

1 **POLLUTION CONTROL HEARINGS BOARD**
2 **STATE OF WASHINGTON**

3 CROWN WEST REALTY, LLC,

4 Appellant,

5 v.

6 STATE OF WASHINGTON,
7 DEPARTMENT OF ECOLOGY,

8 Respondent.

PCHB No. 16-115

ORDER ON SUMMARY JUDGMENT
MOTIONS

9 **I. INTRODUCTION**

10 Appellant Crown West Realty, LLC (Crown) appealed the State of Washington,
11 Department of Ecology's (Ecology) reversal of Chelan County Water Conservancy Board's
12 (CCWCB) conditional decisions approving Crown's four applications for changes of water
13 rights. Both parties moved for summary judgment.

14 The Pollution Control Hearings Board (Board) considering the motions is comprised of
15 Board Chair Thomas C. Morrill, and Members Joan M. Marchioro and Kay M. Brown,
16 Presiding. Assistant Attorneys General Alan M. Reichman, Senior Counsel, and Clifford Kato
17 represented Ecology. Attorney Mark Peterson represented Crown. Oral argument on the
18 motions was held on May 24, 2017.

19 In ruling on the Motions, the Board considered the following material:

- 20 1. Ecology's Motion for Summary Judgment;

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2. Declaration of Scott Turner in Support of Ecology’s Motion for Summary Judgment with Exhibits A through O;
3. Declaration of Alan M. Reichman in Support of Department of Ecology’s Motion for Summary Judgment with attached Exhibits A through D;
4. Declaration of Trevor Hutton in Support of Ecology’s Motion for Summary Judgment;
5. [Crown’s] Memorandum in Response to Respondent’s Summary Judgment Motion;
6. 3rd Declaration of Daniel Haller in Response to Respondent’s Summary Judgment Motion;
7. Ecology’s Reply Memorandum in Support of Motion for Summary Judgment;
8. Second Declaration of Alan M. Reichman in Support of Ecology’s Motion for Summary Judgment with attached Exhibits A and B;
9. [Crown’s] Motion for Summary Judgment;
10. Memorandum in Support of Summary Judgment (Crown’s March 30, 2017, Brief);
11. Declaration of Mark Peterson with attached Exhibits 2 through 12, 12a, 13, 16, 33, 44, 46, 52, 57, 59 through 64;
12. Ecology’s Memorandum in Response to Crown’s Motion for Summary Judgment;
13. 2nd Declaration of Trevor Hutton in Support of Ecology’s Memorandum in Response to Crown’s Motion for Summary Judgment;
14. Rebuttal Memorandum of Appellant in Support of Summary Judgment; and,
15. Crown’s Notice of Appeal and attached Ecology decision.

1 Based on the record and evidence before the Board on the motion, including the oral
2 argument of counsel, the Board enters the following decision.

3 **II. BACKGROUND**

4 In 1942, three wells were drilled to serve a Navy supply depot (Depot) located in the
5 Spokane Valley. Turner Decl., Ex. G, p. 6. By April 1945, there were 127 residents at the
6 Depot, who lived in residential structures. The Navy occupied and maintained the Depot until
7 1958. All parties agree that the Navy's use of the water at the Depot met the definition of
8 municipal water supply purposes.

9 In 1960, the Depot was sold to the Spokane Industrial Park, Inc. (Park). Turner Decl.,
10 Ex. H, pp. 2-3. The CCWCB had limited factual information regarding the Park's use of water
11 during its early development stages. At page 6 of each of its decisions, the CCWCB refers to its
12 "Analysis of Municipal Status of Water Rights." Peterson Decl., Exs. 11, 12, 12a, and 13. In its
13 analysis, the CCWCB states that the residential structures remaining from the Navy's use were
14 "inhabited by company personnel or rented to the public until 1990." Peterson Decl., Ex. 16, p.
15 3. The CCWCB analysis further states that Crown's water rights "have consistently served
16 thousands of persons' basic potable needs through lunch rooms, bathrooms, and other potable
17 requirements consistently since their inception." *Id.* The analysis also notes that in 1998 a 65-
18 room hotel opened on the property. The hotel rooms can accommodate up to five persons. *Id.*,
19 pp. 3, 4. At page 7 of each of its decisions, the CCWCB states that the peak water use at the park
20 was 5,874 acre feet per year (AFY), when the park was two-thirds built out with buildings.
21 Peterson Decl., Exs. 11, 12, 12a, and 13.

1 The record reviewed by the CCWCB included the permitting history on the Park's water
2 rights. In 1970, the Park submitted three statements of water claims, Nos. 001087, 001088, and
3 001089. Each of the claims asserted beneficial use dating back to December 1942. Turner
4 Decl., Exs. A, B, and C. Claim No. 001087 claimed a right of 2,178 AFY, but stated that only
5 half that amount (1,089 AFY) was being used in 1970. Turner Decl., Ex. A. Claim No. 001088
6 claimed a right of 1,208 AFY with the full amount in use in 1970. Turner Decl., Ex. B. Claim
7 No. 001089 claimed a right to 1,694 AFY with the full amount being used in 1970. Turner
8 Decl., Ex. C. Therefore, based on the claim forms, the full amount of water in use in 1970 was
9 3,991 AFY.

10 At page 6 of the four decisions, the CCWCB notes that in 1970, the Park also filed three
11 applications for ground water permits. Peterson Decl., Exs. 11, 12, 12a, and 13. These
12 applications were for non-additive rights, which do not increase the amount of water that can be
13 used under the claims, but are intended to provide a back-up to the claims if for some reason they
14 fail. *Id.* Ecology's Report of Examination (ROE) for the three applications provided additional
15 information regarding the use of the water rights by the Park. Turner Decl., Ex. I. The ROE
16 stated that there were 78 industries employing approximately 2,500 people, and that the water
17 system also served two homes, an office, and a half-acre lawn. *Id.* The ROE also stated that
18 Well No. 3 was used 24 hours per day, and that Wells 1 and 2 were run only when needed. *Id.*

19 In 1971, Ecology issued three non-additive certificates based on the applications made in
20 1970. Turner Decl., ¶¶ 14-17, Exs. J, K, L. Certificate No. 7130-A, a non-additive right to
21 Claim No. 001087, and Certificate No. 7129-A, a non-additive right to Claim No. 001088, were

1 issued for half of the instant demand rates asserted in these claims. Turner Decl., ¶¶ 14-16, Exs.
2 J, K. Certificate No. 7131-A, a non-additive right to Claim No. 001089 was issued in the full
3 claimed amount. Turner Decl., ¶ 17, Ex. L.

4 In 1973, the Park applied for an additional groundwater permit to be used with a fourth
5 well, which would be part of a four well integrated system. Turner Decl., ¶ 18, Ex. M, p. 3.
6 Ecology granted a permit in 1974, allowing the withdrawal of 4,194 AFY. Turner Decl., Ex. G,
7 p. 6, Ex. M, p. 4. In 1976, Ecology issued Certificate No. G3-22023C for the full permitted
8 quantity to be used for community domestic water supply, manufacturing, and industrial use.
9 Turner Decl., ¶ 9, Ex. D.

10 Additional information supplied by Crown during motion practice established that by
11 1993, the Park had 127 tenants. Peterson Decl., Ex. 60, Gragg Decl., ¶ 6. In 2016, the Park had
12 194 businesses with 338 water systems connections. *Id.*, ¶ 7. In January 2017, 194 discrete
13 customers were receiving water from the Park. Peterson Decl., Ex. 61, 1st Haller Decl., ¶¶ 30,
14 31. There were 252 active connections spanning institutional, commercial, business, school,
15 daycare, recreational services, and industry. *Id.*, ¶ 31. In the opinion of Mr. Haller, Crown's
16 expert, the Park's water was being used for outdoor lawn irrigation, drinking water, toilets,
17 showers, laundry, kitchens, and other types of residential uses. *Id.*

18 Other additional information provided by the parties during motion practice involves the
19 existence of an intertie between the Consolidated Irrigation District #19 and the Park. Peterson
20 Decl., Ex. 61, 1st Haller Decl., ¶ 42. This intertie is limited to emergency use. Reichman Decl.,
21 Exs. C, D. It has never been operated other than for maintenance use. Reichman Decl., Ex. B at

1 67. Crown regularly activates the intertie control valve to ensure that the system stays
2 operational. This maintenance use may result in the exchange of a small amount of water
3 between the two systems, but this is not intended to supply Consolidated Irrigation District #19
4 with water. Reichman Decl., Ex. B at 70.

5 On March 18, 2016, Crown filed applications to change Claims 001087, 001088, and
6 001089, and Certificate No. G3-22023C. Peterson Decl., Exs. 2-5. At the time of Crown's
7 applications, the Park's water demand was 3,400 AFY. Turner Decl., Ex. H, p. 1. Crown
8 requested that all the water rights be conformed as being for municipal water supply purposes;
9 the purpose of use be changed to authorize the temporary donation of 5,874 AFY to the State
10 Trust Water Rights Program for instream flows and for the mitigation of out of stream uses;
11 points of withdrawal (well locations) be added for each water right, to enable all of the rights to
12 be exercised by using any of the four existing wells at the Park; and an additional point of
13 diversion and place of use be added for 0.2 AFY for landscape irrigation for a lot in Chelan
14 County in 2017 and 2018. Peterson Decl., Exs. 2-5.

15 The CCWCB issued four conditional decisions granting the change applications.
16 Peterson Decl., Exs. 11, 12, 12a, 13, 16, and 57. The CCWCB made tentative determinations
17 that the three claims and Certificate No. G3-22023C were valid and eligible for change to the full
18 extent specified on the water rights document. *Id.* The CCWCB also determined that Crown
19 meets the "definition of a 'municipal water supplier' whose rights and beneficial uses met
20 municipal use definitions at all times." Turner Decl., Ex. H, p. 6. In support of this conclusion,
21 the CCWCB states on page 6 in all four of the decisions:

1 The right was perfected with demands that meet the definition of
2 “municipal” water use since it served the residential needs of 127 persons
3 and it also served a non residential population of 2700 for residential
4 (typically potable) uses. . . . The right continues to provide for residential
5 uses for a non residential population of approximately 6-7 thousand
6 persons so it continues to meet the municipal supply definition and has
7 done so at all times since its inception. The residential uses now include a
8 hotel, restaurants, mini marts, as well as bathroom and kitchen facilities
9 for the tenant’s thousands of employees. While the claims and certificates
10 use the term “domestic” and/or “community domestic” such terms are in
11 this case synonymous with “municipal” and should be conformed as such.

12 Peterson Decl., Exs. 11, 12, 12a, and 13.

13 The CCWCB went on to approve a temporary donation of 5,874 AFY of water into the
14 state water right trust program for instream flows and mitigation of out of stream uses, while
15 allowing Crown to retain 3,400 AFY to continue providing water service at the Park. Peterson
16 Decl., Exs. 11, 12, 12a, 13, 16, and 57.

17 On September 20, 2016, Ecology issued a decision reversing the CCWCB’s decisions
18 and denying Crown’s change applications. In its decision, Ecology sets out seven grounds for its
19 reversal. The grounds are: (1) an inadequate tentative determination of the extent and validity of
20 the four water rights, (2) failure to demonstrate that the four rights qualify as being for municipal
21 supply purposes, (3) allowing the change of inchoate water and allowing an increase in
consumptive water use, (4) failure to describe how other existing water rights within the place of
use will be exercised, (5) failure to affirm that the proposed changes would not impair existing
rights, (6) a flawed consumptive water use analysis, and (7) failure to demonstrate that approval
of the applications would not be detrimental to the public interest. Crown’s Notice of Appeal
with attached Ecology decision. Crown filed a timely appeal of Ecology’s decision to the Board.

1 **III. ANALYSIS**

2 At the prehearing conference, the following legal issues were established for this appeal:

- 3 1. Did Ecology act lawfully in reversing the CCWCB’s conditional
4 approvals of Crown West’s four water right change applications?
- 5 2. Did the CCWCB fail to perform an adequate tentative determination of the
6 extent and validity of the four water rights to ascertain the correct
7 quantities that are eligible for change?
- 8 2.a. Did the CCWCB err by failing to tentatively determine the extent and
9 validity of the water rights documented by Statement of Claim Nos.
10 001087, 001088, and 001089 based on perfection of the rights through the
11 actual beneficial use of water prior to 1945 when the groundwater code
12 became effective?
- 13 2.b. Did the CCWCB err by failing to tentatively determine the extent and validity
14 of the water right documented under Groundwater Certificate No. G3-
15 22023C based on the quantity that was perfected and maintained through
16 actual beneficial use?
- 17 2.c. Did the CCWCB err by failing to utilize and provide metering data to
18 ascertain and show the quantities of water that actually have been used
19 under each of the four water rights?
- 20 2.d. Did the CCWCB err by failing to ascertain and show how much water was
21 perfected through actual use under each of the four water rights, and the
actual extent of any reductions in use since the time of perfection of each
of the rights?
2. e. If the CCWCB did not err in determining that the law allows the approval
of changes of the inchoate portions of the water rights, did the CCWCB
err in failing to ascertain and show how much inchoate water remains
valid for change under each right through reasonable diligence and other
factors?
2. f. Did the CCWCB err in applying RCW 90.03.330(3) and its “in good
standing” provision to Statement of Claim Nos. 001087, 001088, and
001089 when that statute only governs certain water right certificates?

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- 3. Did the CCWCB err by failing to demonstrate that each of the four water rights qualify as being rights for municipal purposes through active compliance with the definition of “municipal water supply purposes” under RCW 90.03.015(4)?

- 4. Did the CCWCB err by allowing a change in the purpose of use for the inchoate portions of the water rights?
 - 4.a. Was Ecology correct in determining that the applications sought changes in the purposes of use designated for the water rights through the addition of instream flows and mitigation as a purpose of use?

 - 4.b. Did the CCWCB err in not ensuring that approval of the water right change applications would not result in any increase in the consumptive use of water?

 - 4.c. Did the CCWCB err in failing to ensure that the approval of the water right change applications would result in no increase in the annual consumptive quantity of water as required by RCW 90.03.380(1)?

- 5. Did the CCWCB err by failing to ascertain and describe how other existing water rights in the place of use will be exercised, as required by WAC 173-153-130(6)(c)(ii)?

- 6. Did the CCWCB err by failing to perform adequate analysis to ensure that approval of the water right change applications would not cause impairment of other existing water rights?
 - 6.a. Did the CCWCB fail to comply with WAC 173-557-070, which prohibits changes of Spokane River Basin water rights unless there is a finding that existing rights, including the instream flows established under WAC 173-557, would not be impaired?

- 7. Did the CCWCB err by performing an inadequate consumptive use analysis to determine the quantities of water that could be transferred to the state trust program and approved for mitigation to enable new uses of water?

- 8. Did the CCWCB err in failing to demonstrate that approval of the water right change applications would not be detrimental to the public interest?

1 8.a. Did Ecology act lawfully in determining that it would be detrimental to the
2 public interest to allow transfers of inchoate portions of water rights to
3 create a water bank that would enable new consumptive water uses based
4 on deposits of never used “paper” water?

5 Ecology moves for summary judgment on Issues 1, 2.a, 2.b, 2.d, 3, 4, 7, and 8. Crown
6 moves for summary judgment on all issues. The Board concludes that it is appropriate to grant
7 summary judgment to Ecology on Issue 3, because there are no contested issues of material fact.
8 Furthermore, resolution of this issue provides a sufficient basis to grant summary judgment to
9 Ecology on Issue 2 and to affirm Ecology’s reversal of the CCWCB’s decision.

10 **A. Summary Judgment**

11 Summary judgment is a procedure available to avoid unnecessary trials where there is no
12 genuine issue of material fact. *Jacobsen v. State*, 89 Wn.2d 104, 108, 569 P.2d 1152 (1977).
13 The summary judgment procedure is designed to eliminate trial if only questions of law remain
14 for resolution, and neither party contests the facts relevant to a legal determination. *Rainier*
15 *Nat’l Bank v. Security State Bank*, 59 Wn. App. 161, 164, 796 P.2d 443 (1990), *review denied*,
16 117 Wn.2d 1004 (1991).

17 The party moving for summary judgment must show there are no genuine issues of
18 material fact and the moving party is entitled to judgment as a matter of law. *Magula v. Benton*
19 *Franklin Title Co., Inc.*, 131 Wn.2d 171, 182, 930 P.2d 307 (1997). A material fact in a summary
20 judgment proceeding is one affecting the outcome under the governing law. *Eriks v. Denver*,
21 118 Wn.2d 451, 456, 824 P.2d 1207 (1992). If the moving party satisfies its burden, then the
 non-moving party must present evidence demonstrating that material facts are in dispute.

1 *Atherton Condo Ass'n v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990),
2 reconsideration denied (1991). In a summary judgment proceeding, all facts and reasonable
3 inferences must be construed in favor of the non-moving party. *Jones v. Allstate Ins. Co.*, 146
4 Wn.2d 291, 300, 45 P.3d 1068 (2002).

5 **B. Ecology's role in reviewing conservancy board decisions**

6 Under RCW 90.80, county water conservancy boards can be formed to process
7 applications for transfers of water rights. An applicant can then choose whether to file an
8 application for transfer with a county conservancy board or Ecology. WAC 173-153-060(8). If
9 the applicant chooses the conservancy board, Ecology's role is limited. Ecology does not
10 perform a full scale investigation or analysis. Instead, its role is to review the conservancy board
11 record of decision "for compliance with applicable state water law," a task that must be
12 completed within 45 days. RCW 90.80.080. Ecology can affirm, reverse, or modify a record of
13 decision submitted by a conservancy board. RCW 90.80.080(4). Ecology's decision can then be
14 appealed to this Board, which reviews Ecology's decision de novo. WAC 371-08-485(1), (3).

15 In this case, Crown chose to have its transfer application processed by the CCWCB.
16 Following the issuance of the CCWCB's decision affirming the transfers, Ecology timely
17 reviewed the CCWCB's record and decision. Ecology denied the applications through a five
18 page detailed letter listing seven grounds for reversal of the CCWCB's decision. Crown timely
19 appealed Ecology's reversal. At the prehearing conference, the grounds for reversal that
20 Ecology identified in its reversal decision were the same issues established for the appeal.

1 In addition, Crown appears to be raising a procedural challenge¹ in its motion for
2 summary judgment. Crown argues that:

3 If DOE has no obligation to consider the merits of the application and can
4 limit itself to merely criticizing the conservancy board decision, then the
5 applicant is denied the right of appeal. Put another way, if the
6 conservancy board decision ignores law and/or evidence and all the DOE
and PCHB do is confirm that shortcoming without considering the actual
merits of the application then the applicant has no avenue of appeal to
obtain a ruling on the application's merits.

7 Crown's March 30, 2017, Brief at 4. Crown goes on to argue that because Ecology's criticisms
8 do not address the merits of the application "the PCHB could find that all of [Ecology's] issues
9 as presented are beyond the scope of PCHB review" and uphold the conservancy board decision
10 without having to address the merits of the application. *Id.* at 5.

11 This argument reflects a misunderstanding of Ecology's role in the process. Once the
12 applicant chose to have its application processed by the CCWCB, Ecology's role was limited to
13 reviewing the CCWCB's decision. Here, Ecology did just that, issuing a reversal letter which
14 clearly sets out the basis for its reversal decision. Crown disagrees with Ecology's conclusion,
15 and is now contesting Ecology's decision before the Board. If Crown convinces the Board that
16 the CCWCB's decision was correct, and that all of Ecology's grounds for reversal are incorrect,
17 then the Board will reinstate the CCWCB's decision. If the Board finds that any of Ecology's
18 grounds for reversal are correct, then the Board will uphold the reversal. At that point, Crown

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21 ¹ The issues identified in the Prehearing Order do not identify a challenge to the process Ecology followed. The Board briefly addresses Crown's argument in this Order, even though this was not identified as an issue, because it has received extensive briefing from both parties on this subject.

1 can appeal the Board’s decision, or restructure its application based on the Board’s opinion and
2 reapply to either the CCWCB or Ecology for the change it seeks.

3 Crown does not identify anything in this process that denies Crown the right to appeal or
4 that would provide a basis to affirm the CCWCB’s decision without further analysis.

5 **C. Municipal Water (Issue 3)**

6 A water right will be relinquished if it is unused, in whole or in part, for a period of five
7 or more consecutive years without sufficient cause. RCW 90.14.140-160. However, the
8 Legislature has exempted water “claimed for municipal water supply purposes” from
9 relinquishment. RCW 90.14.140(2)(d). Pursuant to RCW 90.03.015(4), “Municipal water
10 supply purposes” means:

11 [A] beneficial use of water: (a) For residential purposes through fifteen or
12 more residential service connections or for providing residential use of
13 water for a nonresidential population that is, on average, at least twenty-
14 five people for at least sixty days a year; (b) for governmental or
15 governmental proprietary purposes by a city, town, public utility district,
16 county, sewer district, or water district; or (c) indirectly for the purposes in
17 (a) or (b) of this subsection through the delivery of treated or raw water to
18 a public water system for such use.

19 Crown argues that its four water rights are municipal water rights. The party asserting
20 that its water right qualifies for the exemption from relinquishment afforded a municipal water
21 right bears the burden of demonstrating that its beneficial use meets the statutory definition of
municipal water supply purposes. *R.D. Merrill Co. v. State, Pollution Control Hearings Bd.*, 137
Wn. 2d 118, 140-141, 969 P.2d 458 (1999). Accordingly, Crown has the burden of
demonstrating that its water rights are municipal water rights.

1 Moreover, “exceptions to statutory provisions are narrowly construed in order to give
2 effect to legislative intent underlying the general provisions.” *Id.* at 140. The intent of the
3 relinquishment statutes is “to cause a return to the state of any water rights which are no longer
4 exercised by putting said waters to beneficial use.” RCW 90.14.010. To ensure consistency
5 with the purpose of the relinquishment statute, the definition of municipal water supply purposes
6 should be narrowly construed.

7 **1. Standard for establishing compliance with municipal water supply purposes.**

8 The question of the proper meaning and application of the statutory definition of
9 “municipal water supply purposes” is not new to the Board. In a prior case involving
10 Washington State University’s (WSU) water rights, the Board addressed the meaning and
11 application of the statutory definition of “municipal water supply purposes.” *Cornelius v.*
12 *Ecology*, PCHB No. 06-099 at 11 (Order on Summary Judgment, as Amended on
13 Reconsideration, Jan. 18, 2008)(Board’s *Cornelius* Summary Judgment Decision). The Board
14 opined that:

15 Because the Legislature defined “municipal water supply purposes” in the
16 present tense (*i.e.*, it “means a beneficial use of water...”), we interpret
17 this as *requiring present, active compliance with the definition through*
18 *actual beneficial use of the water at the time a right is being*
characterized. Thus, we must examine WSU’s actual use of water under
each right, and whether each right is presently being put to beneficial use
for municipal purposes.

1 *Id.* at 11 (emphasis added). The Board went on to apply the active compliance standard, in the
2 context of that case,² by examining the purpose for which WSU’s water rights were issued as
3 well as the current use of the water rights. *Id.* at 11-14.

4 Ecology asserts that an active compliance test must be applied in determining whether
5 water rights are municipal. Ecology has articulated the test in a formal written policy, POL-
6 2030, adopted in 2007, and revised on May 7, 2012. Turner Decl., Ex. N. In POL-2030,
7 Ecology interprets municipal water supply purposes to require “active compliance by
8 conformance with the beneficial use definitions in RCW 90.03.015(4).” *Id.*, p. 2, ¶ 9. Ecology
9 goes on to address the consequences of a failure to meet the active compliance test:

10 If a water right does not meet the definition of a water right for municipal
11 water supply purposes for 5 or more years, or does not otherwise qualify
12 for the relinquishment exception under RCW 90.14.140(2)(d), then the
13 water right would be valid only to the extent it had been beneficially used
during that period, with any non-use resulting in relinquishment of the
right unless the non-use is excused by one of the other exemptions to
relinquishment provided under RCW 90.14.140.

14 *Id.*, ¶ 9.d.

15 The CCWCB, in its analysis of the Crown water rights, appears to have rejected the
16 active compliance standard set forth by Ecology in POL-2030 and applied by the Board in the
17 *Cornelius* Summary Judgment Decision. Instead, the CCWCB states the appropriate test for
18 municipal water rights is whether the right was “authorized in a manner that contemplated
19 municipal use.” The CCWCB opined that if a water right was authorized originally in a manner

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21 ² The Board explained that it did not address the question of whether WSU was a municipal water supplier prior to
2003, because that question involved the potential retroactive application of a statute, which raised constitutional
issues which the Board had declined to address. *Cornelius* Summary Judgment Decision, p. 11, n. 5.

1 that contemplated municipal use, the right is immune from relinquishment. Peterson Decl., Ex.
2 16, p. 2. The CCWCB bases this analysis on its conclusion that the active compliance standard,
3 set out by Ecology’s POL-2030 and applied by the Board, was invalidated by the state Supreme
4 Court in *Cornelius v. Ecology*, 182 Wn. 2d 574, 344 P.3d 199 (2015).

5 In *Cornelius*, the Court considered the constitutionality of the Municipal Water Supply
6 Act. *Cornelius v. Ecology*, 182 Wn. 2d 574, 582, 344 P.3d 199 (2015). The Court also
7 addressed Mr. Cornelius’s challenge to Ecology’s use of a streamlined process for making a
8 tentative determination of the extent and validity of WSU’s water rights. *Id.* at 595-596.
9 Ecology uses a streamlined process for making a “simplified” tentative determination when
10 relinquishment is not an issue, such as in cases involving municipal water rights. Pursuant to the
11 process, Ecology does not require applicants to demonstrate their year-to-year water use where
12 relinquishment is not an issue.

13 In affirming Ecology’s use of the streamlined process in the case of WSU’s water rights,
14 the Court stated:

15 Intuitively, instances where Ecology permits the streamlined policy would
16 include when the water right is for a municipal water supply under RCW
17 90.03.330(3), since those rights are immune from relinquishment. RCW
18 90.14.140(2)(d).

19 *Id.* at 596. The Court went on to reject Mr. Cornelius’s contention that the municipal water law
20 “still required Ecology to look at WSU's historic nonuse of its water rights and revoke any
21 relinquished rights.” *Id.* The Court stated that:

1 Ecology applying the streamlined policy to WSU is consistent with the
2 [Municipal Water Law] because WSU's water rights were for municipal
water supply purposes and immune from relinquishment.

3 *Id.*

4 Crown points to this language as support for its position that the Court has rejected the
5 active compliance test. Crown's argument is misplaced, however, as *Cornelius* did not involve a
6 challenge to WSU's active use of its water rights. There was no question as to whether WSU's
7 water use was consistent with the definition of municipal water supply purposes. Mr. Cornelius
8 did not raise this issue on appeal to the Supreme Court. There was no assertion before the Court
9 that WSU's water rights had ever failed to comply with the statutory definition of municipal
10 water supply purposes in RCW 90.03.015(4). The issue addressed by the Court was whether the
11 statute that provides the definition of municipal water was constitutional. In ruling on this issue,
12 the Court addressed a challenge to Ecology's streamlined process for making a tentative
13 determination. But, in rejecting the challenge to the streamlined process, the Court did not rule
14 on the validity of Ecology's active compliance requirement, nor did it address that portion of the
15 Board's decision.

16 The Board concludes that the Supreme Court's decision in *Cornelius* does not provide a
17 basis for rejecting Ecology's POL-2030 or the Board's prior ruling regarding the meaning of
18 active compliance. The Board's prior ruling affords deference to Ecology's POL-2030, a formal
19 written policy on a technical matter within Ecology's area of expertise. *Port of Seattle v.*
20 *Pollution Control Hearings Bd.*, 151 Wn. 2d 568, 595, 90 P.3d 659, 673 (2004).

1 Ecology's POL-2030 and the Board's prior ruling are also consistent with judicial
2 direction to construe statutory exemptions narrowly to give effect to the legislative intent
3 underlying the general provisions. *R.D. Merrill*, 137 Wn. 2d at 140-141. Since one of the
4 consequences of a determination that a water right is actively used for a municipal water right
5 purpose is that the water right is afforded certain exemptions from relinquishment, expansion of
6 the definition of municipal water right purposes would be contrary to the Legislative intent that
7 water that is not used should be available to other appropriators. The CCWCB's assertion that a
8 water right that was authorized in a manner that contemplated municipal use is immune from
9 relinquishment would have the effect of greatly expanding the number of situations in which the
10 exemption from relinquishment associated with municipal water will apply.

11 The Board concludes that for Crown's water rights to qualify as rights claimed for
12 municipal water supply purposes, Crown must demonstrate that the water rights meet the active
13 compliance standard concerning the beneficial uses set out in RCW 90.03.015(4).

14 **2. The facts as relied upon by the CCWCB and supplemented by Crown do not establish**
15 **active compliance**

16 Under the active compliance standard, water rights must be actively used for municipal
17 water supply purposes. In *Cornelius*, the Board directed that a necessary component of this
18 analysis is looking at the present use of the water to see if it meets the statutory definition of
19 municipal water supply purposes. *Cornelius* Summary Judgment Decision, at 11.

20 The provision which sets out the uses of water that are considered municipal water supply
21 purposes states:

1 'Municipal water supply purposes' means a beneficial use of water: (a)
2 For residential purposes through fifteen or more residential service
3 connections or for providing residential use of water for a nonresidential
4 population that is, on average, at least twenty- five people for at least sixty
5 days a year; (b) for governmental or governmental proprietary purposes by
6 a city, town, public utility district, county, sewer district, or water district;
7 or (c) indirectly for the purposes in (a) or (b) of this subsection through the
8 delivery of treated or raw water to a public water system for such use.

9 RCW 90.03.015(4).³

10 The CCWCB determined that Crown's current use met the provision in RCW
11 90.03.015(4)(a) which states that municipal supply purposes include providing "for residential
12 purposes through fifteen or more residential service connections" or "providing residential use of
13 water for a nonresident population that is, on average, at least twenty-five people for a least sixty
14 days a year." The current use cited by the CCWCB was Crown's provision of water for
15 residential uses for a nonresidential population of approximately 6,000-7,000 persons. A review
16 of the record before the CCWCB fails to support this conclusion.

17 The first type of beneficial use for municipal water supply purposes, set out in RCW
18 90.03.015(4)(a), refers to providing water "[f]or residential purposes through fifteen or more
19 residential service connections." The term "residential service connection" is not defined by
20 statute. Through POL-2030, Ecology interprets this term to mean "service connections used by
21 year-round residents for one hundred eighty or more days within a calendar year." Turner Decl.,
Ex. N at 3-4. Ecology's interpretation is based on the Department of Health's rule, WAC 246-
290-020(5)(a), governing Group A community water systems.

³ The Board only analyzes RCW 90.03.015(a) and (c), since Crown does not contend that its water rights are municipal under (b), the government purposes definition.

1 Ecology's POL-2030 allows an alternative method of measuring residential service
2 connections by calculating "equivalent residential units" within a building. Turner Decl., Ex. N
3 at 4. While use of equivalent residential units provides an alternate method for calculating the
4 number of service connections, Ecology contends that it does not dispose of the requirement that
5 the connections serve year round residents for 180 days or more within a calendar year. Ecology
6 argues that disposing of this requirement ignores the word "residential" in the statute, which
7 would be contrary to the rules of statutory construction. *See Ralph v. Dep't of Nat. Res.*, 182
8 Wn. 2d 242, 248, 343 P.3d 342 (2014)(statutes must be interpreted "as a whole so that, if
9 possible, 'no clause, sentence, or word shall be superfluous, void, or insignificant"). Crown
10 argues that this interpretation is too restrictive; however, a restrictive interpretation of an
11 exemption to relinquishment is appropriate. *R.D. Merrill*, 137 Wn. 2d at 140 (exceptions to
12 statutory provisions narrowly construed). Further, Ecology has put forward a reasonable basis
13 for its interpretation of RCW 90.03.015(4)(a). The Board gives deference to Ecology on this
14 interpretation and applies Ecology's interpretation to the facts.

15 The evidence relied upon by the CCWCB pertaining to the current use of the Park does
16 not support a finding that the requirement of "15 or more residential service connections" is met,
17 either based on the number of residential service connections or under an alternate method of
18 calculation analyzing "equivalent residential units" based on the residential population.⁴ The
19 CCWCB decision found "residential use" at the Park through the presence of "a hotel, restraunts
20 [sic], mini marts as well as bathroom and kitchen facilities for the tenant's thousands of

21 ⁴ The CCWCB calculated that water rights would have served 15 equivalent residential units if the residential population met or exceeded 39 individuals. Turner Decl., Ex. H, pp. 2-3.

1 employees.” Turner Decl., Ex. G, p. 6. The “tenants” referred to in the CCWCB record are
2 businesses, not residents. Nor do individuals staying overnight at the hotel constitute residents.
3 The record does not support a conclusion that the Park currently has any residents for purposes
4 of RCW 90.03.015(4)(a).

5 The second type of beneficial use for municipal water supply purposes, set out in the
6 remainder of RCW 90.03.015(4)(a), is “providing residential use of water for a nonresidential
7 population that is, on average, at least twenty-five people for at least sixty days a year.” Through
8 POL-2030, Ecology has interpreted this phrase to mean:

9 [T]he full range of residential water uses (e.g. drinking, cooking, cleaning,
10 sanitation) are provided under the water right. Further, such service is for
11 temporary domiciles for non-residents (an average of 25 or more people
12 living there for more than 60 days per year.)

13 Turner Decl., Ex. N at 4. Under Ecology’s interpretation of the statutory provision, there must
14 be 25 occupants of temporary domiciles staying overnight for 60 or more days each. Turner
15 Decl., ¶ 23.

16 The CCWCB rejected this policy statement from Ecology. It stated:

17 [Ecology] also seems to require that such water use must accompany
18 sleeping quarters for the population served. Interestingly, there is nothing
19 in the statute from which to imply the intent to defend sleepover capacity
20 for non-residents as part of a water relinquishment exception. While the
21 statute does say “residential uses” the statute also indicates that this use is
for “non-residential” populations so the number of beds is irrelevant.

A more natural interpretation of the statute would be to simply equate
residential uses with potable uses regardless of sleep over
accommodations.

1 Turner Decl., Ex. H, p. 3.

2 The interpretation of the statute applied by CCWCB, and advocated by Crown, is not
3 supported by the statutory language. The language does not provide a clear indication that the
4 Legislature intended to categorize a supplier of potable water for 25 or more persons for 60 days
5 a year, as a municipal water supplier entitled to an exemption from relinquishment. The
6 Legislature could easily have chosen the term “potable” if this was its intent, but it did not. The
7 CCWCB’s interpretation of the “non-residential use” in this context would potentially make a
8 water right that serves a hotel with 25 or more beds or any business that employs 25 or more
9 individuals on a daily basis and provides restroom and eating facilities a municipal water right.
10 To infer such an expansive interpretation to an exemption is inconsistent with guidance that
11 exemptions should be narrowly construed.

12 Furthermore, the statutory provision as drafted is ambiguous. There is an inherent
13 tension between the “residential use of water” which implies water used in residences, and the
14 “use of water for a nonresidential population” which implies use by individuals who do not
15 reside there. Given this ambiguity, Ecology’s interpretation is entitled to great weight.⁵ *Postema*
16 *v. Pollution Control Hearings Bd.*, 142 Wn. 2d 68, 77, 11 P.3d 726, 733 (2000)(where a statute
17 is within the agency's special expertise, the agency's interpretation is accorded great weight,
18 provided that the statute is ambiguous). The Board concludes that it is appropriate to apply
19

20 _____
21 ⁵Crown argues that the CCWCB’s interpretation is also entitled to deference. See Crown’s April 21, 2017, Brief at
9. However, Ecology, and not the CCWCB, is the agency tasked with administering the state’s water resources. See
RCW 43.21A.020 (authorizing Ecology to manage the state’s water resources); *Port of Seattle*, 151 Wn. 2d at 594.

1 Ecology's POL-2030 in determining whether the water use by the industrial park complies with
2 RCW 90.03.015(4)(a).

3 The facts in the CCWCB record do not support a finding that the same 25 occupants of
4 temporary domiciles stay overnight for 60 or more days a year at the Park. The only evidence in
5 the record of current overnight use at the Park is the hotel. While presumably at least 25 hotel
6 guests occupied the hotel for 60 or more days per year,⁶ it is unlikely, and there is no evidence to
7 indicate, that the same 25 hotel guests stayed at least 60 days annually in the hotel. Crown
8 argues that this definition can be met by aggregating populations of different transient
9 nonresidents (hotel guests) who each stay for a few nights. However, such an interpretation is
10 contrary to Ecology's Policy-2030 that water service must be for "temporary domiciles for non-
11 residents (an average of 25 or more people living there for more than 60 days per year)." The
12 Board again gives deference to Ecology's interpretation, and declines to apply Crown's
13 expansive interpretation. The Board concludes that the evidence in this record, relied on by the
14 CCWCB and supplemented by Crown, is insufficient to establish that Crown's water rights
15 currently provide residential use of water for a nonresidential population that is, on average, at
16 least 25 people for at least 60 days a year.

17 The last type of beneficial use for municipal water supply purposes claimed by Crown is
18 set out in RCW 90.03.015(4)(c), and involves delivery of water to a public water system
19
20

21 ⁶ The CCWCB states that hotel has "65 rooms that can accommodate up to 5 persons each . . . and is consistently
booked full months in advance." Turner Decl., Ex. H, p. 4.

1 indirectly for one of the municipal water purposes set out in RCW 90.03.015(4)(a) or (b).⁷
2 Crown points to the fact that the Park’s water system is connected to neighboring Consolidated
3 Irrigation District # 19’s (District) system through an emergency intertie. Crown argues that this
4 emergency intertie means that the Park is delivering water to the District such that the Park’s use
5 of water qualifies as municipal water supply purposes pursuant to RCW 90.04.015(4)(c).

6 Ecology responds that the delivery of water via the intertie is for emergency purposes
7 only, and has never been used for those purposes. The only use of the intertie connection has
8 been the passage of a small amount of water for routine maintenance purposes. Citing the
9 language of RCW 90.03.015 (4)(c), Ecology contends that there must be “a beneficial use of
10 water . . . (c) indirectly for the purposes in (a) or (b) of this subsection through the delivery of
11 treated or raw water to a public water system for such use.” Based on this language, Ecology
12 argues that the delivery of water must be more than an incidental conveyance of water for routine
13 maintenance, and instead must be intentional use for the underlying purpose.

14 The Board agrees with Ecology. The use of an emergency intertie between systems does
15 not amount to the delivery of water to a public water system for municipal water use.

16 The Board concludes that Crown’s water rights are not presently used for a municipal
17 water supply purpose based on the findings in the CCWCB’s decision and supplemental
18 information from Crown provided with the motion briefing. Crown’s water rights are not being
19 actively used for municipal water supply purposes consistent with the definitions of RCW
20 90.03.015. The Board grants summary judgment to Ecology on Issue 3.

21 ⁷ The CCWCB did not rely on RCW 90.03.015(4)(c) as a basis for its decision that the Park’s water rights were municipal.

1 The Board affirms Ecology’s reversal of the CCWCB’s decision on the basis that the
2 CCWCB erroneously concluded that Crown’s water rights are municipal water rights exempt
3 from relinquishment.⁸ Because the CCWCB erroneously concluded that Crown’s water rights
4 were municipal, the CCWCB’s tentative determinations of the validity and extent of Crown’s
5 water rights is also flawed as the CCWCB did not evaluate the water rights for relinquishment
6 for nonuse during periods of five or more successive years.⁹ Therefore, the Board grants
7 summary judgment to Ecology on Issue 2.¹⁰

8 Based on the foregoing analysis, the Board enters the following:

9 **III. ORDER**

10 The Board DENIES Crown West Realty, LLC’s Motion for Summary Judgment and
11 GRANTS Ecology’s Motion for Summary Judgment on Issues 2 and 3, and AFFIRMS
12 Ecology’s reversal of the four conditional decisions of the Chelan County Water Conservancy
13 Board, Application Numbers CG3-001087CL (CHEL-16-01), CG3-001088CL (CHEL-16-02),
14 CG3-001089CL (CHEL-16-03), and CG3-22023C (CHEL-16-04).
15
16
17

18 ⁸ The Board’s decision on the municipal water issue is limited to a determination that Crown’s water rights are not
19 presently being used for municipal purposes. There is insufficient information in the record to determine the period
20 or periods in which Crown’s water rights did not meet the active compliance test and such a determination is not
21 necessary for the Board to issue a decision in this matter.

⁹ The Board does not reach other aspects of the tentative determination of the validity and extent of Crown’s water
rights, such as the CCWCB’s conclusion that it is reasonable to presume that the three water rights were
continuously pumped at their maximum instantaneous rates.

¹⁰ The Board’s decision on Issue 3 also requires a reevaluation by the CCWCB on the factors raised in Issues 4-8,
however, because the Board’s decision on Issue 3 is determinative of this matter the Board does not need to address
Issues 4-8 at this time.

1 SO ORDERED this 25th day of July, 2017.

2
3 **POLLUTION CONTROL HEARINGS BOARD**

4
5 KAY M. BROWN, Presiding

6
7
8 THOMAS C. MORRILL, Board Chair

9
10 JOAN M. MARCHIORO, Member