proposed) (providing for required content of a use agreement, which omits any requirements or even a reference to a DOH rule).

[3] RCW 90.46.050 (emphasis added).

[4] The "One Water" approach seeks a unified policy approach to wastewater, stormwater, and water supply (*i.e.*, drinking water, municipal water).

legislature intended the agencies to work together to adopt a comprehensive and rational regulatory program. The Reclaimed Water Act gives shared jurisdiction to Ecology and Health and directed the agencies "to coordinate efforts" to develop the program.[5] The two agencies' rules "must address all aspects of reclaimed water use."[6] In the purpose section, Ecology concedes that its Proposed Rule falls short of this standard by striking the word "comprehensive" from the phrase "regulatory framework" in stating the objective of the rule. See WAC 173-219-020.

The two agencies' rules regarding reclaimed water must be considered *together* when assessing the adequacy of Ecology's proposed rule. We note that Health recently updated its Group A water system rule without proposing or adopting any new provisions regarding reclaimed water distribution or use. We understand that Health's Group A rule speaks to reclaimed water only by continuing the requirement that water system plans evaluate "opportunities for the use of reclaimed water, where they exist, as defined in RCW 90.46.120."[7] The recent Health update to the Group A rule, however, does not provide any criteria for such "evaluation." The Group A rule does not address other provisions of RCW 90.46.120 regarding planning coordination. In addition, Health's Group A water system rule is silent as to how reclaimed water fits into the service area regulatory framework to coordinate and resolve purveyor and customer conflicts. Thus, a water system plan must evaluate opportunities for reclaimed water, but no regulations address reclaimed water as a competing product or resulting revenue and ratepayer impacts.

Similarly, the Proposed Rule narrowly approaches reclaimed water from the perspective of the reclaimed water generator or the agencies themselves. The Proposed Rule excludes many relevant subjects and issues important to water utilities, including service area coordination, planning coordination for resources and infrastructure, protection of groundwater sources, water utility financial integrity, efficient infrastructure planning and investment, avoidance of stranded assets, revenue and ratepayer impacts, and use of reclaimed water. Because Health has not covered these subjects either, the state agencies' reclaimed water regulations are incomplete and deficient. Some reclaimed water generator(s) assert unfettered legal authority to sell and supply reclaimed water for use inside any other entity's service territory, without planning coordination or interlocal agreement or assessment of impacts on others. In this context, reclaimed water is now a *product* in the water business, but it is not part of the regulated and coordinated water supply sector.

The legislature intended for water utility interests and considerations to be centrally included in the comprehensive regulatory program. To date, however, the rules adopted and proposed by Health and Ecology ignore this legislative intent. The Ecology Proposed Rule references two key provisions in the Reclaimed Water Act, but they are not developed as meaningful elements. One of the provisions, RCW 90.46.120(2), provides as follows:

---

[5] RCW 90.46.005.

[6] RCW 90.46.015.

[7] WAC 246-290-100(4)(d)(vii) (applies to systems serving one thousand or more total connections). This water system planning requirement rebuts Ecology's assertion that a water utility could "prohibit" reclaimed water use.

> "If the proposed use of reclaimed water is to augment or replace potable water supplies or to create the potential for the development of an additional new potable water supply, then regional water supply plans, or any other potable water supply plans prepared by multiple water purveyors, must consider the proposed use of the reclaimed water as they are developed or updated."

And RCW 90.46.120(3) provides:

> "When reclaimed water is available or is proposed for use under a water supply or wastewater plan developed under chapter 43.20, 70.116, 90.44, 90.48, or 90.82 RCW these plans must be coordinated to ensure that opportunities for reclaimed water are evaluated."

To date, the agencies' rules and reclaimed water approach would implement the above provisions to work only in one direction. That is, a water utility in its water system planning should consider reclaimed water from a third-party generator as a potential source of supply; but, the state agencies ignore the demand side of the analysis or the potential for adverse impacts to utility revenues, infrastructure investments, and ratepayers.

The legislature intended for reclaimed water use to be coordinated and integrated into water system plans and regional water planning. The legislature intended for water utilities to be involved in the decision-making process. In the Reclaimed Water Act, the legislature found that reclaimed water should be "a source of supply integrated into state, regional, and local strategies to respond to population growth[8] and global warming." The legislature further found as follows:

> "Use of reclaimed water constitutes the development of **new basic water supplies** needed for future generations **and local and regional water management planning should consider coordination of infrastructure, development, storage, water reclamation and reuse**, and source exchange as strategies to meet water demands associated with population growth and impacts of global warming."[9]

In the most recent amendments to the Reclaimed Water Act, the legislature included a statement of intent about addressing planning and financial "barriers" to the use of reclaimed water and specifically about reclaimed water use to advance water supply objectives and to be consistent with water plans.

> "**It is therefore the intent of the legislature to:**
> (a) Effectuate and reinvigorate the original intent behind the reclaimed water act to expand the use of reclaimed water for nonpotable uses throughout the state;

---

[8] In addition, municipalities planning under the Growth Management Act must plan for and fund public facilities, which include domestic water systems and storm and sanitary sewer systems. RCW 36.70A.030(12), 36.70A.020(12). Reclaimed water needs to be better integrated with GMA planning, especially in contexts where the reclaimed water generator and the water supplier are different entities.

[9] RCW 90.46.005 (emphasis added).

(b) Restate and emphasize the use of reclaimed water as a matter of water resource management policy;
(c) Address current barriers to the use of reclaimed water, where changes in state law will resolve such issues;
(d) Develop information from the state agencies responsible for promoting the use of reclaimed water and address regulatory, **financial**, **planning**, and other barriers to the expanded use of reclaimed water, relying on state agency expertise and experience with reclaimed water;
(e) **Facilitate achieving state, regional, and local objectives through use of reclaimed water for water supply purposes in high priority areas of the state, and in regional and local watershed and water planning**;
(f) Provide planning tools to **local governments** to incorporate reclaimed water and related water conservation into land use plans**, consistent with water planning**;
(g) Expand the scope of work of the advisory committee established under chapter 279, Laws of 2006 to identify other reclaimed water issues that should be addressed; and
(h) Provide initial funding, and evaluate options for providing additional direct state funding, for reclaimed water projects."[10]

If Ecology and Health continue to refuse to "address regulatory, financial, planning" issues regarding drinking water and water utility service, then those issues will increasingly become a "barrier" to expanding reclaimed water usage.

Successful Water Utility Management and Protection of Ratepayers

Water utilities and their ratepayers[11] have a fundamental interest in ensuring that reclaimed water does not adversely affect water utility revenues and long term planning. Although the rate impact is not significant at present given the small number of current reclaimed water customers, ratepayer impacts will become more pronounced going forward as reclaimed water distribution and use expand. The type of customer who is a reclaimed water marketing target is one with substantial irrigation needs in the summer. This sort of customer pays relatively higher rates under seasonal or conservation rate structures. Over the long run, it may be in the public interest to shift this sort of customer use to reclaimed water, but it needs to be coordinated and planned over the long term to avoid or minimize financial impacts.

Water utilities need to be part of the formal decision-making process as to reclaimed water use in their service areas or that could affect drinking water sources, especially groundwater sources. In order to avoid duplicative investments and to increase long-term rate stability for customers, it is important that reclaimed water generators work closely with the water utilities who are the current service providers. Service areas were created for a reason –

[10] Laws of 2007 c 445 §1 (uncodified legislative findings) (emphasis added); *see* RCW 90.46.005.
[11] Typically, these water ratepayers are also sewer ratepayers, such that inefficient infrastructure investments or uncoordinated system development can adversely affect same ratepayer twice; the state agencies have yet to acknowledge this "cost equity" issue in the reclaimed water regulatory program.

namely, to provide a utility with the defined customer base it needs to make long-term investments in infrastructure and thus avoid the potential for stranded costs. To be clear, by seeking a meaningful voice in the process water utilities are not seeking to prohibit or reject the use of reclaimed water.

Protection of Drinking Water Sources

The Proposed Rule uses only an arbitrary set-back distance on the land surface to protect groundwater sources from reclaimed water facilities and end uses.

[*Add more here on Proposed Rule, inadequate provisions, etc.*]

The Proposed Rule should use a hydrologically-based approach consistent with the wellhead protection program. According to the Department of Health:

> Groundwater is the ***source of drinking water for about 65 percent of Washington citizens***. In some counties, dependency on groundwater approaches 100 percent. Groundwater used for drinking water supplies is often vulnerable to contamination. Most public water supply wells are in or around the communities using them as a drinking water source. Therefore, public water systems must take preventive measures to ***minimize the possibility that land uses will contaminate the groundwater*** they use.[12]

DOH developed the Wellhead Protection Program, adopted in regulation in 1993 in WAC 246-290-135, to protect this vital resource. DOH requires purveyors using groundwater to develop and implement Wellhead Protection Programs. The Wellhead Protection Program recognizes and protects against the risks that contaminants will be released into the environment and flow into and pollute aquifers used for drinking water. Note that there are also numerous groundwater supplies in the State that are currently of sufficient quality that they do not require treatment, or even disinfection. Given the chlorination required for reclaimed water, any evidence of chlorine showing up in the water supply would inevitably lead to a requirement to provide continuous disinfection for a source previously served proudly without the need for chlorination. The aesthetics, such as taste and odor, of existing supplies should also be protected.

It is possible to reconcile reclaimed water use with wellhead protection. In the Proposed Rule, however, Ecology declines to try to "coordinate efforts" with DOH's rule and public water systems that have designated wellhead protection areas in their service areas. Facilities and use sites for reclaimed water should not be allowed within a reasonably protective distance (delineated by the 5-year (or equivalent) capture area of the well) from a water supply well, unless there is a written agreement with the public water system owner/operator of the well. The protective area should be the Wellhead Protection Area designated under WAC 246-290-135.

---

[12] Wellhead Protection Program Guidance Document, at http://www.doh.wa.gov/portals/1/Documents/Pubs/331-018.pdf. (emphasis added).

As a practical matter, regulating reclaimed water proximity to underground drinking water sources through an agreement is unlikely to reduce reclaimed water sales. The amount of land area eliminated for reclaimed water use or handling would be a very small fraction of potential sites, a figure that Ecology could learn if it conducted appropriate environmental review of the Proposed Rule instead of resting on a DNS.

Further, we note that Ecology proposes that reclaimed water not be allowed for use to supplement Category I and II wetlands. We submit that drinking water deserves at least the same level of protection, if not greater, as that proposed for wetlands.

WAC 173-219-095 NEW SECTION
Interlocal agreements with affected water utilities.

(1.) When an operator, a distributor, or a permittee proposes to supply reclaimed water for municipal use at one or more location(s) within the service area of a Group A public water system, the operator or distributor must enter into a written agreement, consistent with chapter 39.34 RCW, with such system as to a) reclaimed water supply within the water service area and b) wellhead protection areas of the Group A public water system ~~within the water service area~~. If a non-governmental entity owns the Group A public water system, then the written agreement should in substance address the subjects to be covered in an interlocal agreement. "Service area" has the same meaning as defined in WAC 246-290-010 (232).

(2.) This section does not apply to the use of reclaimed water for stream augmentation, wetlands or other environmental purposes of use unless it is within a wellhead protection area, as identified under WAC 246-290-135(3). ~~In this section, municipal use means an end use of reclaimed water by an existing or potential customer(s) of a public water system, and does not include stream augmentation, wetlands or other environmental purposes of use unless adversely affecting a wellhead protection area, as identified under WAC 246-290-135(3). "Service area" has the same meaning as defined in WAC 246-290-010 (232).~~

(3.) An affected Group A public water system, in its sole discretion, may waive the interlocal agreement requirement in WAC 173-219-095(1) for a period of time not to exceed ten (10) years.

(4.) If no interlocal agreement has been established, or no waiver granted, after a conscientious effort by the operator, distributor, or permittee within one year of commencing consultation with a public water system, then any such party may initiate mediation, consistent with RCW 7.07. The operator, distributor, or permittee and the Group A public water system will make a good faith effort to resolve the dispute by mediation for at least 90 days.

(5.) If no interlocal agreement has been established following the mediation and the dispute has not been resolved, then the operator, distributor, permittee, or Group A public water system may petition the secretary of the department of health, or his or her designee, who will issue a decision.

Notes:

- The terms "operator" and "distributor" and "permittee" are defined terms in Ecology's proposed rule. See WAC 173-219-010 (proposed).
- Chapter 39.34 RCW is the Interlocal Cooperation Act.

#82129