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No. 35610-8

**IN THE COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

CROWN WEST REALTY, LLC,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF ECOLOGY; and
POLLUTION CONTROL HEARINGS BOARD,

Respondents.

**WASHINGTON WATER UTILITIES COUNCIL
AMICUS CURIAE BRIEF**

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I. INTRODUCTION

Amicus Curiae Washington Water Utilities Council (“WWUC”) writes to address only one issue in this case: whether Respondent Department of Ecology (“Ecology”) and the Pollution Control Hearings Board (“PCHB”) distort the Water Code to require that every municipal water right in the State must maintain “active compliance” with the definition of “municipal water supply purposes” (“MWSP”).

The purpose and effect of the “active compliance” interpretation is to expose MWSP water rights to risk of loss every five years under the state’s “use it or lose it” law, Laws of 1967, ch. 233 (“1967 Act”), notwithstanding that the same statute exempts water rights claimed for MWSP. As a result, resolution of this issue about the statutory definition will determine what water rights are or are not subject to relinquishment and will affect the standing of water rights that WWUC members will use to meet current and future needs of growing communities.

Ecology asserts that “active compliance” is necessary to protect against the “revival” of water rights that have been “long unused” or are associated with “absurd scenarios” like a “ghost town.” Resp’t Br. at 2, 29 n.18. However, the “active compliance” interpretation applies *categorically* to all water rights claimed for MWSP purposes in every five-year period, subjecting countless water rights to relinquishment. The WWUC urges the Court not to be lured by Ecology into making a precedential decision on a pure question of law with statewide consequences to dispose of the peculiar facts in this case.

Ecology's interpretation is directly contrary to the manifest objective of the 2003 Municipal Water Law ("MWL") to provide certainty to municipal water suppliers and to require increased water conservation and efficiency. Ecology has sought, and failed, to have "active compliance" validated by the Washington Supreme Court in two prior cases. Ecology now asks this Court to do what the Supreme Court has declined *twice* to do. The WWUC respectfully urges this Court to reject "active compliance" and to reverse the decision below.¹

II. IDENTITY AND INTEREST OF AMICUS CURIAE

The WWUC is the state association of over 200 Washington water utilities including cities, water districts, public utility districts, mutual and cooperative water utilities, and investor-owned water utilities. The water systems owned and operated by WWUC members provide drinking water to over 80 percent of the state's population. WWUC's Motion to File Amicus Curiae Brief sets forth more fully the identity and interest of the WWUC and is incorporated herein by reference.

III. ISSUES ADDRESSED BY AMICUS CURIAE

This *amicus curiae* brief addresses only a component of Issue No. 1: whether "active compliance" through actual beneficial use of a water right is categorically required for any water right to meet the definition of MWSP under RCW 90.03.015(4).

¹ If the Court reverses on Issue 1, the WWUC agrees with Ecology that the Court should remand the case to the PCHB for further proceedings on the six issues that the PCHB did not reach. *See* Resp't Br. at 15 n.12.

IV. STATEMENT OF THE CASE

This *amicus curiae* brief addresses a pure question of law, and therefore, does not rely upon or analyze the facts of this case.

V. STANDARD OF REVIEW

The correct interpretation of the statutory definition of MWSP is a pure question of law. The error of law standard applies, under which the court determines the meaning and purpose of the statute *de novo*. RCW 34.05.570(3)(d); *Pub. Util. District No. 1 of Pend Oreille Cty. v. Dep't of Ecology*, 146 Wn.2d 778, 790, 51 P.3d 744 (2002).

VI. ARGUMENT

A. Water Code Background

1. Beneficial Use.

“Beneficial use” is a term of art in water law that refers to (1) the measure and limit of a vested or “perfected” water right and (2) the purposes for which water may be used.² *Dep't of Ecology v. Grimes*, 121 Wn.2d 459, 468, 852 P.2d 1044 (1993). This case involves Ecology’s erroneous interpretation of “beneficial use” within the definition of MWSP, thereby creating a new requirement (“active compliance”) instead of defining a purpose for which water may be used.

2. The 1967 Relinquishment Provisions.

As part of the 1967 Act, the Legislature enacted relinquishment provisions, under which all or any part of a water right that is not

² See, e.g., Const. art. XXI, § 1; RCW 90.54.020(1) (declaring types of uses as “beneficial”).

beneficially used for five consecutive years is relinquished. RCW 90.14.160 – .180. An express purpose of the 1967 Act is: “to cause a return to the state of any water rights which are no longer exercised by putting said waters to beneficial use.” RCW 90.14.010; *see also* RCW 90.14.020(3). Among other exceptions, the Legislature excepted from relinquishment water rights claimed for MWSP, RCW 90.14.140(2)(d), recognizing that MWSP water rights holders face unique challenges, including that they must serve the current and future water needs of the public. *See Lummi Indian Nation v. State*, 170 Wn.2d 247, 256, n.1, 241 P.3d 1220 (2010).

Prior to 2003, MWSP was not defined, creating uncertainty regarding what water rights qualified for the MWSP exception to relinquishment. *Id.* at 255. Further uncertainty surrounded the status of MWSP rights because, for decades, Ecology granted water right certificates to municipal water suppliers without reference to the actual beneficial use of the water under its “pumps and pipes” policy. *Id.* at 254 (“Until recently, it was not entirely clear what it took to perfect a water right.”). In the 1990s, the Supreme Court concluded that Ecology’s practice of issuing certificates based on system capacity was contrary to statute, and then Ecology raised questions about the validity of such “pumps and pipes” certificates. *Id.* at 255-56.

3. The 2003 Municipal Water Law (“MWL”).

In 2003, the Legislature sought to remedy “these uncertainties” by enacting the MWL. *Lummi*, 170 Wn.2d at 256. The MWL defined

MWSP, in pertinent part, “to mean a beneficial use of water for” certain enumerated purposes, RCW 90.03.015(4), thereby identifying purposes for which water may be used. *See Grimes*, 121 Wn.2d at 468. The MWL declared pumps and pipes certificates issued prior to September 9, 2003 for MWSP to be “right[s] in good standing.” RCW 90.03.330(3); *see also Lummi*, 170 Wn.2d at 256-57. The MWL ensured that MWSP rights could be relied upon to serve future growth needs, regardless of the extent of their past or present beneficial use, as long as those rights were being pursued with reasonable diligence.

4. Ecology’s “Active Compliance” Policy.

Subsequently, Ecology issued POL-2030, under which Ecology announced its interpretation of the definition of MWSP at issue in this case: “active compliance” is required to meet the definition of MWSP. Administrative Record (“AR”) 000144-45. “Active compliance” categorically requires actual use of every water right in compliance with the uses listed in RCW 90.03.015(4) at least once every five years, or the water right is relinquished. *Id.* By requiring MWSP water right holders to exercise rights solely to avoid relinquishment, even when such water is not needed, “active compliance” is contrary to the dual purposes of the MWL to provide certainty to municipal water suppliers and to advance water conservation.

5. The PCHB’s Decision.

In this case, the PCHB deferred to Ecology’s interpretation that the definition of MWSP requires “actual beneficial use of the water” at least

once every five years in conformity with the other requirements of the definition. AR 000598.

B. Ecology’s “Active Compliance” Policy Is an Untenable Interpretation of MWSP.

The “active compliance” interpretation is untenable: 1) it contradicts Supreme Court precedent, 2) undermines the intent of the Legislature, 3) is contrary to the plain meaning of the definition of MWSP, and 4) violates tenets of statutory interpretation.

1. “Active Compliance” Contradicts Supreme Court Precedent.

“Active compliance” contradicts the Supreme Court’s statements in *Lummi*. Ecology and the PCHB describe “active compliance” as a continuing requirement of MWSP status, such that a MWSP water right would relinquish if it is not actually used at least once every five years. Resp’t Br. at 21; AR 000594. Thus, Ecology’s “active compliance” interpretation posits that an established MWSP water right is subject to relinquishment. The Supreme Court stated the opposite in concluding that MWSP water rights “are not subject to relinquishment.” *Lummi*, 170 Wn.2d at 252; *see also Cornelius v. Dep’t of Ecology*, 182 Wn.2d 574, 588, 344 P.3d 199 (2015) (MWSP water rights are “immune” from relinquishment).

2. “Active Compliance” Is Directly Contrary to the Legislative Intent Behind the MWL.

A court’s fundamental objective in construing a statute “is to ascertain and carry out the Legislature’s intent.” *Dep’t of Ecology v. Campbell &*

Gwinn, L.L.C., 146 Wn.2d 1, 9, 43 P.3d 4 (2002). By its title, the MWL is “[a]n act relating to certainty and flexibility of municipal water rights and efficient use of water.” Laws of 2003, 1st Spec. Sess., ch. 5. The title of a legislative act is a source of legislative intent. *Covell v. City of Seattle*, 127 Wn.2d 874, 887-88, 905 P.2d 324 (1995). As discussed above, the history of the MWL further demonstrates that the MWL was enacted to provide certainty to MWSP water rights. The Legislature declared any pumps and pipes certificate to be a “right in good standing” and solidified the class of rights that is not subject to relinquishment pursuant to the MWSP exception. It is in this context that the definition of MWSP must be interpreted.

The “active compliance” interpretation is inconsistent with the MWL’s legislative intent because it undermines the intended certainty for MWSP water rights by subjecting water rights claimed for MWSP, previously protected from relinquishment, to loss. Under Ecology’s policy, MWSP water rights issued on the basis of system capacity would be subject to relinquishment despite the Legislature’s declaration that such rights are “rights in good standing.” RCW 90.03.330(3). It also forces water right holders to use MWSP water rights, regardless of need, even though the MWL seeks increased water conservation and efficiency.

Moreover, “active compliance” is fundamentally incompatible with the Legislature’s repeated pronouncements that MWSP water rights may be unused. *See* RCW 90.82.048(1)(“the planned future use of existing water rights for [MWSP], as defined in RCW 90.03.015, that are inchoate”);

RCW 90.82.048(2) (“water rights for [MWSP] not currently in use”); RCW 90.03.570(1) (contemplating change to an “unperfected surface water right for [MWSP]”). Ecology and the PCHB ignore these statutory provisions from the 2003 MWL.

3. “Active Compliance” is Contrary to the Plain Meaning of MWSP.

“Active Compliance” is contrary to the plain meaning of the definition of MWSP. “[I]f the statute’s meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent.” *Campbell & Gwinn*, 146 Wn.2d at 9-10. The definition of MWSP is plain on its face. The Supreme Court has twice examined the definition of MWSP without identifying any ambiguity. *Lummi*, 170 Wn.2d at 251; *Cornelius*, 182 Wn.2d at 591.

The definition of MWSP does not state, or even imply, “active compliance” or any actual use is required to meet this definition, much less actual use every five years as Ecology’s interpretation would require. Indeed, in *Cornelius* and *Lummi*, the Supreme Court—faced with the argument that “active compliance” should be required—applied the definition without any reference to or reliance upon “active compliance.”

Nevertheless, Ecology asserts, and the PCHB held, that “active compliance” is a *requirement* of the definition. AR 000599. Ecology relies on the phrase “beneficial use” in the definition to support its “active compliance” interpretation. Resp’t Br. at 22. Ecology’s interpretation, however, is contrary to the plain meaning of “beneficial use.” Ecology

erroneously converts the phrase “beneficial use” from a noun into a verb to imply that actual use or action on the part of the water right holder is a requirement of the definition. If the Legislature had intended the definition to require action, it would have used the adverb and verb form: “to beneficially use.” Instead, in the MWSP definition, “beneficial” is an adjective and “use” is a noun, and the phrase is preceded by “a,” an indefinite article, which only precedes nouns. Together, “beneficial use” describes and identifies MWSP as types of beneficial uses.

Ecology’s briefing before the PCHB, and the PCHB’s decision, also assert that the definition requires present use because the definition is “in the present tense (*i.e.* it ‘means a beneficial use of water...’).” AR 000595; *see also* AR 000333. Use of the present tense in the definition does not support a requirement of present use. The RCW is replete with definitions that use the term “means,” but do not imply or impose a continuing obligation to comply with such definition. Indeed, the Washington Bill Drafting Guide advises the Legislature to use the term “means” in all definitions which are meant to be exclusive. Office of the Code Reviser, Wash. Bill Drafting Guide, Part II(11)(h) (2017); Office of the Code Reviser, Wash. Bill Drafting Guide, Part II(10)(h) (2003); *State, Dep’t of Labor & Indus. v. Slauch*, 177 Wn. App. 439, 448, 312 P.3d 676 (Ct. App. Div. III 2013) (applying legislative drafting guidelines to statutory interpretation), *review denied*, 180 Wn.2d. 1007 (2014).

4. “Active Compliance” Violates Tenets of Statutory Construction.

Ecology usurps the role of the Legislature through its “active compliance” interpretation, which would amend the 2003 definition of MWSP and portions of the 1967 relinquishment statute.

i) *Ecology’s Interpretation Adds Words to the Statute.*

Ecology’s interpretation improperly adds words to the statute. A “court cannot read into a statute that which it may believe the legislature has omitted, be it an intentional or inadvertent omission.” *Auto. Drivers & Demonstrators Union Local No. 882 v. Dep’t of Ret. Sys.*, 92 Wn.2d 415, 421, 598 P.2d 379 (1979) (citations omitted); *see also Lockner v. Pierce Cty.*, No. 94643-4, slip op. at 7 (Wash. Sup. Ct. Apr. 19, 2018) (“this court will not ‘read into a statute matters that are not in it.’”). Nevertheless, Ecology asks this Court to add words to the statute, such as “actual use” or an action verb (“put to beneficial use”), to make “active compliance” a requirement of the definition.

Ecology has previously asked the Supreme Court to adopt interpretations that add words to the plain language of the statute. The Court has refused to do so. In *Pend Oreille*, Ecology argued that a water right change application could be denied pursuant to RCW 90.03.380 if the change was not in the “public interest.” 146 Wn.2d at 795. The Court rejected this interpretation, finding that the statute was clear as to what requirements must be met to obtain a change in point of diversion, and “consideration of the public interest is not required.” *Id.* at 796. Here, as

in *Pend Oreille*, the statute is clear as to requirements: “active compliance” or “actual use” is simply not required.

ii) *The Legislature Knows How to Require Actual Use, But Did Not in the Definition of MWSP.*

Not only would Ecology’s interpretation require the Court to add words to the statute, it would do so where the Legislature has clearly demonstrated that it knows how to draft a provision to require actual use. *Pend Oreille*, again, is instructive. In that case, the Supreme Court found that it would be contrary to principles of statutory construction to require that a surface water right change application meet the “public interest” standard, where the ground water right statute expressly required that a change application meet the public interest standard, but the surface water statute did not. *Pend Oreille*, 146 Wn.2d at 796-97. The Court explained that the “presence of the ‘public interest’ requirement in these other statutes and the omission of the requirement in RCW 90.03.380 indicate a difference in legislative intent.” *Id.* at 797 (citations omitted). Just as in *Pend Oreille*, the presence of an “actual use” requirement in other sections of the Water Code and the omission of “actual use” in the definition of MWSP, indicates a difference in legislative intent.

The Legislature knew how to require actual use, but did not do so in the definition of MWSP. For example, the Legislature used the phrase “actual beneficial use” in RCW 90.03.330(3) and (4), requiring that certificates for water rights issued after September 9, 2003 be issued only after water is put to “actual beneficial use.” Similarly, where the

Legislature contemplated *action* on the part of the water right holder with respect to beneficial use, it did so through the use of verbs. *See, e.g.*, RCW 90.03.140 (“*put to beneficial use*”); RCW 90.03.320 (“the *application of the water to the beneficial use prescribed in the permit*”); RCW 90.03.370 (“the party or parties proposing to *apply to a beneficial use the water*”)(emphasis added).

iii) “*Active Compliance*” *Vitiates the Municipal Exception to Relinquishment.*

“Active compliance” must be rejected because it vitiates and renders meaningless the MWSP exception to relinquishment. *See State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (statutes should not be read to render a portion meaningless or superfluous). “Active compliance” requires the very thing—actual use—that the exception to relinquishment expressly excuses. Under Ecology’s “active compliance” interpretation, the MWSP exception can never function: either the water right will actually be used within a five-year period, and thus will not be subject to relinquishment, *or* it will not qualify for the MWSP exception to relinquishment because it has not been actually used in the five-year period and thus does not “actively comply” with the definition of MWSP.³ The MWSP relinquishment exception cannot be interpreted so narrowly as to not exist.

³ The WWUC agrees with Ecology that the planning provision of POL-2030 is not involved in the case or relevant to issues before the Court. *See Resp’t Br.* at 21 n.14, 27 n.16. The planning provision is not germane to this Court’s decision as to whether the PCHB correctly interpreted the MWL as requiring “active compliance.”

5. The Relinquishment Provisions Do Not Provide a Legal Basis for an “Active Compliance” Requirement.

Ecology asserts that “active compliance” is supported by, and best effectuates, the purpose of the relinquishment provisions to return water appropriations not being beneficially used to the state. Resp’t Br. at 22. In particular, Ecology argues that MWSP must be narrowly construed as an exception to the relinquishment provision. *Id.* at 20, 25. This argument fails for the following reasons.

i) *The Definition of MWSP Must be Construed In the Context of the MWL.*

It is improper to interpret the definition of MWSP based solely on its use in the 1967 relinquishment provisions. MWSP was defined in the MWL, not in the 1967 Act, and the term MWSP is used throughout the MWL and applies statewide to thousands of water rights held by water utilities. The MWL is a significant and independent legislative act. It totals 20 pages in length and enacts or amends numerous provisions of the Water Code. *See* Laws of 2003, 1st Spec. Sess., ch. 5. As explained above, the MWL was adopted to provide certainty regarding the continuing validity of an entire class of water rights—certainty that Ecology’s and the PCHB’s interpretation would repeal. The interpretation of MWSP must, therefore, be informed by the legislative intent of the MWL.

To carry out the intent of the Legislature, the court assesses the plain meaning of a statute “viewing the words of a particular provision in the context of the statute in which they are found, together with related

statutory provisions, and the statutory scheme as a whole.” *Burns v. City of Seattle*, 161 Wn.2d 129, 140, 164 P.3d 475 (2007) (citing *Campbell & Gwinn*, 146 Wn.2d at 11). In determining, legislative intent, the court considers the sequence of all statutes relating to the same subject matter. *Ravsten v. Dep't of Labor & Indus.*, 108 Wn. 2d 143, 150, 736 P.2d 265 (1987); *see also Tunstall v. Bergeson*, 141 Wn.2d 201, 211, 5 P.3d 691 (2000) (“...courts generally give preference to the more specific and more recently enacted statute.”). The MWL, enacted 36 years after the relinquishment provisions, is the Legislature’s most recent enactment pertaining to MWSP water rights and the statute in which MWSP is defined. Ecology makes no attempt to reconcile its interpretation with the MWL.

ii) *Narrow Construction Principles do not Apply to the Definition of MWSP.*

Application of narrow statutory construction principles to the definition of MWSP is not appropriate because MWSP is unambiguously defined. In arguing for narrow construction, Ecology relies on a decision that interprets a different exception to relinquishment that, unlike MWSP, was not defined in a later statute. In *R.D. Merrill Co. v. Pollution Control Hearings Bd.*, 137 Wn.2d 118, 969 P.2d 458 (1999), the Supreme Court interpreted the “determined future development” exception to relinquishment. The Supreme Court applied the statutory construction principle that “*generally* exceptions to statutory provisions are narrowly construed,” *id.* at 140 (emphasis added), but only after noting that “[t]he

statute does not define ‘determined future development.’” *Id.* at 142. After the adoption of the MWL, the analysis in *R.D. Merrill* is no longer applicable to the MWSP exception. Because the Legislature unambiguously defined MWSP, there is no need to resort to general statutory construction principles as there was in *R.D. Merrill*. Indeed, the “court does not subject an unambiguous statute to statutory construction.” *Lockner v. Pierce Cty.*, No. 94643-4, slip op. at 7 (Wash. Sup. Ct. Apr. 19, 2018).

iii) Active Compliance is Contrary to the Relinquishment Provisions.

Even if this Court were to accept Ecology’s assertion that MWSP must be interpreted solely to effectuate the intent of the relinquishment provisions, the relinquishment provisions undermine Ecology’s “active compliance” theory. The 1967 Act excepts from relinquishment any water rights “claimed” for MWSP. RCW 90.14.140(2)(d). As other sections of the Water Code make apparent, to be “claimed for” a use does not require actual use. Uncertainty as to actual use is inherent in the word “claim.” *See, e.g.*, RCW 90.03.140(1)(g) (an adjudication claim must identify “the land upon which the water as presently claimed has been, or may be, put to beneficial use.”). Therefore, contrary to Ecology’s “active compliance” policy, water rights *claimed* for such purposes and pursued with reasonable diligence are exempt from relinquishment. Moreover, where the Legislature intended that an exception to relinquishment apply only to water rights that are not simply “claimed,” but also acted upon, it did so

explicitly. For example, one exception to relinquishment applies if the water right is “claimed for power development purposes under chapter 90.16 RCW and annual license fees are paid...” RCW 90.14.140(2)(a) (emphasis added).

Ecology asserts that this Court rejected a broad interpretation of “claimed for” in *City of Union Gap v. Department of Ecology*, 148 Wn. App. 519, 523, 195 P.3d 580 (Ct. App. Div. III 2008). Ecology overextends the holding in that case. *Union Gap* presented the question of whether an industrial water right owned by one entity could rely on the MWSP exception to relinquishment merely by virtue of a potential sale of such right to another entity who contemplated municipal use. Faced with this narrow set of facts, the court only limited the meaning of “claimed for” to require that the water right be owned by the person claiming it. *Id.* at 532. Therefore, *Union Gap* is inapposite.

C. The PCHB Applied Legally Incorrect Presumptions that Led to An Absurd and Inconsistent Outcome.

The PCHB made numerous errors of law in adopting “active compliance,” each of which requires remand of the PCHB’s decision. RCW 34.05.570(3)(d).

1. The PCHB Misapplied Rules of Statutory Interpretation to Construe the Plain Meaning of the Statute.

The PCHB erred as a matter of law by ignoring rules of statutory interpretation adopted by the Supreme Court. In *Campbell & Gwinn*, the Supreme Court considered varying approaches to interpreting the plain

meaning of a statute and adopted an approach, under which the plain meaning is “still derived from what the Legislature has said in its enactments, but that meaning is discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question.” 146 Wn.2d at 11. The PCHB never attempted to apply *Campbell & Gwinn* principles or to place the definition in context of the statutory scheme.

Moreover, the PCHB failed to consider that the term MWSP appears in multiple places throughout the Water Code. “A term appearing in several places in a statutory text is generally read the same way each time it appears.” *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994); *see also Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 573 (1995) (refusing to “accept the conclusion that [a] single operative word means one thing in one section of the Act and something quite different in another”). The PCHB failed to consider whether “active compliance” is harmonious with how MWSP is used in other parts of the Water Code.

Instead, the PCHB relied solely on one purpose of the 1967 Act to support its interpretation that “active compliance” is a requirement of the definition of MWSP, finding that MWSP must be construed narrowly because “expansion of the definition of municipal water right purposes would be contrary to the Legislative intent that water that is not used should be available to other appropriators.” AR 000599. In other words, the PCHB sought to attain maximum relinquishment without updating its analysis to account for the Legislative intent of the MWL.

The PCHB cannot subvert the plain meaning of the 2003 MWL to a general policy goal of the 1967 Act. In addition, the PCHB decision takes no account of the Legislature’s goals and intent in the adoption of the MWL, nor for compromises made in drafting the MWL. The United States Supreme Court has held that: “[i]nnvocation of the ‘plain purpose’ of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent.” *Bd. of Governors of Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 374 (1986).

Maximizing forfeiture of unused water rights and limiting the use of MWSP status to the greatest extent possible, as the PCHB did, frustrates the legislative intent of both the 2003 MWL and the 1967 relinquishment provisions. First, it undermines the certainty and flexibility that the Legislature intended to provide to MWSP water rights holders in adopting the MWL. Second, the PCHB’s analysis fails to account for the Legislature’s recognition in the 1967 Act—embodied in the exception in the relinquishment provisions—of the need to treat MWSP water rights uniquely.

2. The PCHB Erred When it Deferred to Ecology.

The PCHB erred as a matter of law when it deferred to Ecology’s interpretation without any independent evaluation of the meaning of the term MWSP. Had the PCHB engaged in this required analysis, the PCHB would have found that “active compliance” lacks the power of persuasion, and is in fact, wrong. First, an agency’s interpretation of an unambiguous

statute is not entitled to deference. *See City of Pasco v. Pub. Emp't Relations Comm'n*, 119 Wn.2d 504, 507, 833 P.2d 381 (1992). The PCHB found that the definition of MWSP was ambiguous based solely on the phrase "residential use of water for a nonresidential population" in the definition. AR 000603. Ecology's basis for asserting that "active compliance" is a requirement derives from the phrase "beneficial use" in the definition, Resp't Br. at 22, and is unrelated to the residential use clause. Any ambiguity relating to the meaning of "residential use" cannot result in the assumption that every other part of the definition is ambiguous. Therefore, the PCHB erred in deferring to Ecology's interpretation of the unambiguous phrase "beneficial use."

Second, Ecology was not entitled to deference because "active compliance" conflicts with the statute. "No deference is to be accorded a policy that is wrong." *White v. Salvation Army*, 118 Wn. App. 272, 277, 75 P.3d 990 (Ct. App. Div. I 2003), *review denied*, 118 Wn.2d 1028 (2004); *see also Port of Seattle v. Pollution Control Hr'gs Bd.*, 151 Wn. 2d 568, 593, 90 P.3d 659 (2004).

Third, the PCHB erred by deferring to POL-2030 as a "policy on a technical matter within Ecology's area of expertise." AR 000598. Although courts may give deference to an agency on a technical matter within the competence and special skills of the agency, *Port of Seattle*, 151 Wn. 2d at 595, the interpretation of a statutory definition is not a technical matter and requires no specialized scientific understanding.

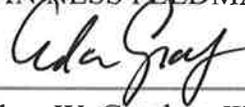
Fourth, the PCHB erred as a matter of law when it deferred to POL-2030 as a “formal written policy.” AR 000598. Ecology’s POL-2030 is “advisory only”, RCW 34.05.230(1),⁴ and such guidance documents “are not binding on the courts and are afforded no deference other than the power of persuasion.” *Ass'n of Wash. Bus. v. State of Wash., Dep't of Revenue*, 155 Wn.2d 430, 447, 120 P.3d 46 (2005). Accordingly, POL-2030 is not entitled to any deference.⁵

VII. CONCLUSION

The WWUC urges the Court to reverse on Issue 1; to remand to the PCHB for further proceedings on Appellant’s application; and to direct the PCHB to apply the plain text of the MWSP definition in the context of the entire statutory scheme relating to municipal water rights without “active compliance.”

Respectfully submitted this 3 day of May, 2018.

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⁴ Although issued more than 10 years ago, Ecology has never formalized POL-2030 as a rule or complied with the requirements of the Administrative Procedure Act. Pursuant to RCW 34.05.230, “an agency is encouraged to convert long-standing interpretive and policy statements into rules.”

⁵ Although the PCHB finds that active compliance is a “requirement,” such an interpretation converts Ecology’s policy statement into an unlawful rule.

CERTIFICATE OF SERVICE

I, Marya A. Pirak, declare as follows:

That I am over the age of 18 years, not a party to this action, and competent to be a witness herein;

That I, as a Paralegal in the office of Van Ness Feldman LLP, caused true and correct copies of the following documents to be delivered as set forth below:

1. Washington Water Utilities Council Amicus Curiae Brief; and this
2. Certificate of Service;

and that on May 3, 2018, I caused the foregoing documents to be e-filed and e-served electronically through Washington State's Appellate Court Portal Filing System as follows:

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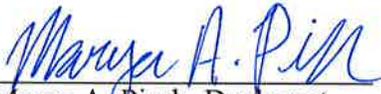
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I certify under penalty of perjury under the laws of the State of
Washington that the foregoing is true and correct.

EXECUTED at Seattle, Washington on this 3rd day of May, 2018.


Marya A. Pirak, Declarant