POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

PAINTED SUMMER HILLS, LLC, Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Respondent.	PCHB NO. 09-006 DISSENT—ORDER ON RECONSIDERATION

The dissenting opinion on the Order on Summary Judgment did not address the question of whether the number of service connections is a limiting attribute of a community domestic water right, as it was unnecessary to do so, given the basis of the dissent. However, because the remaining Board member on the majority opinion discusses the issue in response to Ecology's Motion for Reconsideration, I will now address the issue. I would grant Ecology's motion to reconsider, and conclude that service connection figures in water rights documents for community domestic water suppliers are attributes limiting the exercise of those rights. Although I disagree with the majority's opinion that increasing the number of service connections is a "manner of use' change under RCW 90.44.100, I would clarify the majority opinion to conclude that before a non-municipal entity like PSH can increase service connections, it must seek a change in the manner of use from Ecology.

The Legislature does not engage in unnecessary or meaningless acts, and the reviewing courts are to presume some significant purpose or object in every legislative enactment. *Tobin v. Dept. of Labor and Industries,* 169 Wn.2d 396, 239 P.3d 544 (2010); *Taylor v. City of Redmond,*

89 Wn.2d 315, 319, 571 P.2d 1388 (1977). While the order denying reconsideration states that the changes enacted as part of the Municipal Water Law (MWL) did not address the service connection issue for non-municipal suppliers, such a conclusion voids or renders meaningless or superfluous several sections or words in RCW 90.03.260. That section requires water rights applications to give "the projected number of service connections sought to be served," and then states, by way of exception ("However") that for municipal water suppliers the service connection figure is not an attribute limiting the exercise of the water right. RCW 90.03.260(4). The subsequent section does much the same, stating that if the application is for municipal supply, the population figures in the application are "not an attribute limiting exercise of the water right" so long as the population remains consistent with the approved water system plan (from the department of health). RCW 90.03.260(5). Both references to "an attribute limiting exercise of the water right" were part of the 2003 amendments to this chapter . *See* Laws of 2003, 1st Spec. Sess., ch 5; SESSHB 1338. The logical conclusion to draw from these changes is that the service connection figure is not binding for municipal suppliers, but is for others, including community domestic suppliers. To conclude otherwise renders the language and exception created by these sections of the MWL meaningless.

As the House Bill Report on the MWL (SESSHB 1338) makes clear, the MWL was intended to give "certainty and flexibility" to municipal water rights, as well as to require municipal water suppliers to adopt water conservation measures, providing a balanced approach to water policy. In short, the MWL facilitates the provision of service to growing communities

while requiring those systems to be better stewards of a valuable resource.[1] The Bill Report on the MWL also noted that the legislation defined "when limitations found in water right documents do not limit the number of service connections or population that may be served" by such rights. H.B. REP. on 2E2SHB 1338, 58th Leg., 1st Spec. Sess. (Wash.2003) Implicit in this legislative history is the understanding that limitations stated in water rights documents are, in some manner, a constraint on the exercise of the water right. This is consistent with the position Ecology presented to the Board on briefing ("Ecology's position historically has been that the maximum numbers of residential connections specified under Washington community domestic water rights have been limits on such rights.") Ecology's Response to Appellant's Motion at p. 21.

The Supreme Court has also recognized that municipalities must estimate future needs, not merely apply for water to meet existing, finite needs, such as a private developer might. *Lummi Indian Nation v. State,* 170 Wn.2d 247, 256, (FN1), 241 P.3d 1220 (2010). As the Supreme Court pointed out in *Lummi*, the Legislature enacted the MWL in 2003 in response to uncertainties among existing water users about the vitality of their rights based on system capacity, in the wake of the *Theodoratus* decision of the Supreme Court.[2] The MWL responded to these uncertainties by defining the scope of municipal water supply rights, including that

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[1] *See "Not a Performing Bear: The Supreme Court's Decision in Lummi Indian Nation v. State"* Adam W. Gravley, Tadas Kisielius, and Peter J. Smith, GordonDerr LLP.

[2] *Dep't of Ecology v. Theodoratus,* 135 Wn.2d 582, 957 P.2d 1241 (1998). *Theodoratus* did not address municipal rights, but acknowledged that even the statutory scheme at that time allowed for differences between municipal and other water use. *See Lummi,* at 255.

"municipal water rights were not limited to the number of subscribers." *Lummi* at 256. Clearly, the Legislature intended to give certainty and flexibility to municipal water suppliers by the terms related to service connections, but in doing so, also draw a distinction from how other, non-municipal suppliers would be treated. This was responsive to *Theodoratus* and Ecology's implementation of that decision. *Lummi* at 256.

Given this history and the development of the MWL, why would the Board construe the MWL to allow non-municipal water suppliers the same advantage and ability to expand up to a maximum quantity specified under their inchoate water permits, to add service connections, and to not be bound by any requirement for conservation of the water resource? As Ecology points out, the legislation would simply have been unnecessary if the Legislature had concluded that service connection limits were not binding for *either* municipal or community domestic purveyors of water. For these reasons, I respond to the conclusions of the remaining Board Member, and would grant Ecology's motion for reconsideration.

The majority opinion has concluded that "increasing the number of homes being served under a community domestic water right is within the meaning of 'manner of use' under RCW 90.44.100. (Majority Opinion, p. 17, p. 27) Under that statute, to change the "manner of use" of a water right, the holder must apply and receive the approval of Ecology to change the manner of use. RCW 90.44.100 ("After an application to, and upon the issuance by the department of an amendment…"). However, as Ecology points out, the majority opinion later equivocates, concluding that the MWL (not RCW 90.44.100), at most, supports the need for non-municipal suppliers like PSH to request a change the manner of use to increase that number of service

connections. Majority Opinion at pp. 31-32. Now, on reconsideration, the remaining Board Member clarifies the opinion to state that a non-municipal supplier such as PSH may increase the number of service connections without going through a "manner of use" change process at all. These positions are contradictory, and cannot be reconciled. If the majority wishes to say that increasing the number of homes served (service connections) is within the meaning of "manner of use" under RCW 90.44.100, then it must also conclude that service connections in some way constrain, or limit the exercise of the water right, *at least until Ecology reviews and approves a modification of the right*. Reconsideration should be granted to clarify this point.

I also conclude that the Board has authority and obligation to construe the language of the MWL consistently with the well-understood purposes behind the statute and the relevant history of court decisions, and that it would neither overstep its bounds, nor create legislation in doing so. The Majority Opinion, on the other hand, asserts the legislature has not addressed the question of limits on non-municipal suppliers, and rejects Ecology's arguments by asserting that words cannot be added to an unambiguous statute. However, the Majority also resorts to reference to the Bill Report, legislative history, and case law to reach its conclusions. These aids are appropriate to use when the statute's language is ambiguous, not when the statute is plain on its face. I conclude that both the statute addressing "manner of use" changes, as well as the language related to service connections, as stated in the MWL are susceptible to more than one reasonable interpretation, and are therefore ambiguous. Only then is it appropriate to turn to other aids to statutory construction. *Cerrillo v. Esparza*, 158 Wn.2d 194, 201, 142 P.3d 155 (2006); *Dep't of Ecology v. Campbell & Gwinn, LLC,* 146 Wn.2d 1, 9-12, 43 P.3d 4 (2002).

Under *Port of Seattle,*[3] I would again give greater deference to Ecology in the interpretation of these ambiguous statutes, and grant the Motion for Reconsideration.

Dated this 16th day of November, 2011

POLLUTION CONTROL HEARINGS BOARD
KATHLEEN D. MIX, Chair

[3] *Port of Seattle v. Pollution Control Hearings Board,* 151 Wn.2d 568, 90 P.3d 659 (2004).