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**POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON**

FRIENDS OF TOPPENISH CREEK,

Appellant,

v.

LOWER YAKIMA VALLEY GWMA  
ADVISORY COMMITTEE and  
STATE OF WASHINGTON,  
DEPARTMENT OF ECOLOGY,

Respondents.

PCHB No. 19-060

RESPONDENT STATE OF  
WASHINGTON, DEPARTMENT OF  
ECOLOGY'S HEARING BRIEF

**I. INTRODUCTION**

The Department of Ecology's decision to certify the Lower Yakima Valley Groundwater Management Program pursuant to WAC 173-100-120(3) should be affirmed. The Program is fully consistent with the applicable statutes and regulations. In fact, the Program is a major accomplishment—it represents the culmination of thousands of hours of work by dozens of interested stakeholders over a period of seven years. Its recommendations are supported by the consensus of the group—itsself a major accomplishment—and by the underlying scientific work undertaken by the group over the years. Once implemented, the Program will help improve groundwater quality in the Lower Yakima Valley.

The complaints raised by the Friends of Toppenish Creek in this appeal are misguided. The Friends do not support their complaints with any independent scientific evidence, and instead rely on a misunderstanding of the process and a misunderstanding of the applicable

1 law. The Friends fail to recognize the significant accomplishments and benefits of the  
2 Program. This is unfortunate, because if the Board decertifies the Program in this appeal, the  
3 benefits of the Program may be lost, and groundwater quality in the Lower Yakima Valley may  
4 suffer as a result.

## 5 II. STATEMENT OF FACTS

6 Yakima County petitioned Ecology to establish the Lower Yakima County  
7 Groundwater Management Area in 2012 in order to address the problem of nitrates in  
8 groundwater. Ecology granted the petition, established the Groundwater Advisory Committee,  
9 and appointed Yakima County as the lead to develop the management program. *See Ex. R-2.*  
10 This led to a lengthy process involving dozens of stakeholders, numerous subcommittees,  
11 hundreds of meetings, various scientific investigations and reports, and ultimately culminated  
12 in the final Program that is the subject of this appeal. *See Ex. R-9 (Vol. I at iii–iv)* (identifying  
13 members of the Advisory Committee); *Ex. R-12* (identifying workgroups and number of  
14 meetings).

15 Testimony at trial will establish that the development of the Program was an arduous,  
16 time-consuming process. Stakeholders involved had divergent perspectives and often  
17 disagreed. Meetings went on for years while the parties discussed options and underlying  
18 scientific work was completed. Despite this, the Advisory Committee completed a number of  
19 important interim steps during the development process. These are documented in Volume III  
20 of the Program and include a high risk well assessment survey, deep soil sampling, installation  
21 of the monitoring well network, a nitrogen availability assessment, and education and outreach.  
22 *See Ex. R-9 (Vol. III at 3–7)*. Finally, after seven years of study, debate, and discussion, the  
23 parties reached consensus on the final Program document.

24 The Program includes a description of the Management Area, its hydrology and  
25 geology, it identifies the major sources of nitrates in Area groundwater, and it includes a list of  
26 64 recommended actions to address the problem. *See Ex. R-9 (Vol. I)*. The recommended

1 actions address each of the identified sources of nitrates. The Program also includes a network  
2 of monitoring wells that will allow Ecology and the County to monitor progress toward  
3 achieving the Program’s goal of reducing nitrates in groundwater to below the state drinking  
4 water standard. *See* Ex. R-7 (describing monitoring network).

5       Importantly, the Program is a voluntary, consensus-based document. The Advisory  
6 Committee agreed to each of the 64 recommended actions by consensus from a list of over 300  
7 actions that were considered. The recommended actions include public education and outreach  
8 efforts, best management practices, commitments to seek funding to conduct pilot studies and  
9 collect data, and a host of other actions. *See* Ex. R-9 (Vol. I at 87–98). Testimony at trial will  
10 show that achieving consensus on such a broad suite of actions is almost unprecedented. Taken  
11 together, the recommended actions will, over time, help to improve groundwater quality in the  
12 Lower Yakima Valley.

13       The Committee, also on a consensus vote, sent the Program to Ecology for certification.  
14 Ecology took public comment on the Program and issued findings regarding its consistency  
15 with the intent of the regulations. Ex. R-10. Among other things, Ecology found that “[t]he 64  
16 recommendations approved by the GWAC provide a technically sound set of best management  
17 practices, education and outreach efforts, technology based actions, and inter-agency  
18 coordination initiatives to begin addressing the reduction of nitrate in groundwater within the  
19 Lower Yakima Valley Groundwater Management Area (GWMA).” Ecology also concluded  
20 that that the Program was consistent with the intent of RCW 90.44.400 and WAC 173-100.  
21 *Id.* at 1–2.

22       Based on these findings, Ecology certified the Program subject to three conditions.  
23 Ex. R-6. The conditions required the Executive Committee to (1) identify a new lead agency to  
24 implement the Program (because Yakima County at that point had withdrawn as lead),  
25 (2) submit a prioritized implementation schedule, and (3) seek funding and opportunities to  
26 provide immediate assistance to residents within the Groundwater Management Area whose

1 drinking water nitrate levels are consistently above the safe drinking water standard. *Id.* at 2.  
2 These conditions bolster still further the Program’s benefits in terms of protecting water  
3 quality.

### 4 III. AUTHORITY AND ARGUMENT

5 Under WAC 173-100-120(3), Ecology is required to certify a groundwater  
6 management program if it is “consistent with the intent of this chapter.” According to  
7 WAC 173-100-010, the intent of the chapter is to “forge a partnership between a diversity of  
8 local, state, tribal and federal interests in cooperatively protecting the state’s groundwater  
9 resources.” The Program here does just that—it represents a commitment by a diverse group of  
10 stakeholders to undertake a variety of coordinated actions to protect and improve the  
11 groundwater quality in the management area. Thus, Ecology’s certification should be affirmed.

12 In this appeal, the Friends of Toppenish Creek challenge the Program on several  
13 grounds. Initially, they raised ten issues, but the Board dismissed five of these on summary  
14 judgment. The issues that remain may be summarized as follows:

15 (1) Issues 2 and 3: Does the Program comply with RCW 94.44.410(1)(d) and  
16 (1)(e), which relate to water supply needs and water resource management policies?

17 (2) Issue 8: Does the Program violate the antidegradation policy in WAC 173-200-  
18 030 by allowing the continued pollution of groundwater?

19 (3) Issue 9: Did Ecology exceed its authority by certifying the Program?

20 (4) Issue 10: Is the Department of Agriculture authorized to implement  
21 recommended action 41, which involves identifying and supporting research and investment  
22 opportunities regarding management of fertilizers and manure?

23 For the reasons stated below, the Board should reject each of these contentions.

#### 24 A. The Program Adequately Addresses Water Resource Supply and Management

25 At the outset, Ecology contends that RCW 90.44.410(1)(d) and 1(e) do not apply to the  
26 current Program. For the reasons stated in Ecology’s summary judgment motion, the

1 groundwater management statutes allow flexibility in the adoption of groundwater  
2 management programs—they do not contain hard and fast mandates. Ecology’s implementing  
3 regulation, WAC 173-100-100, explicitly states this principle: “[t]he program for each  
4 groundwater management area will be tailored to the specific conditions of the area.”

5 In this case, the County, Ecology, and the other stakeholders tailored the Program to  
6 address water quality, not water quantity. The stakeholders developed the Program to address  
7 the problem of nitrates in groundwater; they did not develop it to address future water supply  
8 needs or concerns, which is a very different subject. Addressing future water supply needs  
9 involves a different set of scientific issues and problems that have no direct bearing on  
10 improving existing groundwater quality. For this reason alone, the Board should dismiss this  
11 issue. *See generally, Cntr. for Env’tl. Law and Policy v. Dep’t of Ecology*, No. 97684-8,  
12 2020 WL 4516804, at \*6 (Wash. S. Ct. August 6, 2020) (word “shall” in a statute does not  
13 necessarily establish a mandatory element, if contrary intent is apparent).<sup>1</sup>

14 In any case, the evidence at hearing will show that the Program does address these  
15 topics, although perhaps not at the level of detail that the Friends would like. Volume I of the  
16 Program contains an extensive discussion of the hydrogeology of the Management Area,  
17 including a description of the aquifers, groundwater recharge rates, groundwater flow, soil  
18 types, hydraulic conductivity, and precipitation. *See Ex. R-9* (Vol. I at 35–50). Volume I also  
19 discusses land and water use in the area, zoning, agricultural practices, irrigation methods and  
20 population. *Id.* at 50–65; *see also R-9* (Vol. II, App. D at 41) (discussing aquifer recharge).

21 Furthermore, the Program incorporates by reference earlier studies addressing water  
22 supply issues. These include, for example, a 2016 study by Yakima County that describes in  
23 detail land and water use in the area and includes mitigation strategies to address future water

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25 <sup>1</sup> Evidence at hearing will show that the Legislature originally enacted the groundwater management  
26 statutes to address water supply issues, not water quality. Subsequently, the Legislature amended the statutes to  
include water quality. When the Legislature did so, it left intact the pre-existing provisions relating to water  
quantity but this does not mean the Legislature intended those provisions to apply to water quality focused  
programs such as this one.

1 supply needs. *See* Ex. R-14. The Program also references in Volume III a 2010 preliminary  
2 assessment by Ecology that discussed the hydrogeology of the area, and land and water use.  
3 *See* R-9 (Vol. III at 3); *see also* Vol. II, App. A at 1–2 (describing the preliminary assessment).

4 In short, the Program contains or references extensive information regarding water  
5 supply issues and thereby complies with the intent of the statute. The Friends identify no  
6 benefit to be gained by delaying implementation of the Program, potentially for years, while  
7 more detail is added regarding water supply needs.

8 **B. The Program Does Not Violate the Antidegradation Policy**

9 The Friends’ claim that the Program violates the antidegradation policy is mistaken.  
10 The Program is fully consistent with that policy because its purpose is to protect and improve  
11 water quality, not degrade it.

12 The antidegradation policy in the state water quality standards ensures that discharges  
13 to state waters do not degrade background water quality. *See* Ex. R-13 (Ecology’s  
14 Implementation Guidance for the Groundwater Quality Standards, ch. 3). The primary means  
15 by which Ecology implements the policy is through permits. Although the policy also applies  
16 to unpermitted activities, Ecology has discretion to determine how to apply the policy to such  
17 activities. *See* Ex. R-13, § 3.3.2. With respect to such unpermitted activities, “Ecology may  
18 determine the appropriate ground water protection provisions . . . to provide a reasonable level  
19 of assurance that the intent of the antidegradation policy will be met.” *Id.*

20 In this case, the Program itself does not authorize or permit any discharge into state  
21 waters. It is a planning document that identifies various voluntary actions that may be  
22 undertaken to improve or protect groundwater quality. As a result, the antidegradation policy  
23 does not directly apply to the Program. To the extent that activities contemplated by the  
24 Program involve a discharge to state waters, they would be required to comply with the  
25 antidegradation policy at the time of the discharge.

1           Nevertheless, Ecology and the other stakeholders effectively complied with the intent  
2 of the policy in developing the Program because it is intended to improve, and not degrade,  
3 existing water quality. The Program includes best management practices, guidance, and  
4 policies intended to protect water quality, just as the Implementation Guidance directs. The  
5 Friends have no scientific evidence to show that the Program itself will cause degradation of  
6 groundwater quality—to the contrary, the Program will improve water quality.

7           The Friends' complaint in this regard is, apparently, that the Program does not do  
8 enough to protect water quality. Their complaint is really with the underlying activities that the  
9 Program describes, rather than the Program itself. However, the Program obviously cannot  
10 forbid or prevent otherwise legal activities from occurring, or cut off permitted discharges. The  
11 Friends' complaints are misguided and should be rejected.

12 **C. Ecology Did Not Exceed Its Authority by Certifying the Program**

13           As discussed above, Ecology certified the Program as consistent with the intent of the  
14 groundwater management regulations pursuant to WAC 173-100-120(3). In contending that  
15 Ecology exceeded its authority, the Friends appear to be simply reiterating their other claims,  
16 i.e., that the Program does not comply with other statutory provisions. For the reasons stated  
17 herein, and in the Board's summary judgment ruling, the Friends' contention that the Program  
18 does not comply with the statute have no merit. Ecology did not exceed its authority in  
19 approving the Program. Thus, this claim should be rejected.

20 **D. Recommendation No. 41 Is Appropriate**

21           Last, the Friends challenge recommendation 41, which requires the Department of  
22 Agriculture to identify and support research and investment opportunities regarding the  
23 management of fertilizers and manure. Ex. R-9 (Vol. I at 94). The Friends contend the  
24 Department of Agriculture has no authority to undertake this effort.

25           It is unclear why the Friends make this contention. Identifying and supporting  
26 alternative methods of fertilizer and manure management is a positive undertaking that may

1 benefit water quality. The Department of Agriculture was a stakeholder in the development of  
2 the Program and presumably it would not have supported this recommendation if it was unable  
3 to implement it. Moreover, even if the Friends are correct, the Program as a whole is still valid.

4 In their comments on the Program, the Friends asserted that the Department of  
5 Agriculture lacked expertise to undertake this recommendation, that they had not acted in good  
6 faith during the process, and that they had committed various other errors. The Friends did not  
7 assert that the Department lacked authority to carry out the recommendation. *See* Ex. R-8  
8 (Response to Comments, Letter from Friends of Toppenish Creek).

9 This contention appears to be more of a generalized grievance against the Department  
10 of Agriculture rather than a legal claim. Because, however, the purpose of this appeal is not to  
11 air or resolve every such grievance, but instead is to address the specific legal claims raised,  
12 this contention should be rejected.

#### 13 IV. CONCLUSION

14 For the reasons stated above, the Board should affirm Ecology's certification of the  
15 Program. The Program is an extraordinary accomplishment that contains a wealth of  
16 information, scientific work, and recommended actions that will help improve groundwater  
17 quality in the Lower Yakima Valley. The complaints raised by the Friends are, ironically,  
18 inimical to that goal, and they should be rejected.

19 DATED this 18th day of August, 2020.

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