POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

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

The Pollution Control Hearings Board (Board) granted summary judgment to Painted Summer Hills in a split decision, thereby affirming the decision of the Conservancy Board to change the manner of use under the permit to increase the number of continuous community domestic supply connections from 12 to 19 homes. *Order on Summary Judgment* (October 6, 2011). The Board granted Painted Summer Hills' Petition for Reconsideration regarding Issue No. 8 and directed Ecology to establish a development schedule for the community domestic portion of the water right consistent with the Board's decision.

Ecology also filed a Petition for Reconsideration, but as the Board indicated in its Order of Reconsideration, it was denying Ecology's request because the third position on the Board is vacant, and the remaining Board members are unable to agree on the extent to which Ecology's Petition for Reconsideration should be granted. Instead, the remaining Board members respond to Ecology's petition by separate opinion. Because the Board member who left the Board signed the majority opinion, this interpretation of the majority decision can only express my own thinking as to what was meant by the majority opinion.

Ecology first requests the Board to reconsider its decision by concluding that Painted Summer Hills' change in manner of use is an unlawful change in purpose of use because it allows a community domestic water right to be changed to municipal water supply purposes. Alternatively, Ecology requests that the Board can allow an increase in service connections only to a maximum of 14 residential service connections. This portion of Ecology's request for reconsideration is denied on the basis that the arguments were fully made and considered by the Board on this issue. There is nothing new in the facts or legal arguments to provide a basis for reconsideration of this particular aspect of the decision.

Ecology next asks for clarification of the majority's decision regarding whether a change in connection limits in community domestic water rights can occur without a change in the manner of use. Ecology is correct in its identification of inconsistent language in the majority decision. The Board indicates that a change in the number of service connections may be accomplished through a change in the manner of use, but then also states the number of service connections in water right documents is not a limiting attribute of community domestic rights. I would have granted reconsideration for the limited purpose of providing clarity to this portion of the Board's majority decision.

The majority opinion in the Order on Summary Judgment concluded that the Appellant's proposed project did not change the purpose of use, and upheld the Douglas County Water Conservancy Board's approval of Painted Summer Hills' change application. I would modify the majority opinion to clarify that an increase in the number of service connections for a community domestic water right may be accomplished without the need to go through the

change process. If a reviewing court found that the number of service connections is a limiting attribute of a community domestic water right, then alternatively I would conclude that the number of service connections can be changed pursuant to a change in the manner of use. I would also add an additional suggestion for the Legislature to review this area of the statutes.

In reviewing whether the number of connections to a community domestic water right is a limiting attribute to the water right, and not subject to change, it is first necessary to determine whether the law prior to the 2003 amendments imposed such a restriction. Ecology argued in *Lummi Indian Nation v. State*, 170 Wn.2d 247, 241 P.3d 1220 (2010), that service connection numbers were not limiting attributes of water rights prior to the 2003 amendments. It did not distinguish between municipal and non-municipal water rights. *Ecology's Reply to Appellant's Memorandum in Opposition to Ecology's Motion for Partial Summary Judgment or Stay; Ecology's Response to Appellant's Motion for Summary Judgment at 21.* King County Superior Court Judge Rogers ruled that there is no prior statutory law providing that service connections or populations were an attribute limiting the exercise of the water right. *Mack Decl., Ex. 37.* The Supreme Court then stated that prior to the 2003 amendments, no provision of the water code that it found or had its attention drawn to limited municipal water suppliers to some maximum number of clients. *Lummi Indian Nation at 272*. Therefore, any law regarding the number of service connections acting as a limit on a water right must come from the 2003 amendments.

Ecology asserts that in 2003 the Legislature added language in RCW 90.03.260(4) to provide flexibility to municipal water suppliers, and did not provide the same flexibility to non-

municipal water suppliers. This assertion is premised on the Legislature's desire to provide relief to municipal water suppliers from the binding attribute of the number of service connections on their water rights that existed prior to the amendments. As the Washington Supreme Court found, however, there were no previous limits in the law related to the number of service connections and water rights. The Municipal Water Rights legislation also did not expressly place any new service connection limitation on non-municipal suppliers. Furthermore, I take judicial notice that the Final Bill Report for the Municipal Water Rights legislation (2nd Engrossed 2nd Substitute House Bill 1338) makes no mention that the legislation will result in the imposition of a new limitation on non-municipal water right holders.[1] Finally, the amendatory language identified by Ecology was not placed anywhere in the change statutes or otherwise indicates it is a limit on the exercise of water rights. The 2003 amendments did not impose a limit on non-municipal water rights based upon the number of service connections.

I think it is fair to conclude that the Legislature has not addressed the number of service connections by non-municipal water suppliers with regard to water rights, and therefore, no such limitation exists. Although Ecology may have some good arguments why some oversight by Ecology regarding increases to the number of service connections *should* be extended to non-municipal water suppliers, this Board should not make this extension on its own volition. It is up to the elected members of the Legislature to determine the pros and cons of such an extension. As stated in the majority opinion, a court will not add words or clauses to an unambiguous

[1] In referring to this bill report, I give Ecology the benefit of the doubt that the 2003 amendments are ambiguous. I believe, however, that the legislation clearly addressed how information regarding the number of service connections or the population to be served in municipal water right applications or water right documents is construed.

statute when the Legislature has not included the language. *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003). If the Legislature were to specifically state, for example, that the number of service connections of a non-municipal water supplier is a limit on the water right, but that the number of connections could be changed pursuant to the change process, Ecology would be able to view if a particular proposed change in a groundwater right was in the public interest under RCW 90.44.100 (referring back to the requirements for an original application. *See* RCW 90.03.290).

Ecology is not entitled to deference in its arguments. As discussed in both the majority opinion in the Order on Summary Judgment and this Concurrence, Ecology fails to point to any statutory language upholding its interpretations, and these interpretations are inconsistent with rules of statutory construction. More importantly, a court will not give deference to an agency's interpretation of a law when the interpretation is inconsistent. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 815, 828 P.2d 549 (1992); *Sleasman v. City of Lacey*, 159 Wn.2d 639, 646-47, 151 P.3d 990 (2007); *Western Ag Land Partners v. Department of Revenue*, 43 Wn. App. 167, 171, 716 P.2d 310 (1986). Ecology acknowledges in its briefing, that "[i]n a multi-faceted defense of the constitutionality of RCW 90.03.260(4), the State included an assertion that connection limits are not binding based on Health's long-held position." *Ecology's Response to Appellant's Motion for Summary Judgment at 21.* Ecology cannot argue one position before one tribunal and a different position before another tribunal and expect to receive deference. That is not how it works.

Although this concurrence is limited to the opinion of one Board member, I hope it provides guidance to the parties with respect to the majority opinion.

SO ORDERED this 16th day of November, 2011.

POLLUTION CONTROL HEARINGS BOARD
WILLIAM H. LYNCH, Presiding