

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

Appellant Painted Summer Hills, LLC (Painted Summer Hills), filed an appeal contesting the Department of Ecology's (Ecology) decision reversing the Douglas County Water Conservancy Board's (Conservancy Board) decision in No. DOUG-08-01 and denying a change in the manner of use of Ground Water Permit No. G4-29196P (permit). Painted Summer Hills and Ecology filed cross motions for summary judgment as to all legal issues. 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). Ecology and Painted Summer Hills both filed timely petitions for reconsideration. Ecology also filed an Answer to Painted Summer Hills' Petition for Reconsideration.

Having fully considered the record and the prior oral argument of counsel, the Board makes the following ruling.

1 Painted Summer Hills Petition for Reconsideration – Issue No. 8

2 Painted Summer Hills asks the Board to clarify its Order on Summary Judgment
3 regarding Issue No. 8, which addresses the development schedule contained in the Conservancy
4 Board’s Report of Examination for the permit. Among the grounds provided for reversing the
5 Conservancy Board’s decision, Ecology stated the Conservancy Board did not have authority
6 under RCW 90.03.320 to grant extensions of existing development schedules for permits.
7 *Ecology’s Motion for Partial Summary Judgment, Downes Decl., Ex. M.*

8 The parties originally disputed whether the development schedule exceeded the
9 Conservancy Board’s authority under RCW 90.80 and WAC 173-153, whether it constituted an
10 invalid “permit extension,” and, if so, whether the proper remedy is reversal, or modification, of
11 the Conservancy Board’s decision (Issues 8.A, 8.B, and 8.C).

12 In granting summary judgment to Painted Summer Hills, the Board stated that it appeared
13 Issue No. 8 was moot because Ecology granted Painted Summer Hills an extension in June 2009,
14 until July 1, 2010, and it appeared that the issue had been abandoned by the parties. *Order on*
15 *Summary Judgment, at 39.* The Board’s Order on Summary Judgment deemed Issue No. 8 moot,
16 or otherwise abandoned. *Id. at 40.*

17 Painted Summer Hills asks the Board to clarify its decision by either explicitly affirming
18 the development schedule set by the Conservancy Board, or explicitly reversing Ecology’s
19 decision to reverse the Conservancy Board’s decision specifying a development schedule for the
20 change authorization. *Appellant’s Motion for Reconsideration, at 1.* Both parties state that they
21 have not abandoned Issue No. 8. *Id. at 5; Ecology’s Answer to Appellant’s Petition for*

1 *Reconsideration, at 2-3.* Therefore, the Board grants reconsideration of its Order on Summary
2 Judgment to clarify its decision regarding Issue No. 8.

3 The Conservancy Board’s decision, which issued on October 16, 2008, included a
4 provision stating: “Completion of construction shall occur by July 1, 2010, and water shall be
5 put to full beneficial use by July 1, 2017.” *Ecology’s Motion for Partial Summary Judgment,*
6 *Downes Decl., Ex. L at 10.* Both parties agree that the Conservancy Board’s decision does not
7 affect the irrigation portion of the permit. The Conservancy Board gave a new construction
8 schedule for development of the community domestic portion of the water right to July 1, 2010;
9 and extended the deadline for putting water to beneficial use for the community domestic portion
10 of the water right to 2017. The new construction schedule therefore only applies to the
11 construction of the seven additional hook-ups.

12 Ecology maintains the development schedule is an unlawful permit extension because
13 conservancy boards’ authority under RCW 90.80.055(1)(a) does not include a reference to
14 permit extensions, and the authority to grant extensions is given to Ecology under RCW
15 90.03.320. *Ecology’s Response to Appellant’s Motion for Summary Judgment, at 57.* Ecology
16 acknowledges WAC 173-153-130(6)(f)(iii) authorizes a conservancy board to include a
17 “schedule for development and completion of the water right transfer, if approved in part or in
18 whole, that includes a definite date for completion of the transfer and application of the water to
19 an authorized beneficial use.” Ecology says this regulation does not trump Ecology’s statutory
20 authority to grant permit development extensions for unperfected water rights. Ecology asserts
21 the change development schedule established by a conservancy board must not exceed the

1 schedule established by Ecology in the permit, or through Ecology's approval of a request for an
2 extension. *Ecology's Answer to Painted Summer Hill's Petition for Reconsideration, at 4.*

3 Painted Summer Hills asserts it agreed to a stay of this appeal before the Board in
4 exchange for Ecology's agreement to extend the date for putting water to beneficial use under
5 the permit. Ecology extended this deadline to November 23, 2012. *Appellant's Petition for*
6 *Reconsideration, at 3.* Painted Summer Hills notes, however, that the permit extension was for
7 the permit as originally authorized, not for the change authorized by the Conservancy Board.
8 Ecology had reversed the Conservancy Board's change approval when it granted the permit
9 extension. WAC 173-153-130(6)(f)(iii) gives the Conservancy Board authority to set a
10 development schedule. Painted Summer Hills further notes that the Board's decision was not
11 issued until October 6, 2011. Painted Summer Hills argues that the July 1, 2017 proof of
12 appropriation for the community domestic portion of the water right established by the
13 Conservancy Board is reasonable because much must be done before the water can be put to
14 beneficial use. *Appellant's Petition for Reconsideration, at 5, n.4.*

15 The Board concludes it is not necessary to answer the question posed by Ecology, (i.e.,
16 whether WAC 173-153-130(6)(f)(iii) allows a conservancy board to grant permit development
17 extensions for unperfected water rights) in order to resolve the outstanding portion of this appeal.
18 Clearly, Ecology has the authority under RCW 90.03.320 to grant permit extensions. Ecology
19 also has the authority under RCW 90.80.080(4) to affirm, reverse, or modify the action of a
20 conservancy board.

1 The Board concludes that Painted Summer Hills, as the prevailing party in this appeal,
2 must be given a reasonable opportunity to implement the Board’s decision. Ecology
3 acknowledges in its response that the Board could remand the case to Ecology to modify the
4 development schedule consistent with the allowed change in the permit. *Ecology’s Response to*
5 *Appellant’s Motion for Summary Judgment*, at 60. Painted Summer Hills suggests that the
6 development schedule established by the Conservancy Board is reasonable, especially with the
7 amount of time that has elapsed between the time the development schedule was established and
8 the time the Board issued its decision. The Board, however, is left with little in the record to
9 make a determination on the timing of the development schedule. The Board concludes that
10 under these circumstances, it is appropriate for Ecology to make the final determination
11 regarding the timing of the development schedule consistent with this decision.

12 Ecology’s Petition for Reconsideration – Manner of Use/Connection Limits

13 Ecology requests the Board to reconsider its decision by concluding that Painted Summer
14 Hills’ change in manner of use is an unlawful change in purpose of use because it allows a
15 community domestic water right to be changed to municipal water supply purposes.
16 Alternatively, Ecology requests that the Board allow an increase in service connections only to a
17 maximum of 14 residential service connections in order to avoid an unlawful change in the
18 purpose of use to municipal supply. In addition, Ecology asks for clarification of the majority’s
19 decision regarding whether a change in connection limits in community domestic water rights
20 can occur without a change in the manner of use.

1 Because the third position on the Board is vacant, and the remaining Board members are
2 unable to agree on the extent to which Ecology's Petition for Reconsideration should be granted,
3 Ecology's Petition for Reconsideration is denied. Instead, the remaining Board members
4 respond to Ecology's petition by separate opinion.

5 **ORDER**

- 6 1. Having found basis to reconsider the final order of the Board, dated October 6, 2011,
7 Painted Summer Hills' Petition to Reconsider is GRANTED regarding Issue No. 8.
8 The Board modifies its Order on Summary Judgment by REVERSING and
9 REMANDING Ecology's decision to reverse the Conservancy Board's decision
10 specifying a development schedule for the change authorization. Ecology shall
11 establish a development schedule consistent with this decision.
- 12 2. Ecology's Petition to Reconsider is DENIED because of a lack of a majority to agree
13 on the extent of the reconsideration. The Board, instead, issues a separate
14 concurrence and dissent to this decision as a means of providing clarification to the
15 parties.

16 SO ORDERED this 16th day of November, 2011.

17 **POLLUTION CONTROL HEARINGS BOARD**
18 WILLIAM H. LYNCH, Presiding
19 KATHLEEN D. MIX, Chair
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