

Washington State Pollution Control Hearings Board

PCHB 19-060

Friends of Toppenish Creek versus Washington State Department of
Ecology and the Lower Yakima Valley Groundwater Management Area
Advisory Committee

Friends of Toppenish Creek Opening Brief

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Table of Authorities

Cases

- ARD v. Shelton*. Western WA Growth Management Hearings Board, No. 98-2-0005 (1998)
- Cnty. Ass'n for Restoration of the Env't (CARE) v. Cow Palace, LLC*, 80 F. Supp. 3d 1180 (E.D. Wash. 2015)
- Cnty. Ass'n for Restoration of the Env't (CARE) and Center for Food Safety v. George DeRuyter & Son Dairy and D&A Dairy*, No. 1:13-CV-3017-TOR Order Finding Noncompliance, Setting Briefing on Sanctions and Full Compliance
- Ecology v. Theodoratus*, 135 Wn 2nd 582, 600, 957 P.2d 1241 (1998)
- Hubbard, et al. v. Ecology*, PCHB Nos. 93-73 & 103 (1995)
- Pannell v. Thompson*, 91 Wn. 2nd 591, 601, 589 P 2d 1235 (1979)
- Pend Oreille PUD No. 1 v. Ecology*, PCHB Nos. 97-177, 98-043 & 98-044 (2000)
- Postema v. PCHB*, 142 Wn 2d 68, 11 P.3d 726 (2000)
- Public Util. Dist. No. 1 of Pend Oreille County v. Ecology*, 146 Wn.2d 778, 51 P.3d 744 (2002)
- PUD No. 1 of Jefferson County et al. v. Washington Department of Ecology et al.* No. 92-1911, 511 U.S. 700 (1994)
- Rettkowski v. Ecology*, 122 Wn.2d 219, 858 P.2d 232 (1993).
- Rosemere Neighborhood Association, Columbia Riverkeeper, and Northwest Environmental Defense Center v. Ecology and Clark County and Building Industry Association of Clark County, Intervenor.* PCHB No. 10-013 (2011)
- Stone v. Chelan County Sheriff's Dep't*, 110 Wn.2d 806, 810, 756 P.2d 736 (1988)

Statutes

Chapter 34.05 RCW ADMINISTRATIVE PROCEDURE ACT

Chapter 36.70A RCW GROWTH MANAGEMENT—PLANNING BY SELECTED
COUNTIES AND CITIES

Chapter 43.23 RCW DEPARTMENT OF AGRICULTURE

Chapter 43.21A RCW DEPARTMENT OF ECOLOGY

Chapter 43.21B RCW ENVIRONMENTAL AND LAND USE HEARINGS OFFICE—
POLLUTION CONTROL HEARINGS BOARD

Chapter 70.95 RCW SOLID WASTE MANAGEMENT—REDUCTION AND RECYCLING

Chapter 90.44 RCW REGULATION OF PUBLIC GROUNDWATERS

Chapter 90.48 RCW WATER POLLUTION CONTROL

Chapter 90.54 RCW WATER RESOURCES ACT OF 1971

Chapter 90.82 RCW WATERSHED PLANNING

Chapter 90.64 RCW DAIRY NUTRIENT MANAGEMENT

Chapter 173-100 WAC GROUNDWATER MANAGEMENT AREAS AND PROGRAMS

Chapter 173-200 WAC WATER QUALITY STANDARDS FOR GROUNDWATERS OF THE
STATE OF WASHINGTON

Chapter 173-216 WAC STATE WASTE DISCHARGE PERMIT PROGRAM

Chapter 173-218 WAC UNDERGROUND INJECTION CONTROL PROGRAM

Chapter 173-350 WAC SOLID WASTE HANDLING STANDARDS

Chapter 371-08 WAC PRACTICE AND PROCEDURE

Chapter 365-195 WAC GROWTH MANAGEMENT ACT—BEST AVAILABLE SCIENCE

I. Introduction

The Lower Yakima Valley Groundwater Management Area Program (LYV GWMA Program) fails to reduce nitrates in groundwater because the Program ignores the largest sources of nitrate pollution in the LYV:

1. Over application of manure to cropland, and
2. Leakage from aging manure lagoons that do not meet today's safety guidelines.

The Friends of Toppenish Creek (FOTC) ask the WA State Pollution Control Hearings Board (PCHB) to order the WA State Dept. of Ecology (Ecology) to withdraw certification of the Program and to take meaningful action to address groundwater pollution in this area. All stakeholders agree that prevention is less costly than treatment. The agencies that signed on to support development of a LYV GWMA in 2010 agreed that, *pollution prevention will be a guiding principle for all work done by the coordinating body.*¹

Yet the Program, as written, supports public expenditures as high as \$70 million² to treat ongoing pollution that the Program shields from scrutiny. In the interim, people who live in the LYV spend over \$1 million per year to access safe drinking water.³ Samples from LYV monitoring wells show nitrate readings that are possibly the highest in the nation⁴.

The Program's Problem Statement is based on a Nitrogen Availability Assessment (NAA) crafted by the WA State Dept. of Agriculture (WSDA) and Yakima County from 2015 to 2017.⁵

1 Exhibit A-55 *Vital Elements of a Groundwater Management Area* – June 3, 2010

2 Exhibit R-9 Volume II Appendices LYV GWMA – June 2019, page 219/231

3 Exhibit A-147 FOTC Costs Related to Elevated Nitrates in GW – February 23, 2017

4 Exhibit A-74 LYV Dairy Cluster Fact Sheet, EPA – 2014

5 Exhibit R-3 *Estimated Nitrogen Available for Transport in the Lower Yakima Valley Groundwater Management Area*, AGR PUB 103-691 (N/6/18) – August 2018

1. The NAA calculated the amount of nitrogen that is available from irrigated agriculture when farmers follow the rules. The Program used this number to estimate how much contamination comes from irrigated agriculture.⁶ The NAA left out the nitrate that leaches to groundwater when manure is spread on the land at greater than agronomic rates, in quantities beyond what the crops can utilize.

2. The NAA calculated leakage from manure lagoons using estimates of lagoon dimensions, soil permeability and liner thickness from inspections and the literature when necessary. The LYV GWMA NAA states on page 24:

Clearly lagoons constructed prior to the current guidance documents are unlikely to meet current NRCS standards. However, no information is available about what seepage might be for lagoons constructed before 1990, or between the 1993 guidance and the 2004 guidance. As a result, it is impossible to estimate what the permeability endpoint would be to estimate a high seepage rate.

Then WSDA calculated lagoon leakage as though the structures had permeabilities $< 10^{-6}$ cm/sec, the maximum leakage for modern lagoons in Washington state. In fact, the majority of LYV manure lagoons were built before 2004. Some are nothing more than holes in the ground.

II. Statement of Facts

1. According to the NAA, 5,428 tons of nitrogen are applied to the 15 major LYV crops every year. The breakdown by fertilizer type is: Commercial Fertilizer – 3,769 tons; Manure – 1,473 tons; Compost – 196 tons.⁷

2. According to the WSDA, LYV milk cows alone produce 14,512 tons of nitrogen per year.

⁶ Exhibit A-115 Irrigated Ag Flow Sheet for Estimated Nitrogen Available for Transport in the Lower Yakima Valley Groundwater Management Area 2016

⁷ Exhibit 191 Basic Documents for PCHB No. 19-060 2020, page 12

An estimated 5,079 tons of this nitrogen is emitted to the atmosphere; and 9,433 tons remains available for application to cropland as fertilizer and for export.⁸

3. The LYV GWMA had only one goal – To reduce concentrations of nitrate in groundwater to below Washington State drinking water standards or < 10 mg/L nitrate N. There is no longer a target date for this goal and no real plan for measuring success.

4. Washington has a watershed approach for reducing pollution. This means that problem solving looks at a combination of water testing, soil sampling, best management practices (BMPs), irrigation water management, critical habitat management, and stakeholder involvement.^{9, 10, 11, 12}

5. Over 35% of all Washington dairy cows are housed in Yakima County. In the LYV GWMA target area there are ≈ 332 milk cows per square mile, or 90,000 milk cows, producing as much waste as a city of 2.3 million. In 2012 EPA estimated that 65% of nitrate pollution of groundwater in the LYV came from animal agriculture and 58% came from CAFO dairies.¹³

6. In March 2013, the EPA signed an Administrative Order on Consent (AOC) with five dairies in the area in order to address nitrate contamination in groundwater.¹⁴ Major findings were: a. In 2013, 61% of homes one mile down gradient from the dairies had wells with nitrate levels > 10 mg/L, b. Dairies applied manure to cropland at up to seven times agronomic rates, c. Dairies frequently violated their nutrient management plans, d. In fall 2013, nitrate samples on 20 out of 34 dairy application fields exceeded 45 ppm at 2 feet, the standard for agronomic application at

8 Ibid, page 16

9 Exhibit A-96 *Protecting Groundwater, A strategy for Managing Agricultural Pesticides and Nutrients*, Ecology No. 91-42 – April 1992

10 Exhibit A-99 *WA State Interagency Groundwater Committee*, Ecology Pub. No, WQ-96-07 – March 1997

11 A-105 Yakima County Voluntary Stewardship Work Plan – October 2017

12 A-107 Detailed Implementation Plan Yakima River Basin WRIAs 37, 38 & 39 – September 10, 2007

13 Exhibit 187 EPA Nitrogen Budget for Yakima County 2012

14 Exhibit A-74 LYV Dairy Cluster Fact Sheet, EPA – 2014

that time,¹⁵ e. In fall 2015, after implementation of recommended BMPs, the number of fields with nitrate exceeding 45 ppm at the 2-foot depth was reduced to 9 out of 34,¹⁶ f. Soil testing beneath abandoned manure lagoons on the dairy cluster prove that aging lagoons leak large amounts of nitrogen into the surrounding soils.¹⁷

7. In a 2015 Order for Summary Judgement, CARE versus Cow Palace,¹⁸ Judge Thomas Rice from the 9th Circuit Court ruled that an 11,000 head LYV CAFO dairy: 1. Did not follow its Nutrient Management Plan.¹⁹ 2. Failed to use manure nutrient analyses or consider average crop yield when determining manure applications,²⁰ 3. Failed to account for residual manure already present in the soil when determining how much manure to apply,²¹ 4. Applied manure at rates in excess of what the crop actually could or did use,²² 5. Leached nitrate to groundwater from poorly maintained manure lagoons,²³ 6. Caused manure constituents to leach into the soil by purposefully composting wet manure on open, native soil,²⁴ 7. Contributed to high levels of nitrate in groundwater,²⁵ and 8. Posed a substantial and imminent endangerment to health and the environment.²⁶

8. In 2020 Judge Rice found that, for five years, one of the dairies with a consent decree continued to over apply manure to cropland and failed to comply with court orders.²⁷

15 Ibid.

16 Exhibit A-75 LYV Dairy Cluster Fact Sheet, EPA – 2016

17 Exhibit 110 Transmittal of Lagoon Abandonment Sampling Data – H.S. Bosma Dairy and Cow Palace, LLC, Anchor QEA – December 28, 2018

18 Exhibit A-78 No. 13-CV-3016 TOR, Order Granting Partial Motion for Summary Judgement, CARE v. Cow Palace – 2015

19 Ibid., page 9

20 Ibid., page 11

21 Ibid., page 11

22 Ibid., page 15

23 Ibid pages 22 & 91

24 Ibid pages 30 & 95

25 Ibid page 31 & 97

26 Ibid page 102

27 Exhibit A-188 NO. 1:13-CV-3017-TOR Order Finding Noncompliance, April 14, 2020

9. Nitrate levels in LYV aquifers have worsened over the past thirty years. 45% of the 30 newly drilled LYV GWMA monitoring wells have initial nitrate readings > 10 mg/L. The average initial nitrate level for these monitoring wells was 12.19 mg/L.²⁸

III. Standards of Review

This appeal process is governed by Chapter 43.21B RCW and Chapter 371-08 WAC. The scope and standard of review shall be de novo. The Board shall make findings of fact based on preponderance of the evidence. Appellant FOTC has the initial burden of proof. WAC 371-08-485; *Hubbard, et al. v. Ecology*, PCHB Nos. 93-73 & 103 (1995); *Public Util. Dist. No. 1 of Pend Oreille County v. Ecology*, 146 Wn.2d 778, 51 P.3d 744 (2002)

IV. The Issues

Issue 2: Does the Lower Yakima Valley Groundwater Management Area (LYV GWMA) program meet the requirements of RCW 90.44.410 (1) (d)

The groundwater area or sub-area management program shall include Projection of water supply needs for existing and future identified user groups and beneficial uses

And WAC 173-100-100 (1)(h)

Each program shall include, as appropriate, the following: Projections of groundwater supply needs and rates of withdrawal based upon alternative population and land use projections

The Law: WAC 173-100-100 must carry out the intent of RCW 90.44.410. The Washington Administrative Code cannot change the intent of the Revised Code of WA.

The groundwater area or sub-area management program shall include Projection of water supply needs for existing and future identified user groups and beneficial uses

Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous. Stone v. Chelan County Sheriff's Dep't, 110 Wn.2d 806, 810, 756 P.2d 736 (1988)

Administrative rules or regulations cannot amend or change legislative enactments, Dep't of Ecology v. Theodoratus, 135 Wn 2nd 582, 600, 957 P.2d 1241 (1998) (citing Pannell v. Thompson, 91 Wn. 2nd 591, 601, 589 P 2d 1235 (1979)

RCW 90.44.410 uses the word “long-term” four times and the word “future” four times. The statutes clearly require groundwater management areas to plan for the next generations. WAC 173-100-040 (7) says:

"Groundwater management program" means a comprehensive program designed to protect groundwater quality, to assure groundwater quantity and to provide for efficient management of water resources while recognizing existing groundwater rights and meeting future needs consistent with local and state objectives, policies and authorities within a designated groundwater management area or subarea and developed pursuant to this chapter.

Arguments: It is “appropriate” to make projections of future needs and rates of withdrawal. Ecology and Yakima County are mistaken when they state that the LYV GWMA could not talk about water quantity. In fact, IAA No. C1600074, the Interagency Agreement between Ecology and Yakima County that authorized the LYV GWMA, stipulated the writing of water quality/quantity goals and objectives.²⁹ It is impossible to develop a water quality program *tailored to the specific conditions* of an area and *adapted to the particular needs of each area* (WAC 173-100-100) without considering water quantity.

If 10 kilograms of a pollutant, such as nitrate, are dispersed into a million-kiloliter body of water the result is a concentration of 10 mg/L, the safety standard for nitrate in drinking water. If that body of water doubles in size to 2 million kiloliters, then the concentration of the pollutant becomes 5 mg/L and the water is considered safe to drink.

29 Exhibit A-38, 2015 4th Quarterly LYV GWMA Report, page 64/76

The U.S. Supreme Court has ruled:

Petitioners also assert more generally that the Clean Water Act is only concerned with water "quality," and does not allow the regulation of water "quantity." This is an artificial distinction. In many cases, water quantity is closely related to water quality; a sufficient lowering of the water quantity in a body of water could destroy all of its designated uses, be it for drinking water, recreation, navigation or, as here, as a fishery. PUD No. 1 of Jefferson County et al. v. Washington Department of Ecology et al. No. 92-1911, 511 U.S. 700 (1994), page 8

See also *Pend Oreille PUD No. 1 v. Ecology*, PCHB Nos. 97-177, 98-043 & 98-044 (2000), and *Public Util. Dist. No. 1 of Pend Oreille County v. Ecology*, 146 Wn.2d 778, 51 P.3d 744 (2002)

We similarly view the Water Pollution Control Act as encompassing man-induced reduction of water quantity as pollution where it has the negative effects outlined in RCW 90.48.020.

The Moxee Valley, north of the LYV GWMA, is home to a 4,000 head dairy that was vigorously opposed by neighbors when the operation began in 2000. To address worries about groundwater pollution, officials required four monitoring wells with annual measurements for nitrates. Fifteen years later three of the four wells had gone dry and the problem was solved. If there is no water, then water pollution does not occur.

Small cities in the LYV are mandated to provide safe drinking water to residents. The City of Mabton spent \$1.8 million to drill a new municipal well in 2013 due to decreased water pressure and elevated nitrate concentrations in an older well.³⁰ Mabton has concerns about the city's ability to deliver safe drinking water to a growing population. The LYV GWMA did not ask the City of Mabton to write a Letter of Concurrence for the Program, despite the fact that Recommended Action 17 calls on municipalities to expand public water systems.

30 Exhibit R-9 Volume IV Member Contributions LYV GWMA – June 2019, page 881/1803

Issue 3: Does the Lower Yakima Valley Groundwater Management Area (LYV GWMA) program meet the requirements of RCW 90.44.410 (1)(e)

The groundwater area or sub-area management program shall include Identification of water resource management policies and/or practices that may impact the recharge of the designated area or policies that may affect the safe yield and quantity of water available for future appropriation;

And WAC 173-100-100 (1)(e)

A description of the area's hydrogeology, including the delineation of aquifers, aquitards, hydrogeologic cross-sections, porosity and horizontal and vertical permeability estimates, direction and quantity of groundwater flow, water-table contour and potentiometric maps by aquifer, locations of wells, perennial streams and springs, the locations of aquifer recharge and discharge areas, and the distribution and quantity of natural and man-induced aquifer recharge and discharge

The Law: Water management purposes and fundamentals for utilization and management are spelled out in RCW 90.54.010 to 040. Other relevant policies, enacted after RCW 90.44.400, include: RCW 90.82 (Watershed Planning), RCW 35.70A (Growth Management Act), and the Yakima River Basin Water Enhancement Program (YRBWEP).

RCW 90.44.420 states:

The department of ecology shall consider the groundwater area or sub-area management plan for adoption in accordance with this chapter and chapter 90.54 RCW.

RCW 90.54.020 states:

(b) Waters of the state shall be of high quality. Regardless of the quality of the waters of the state, all wastes and other materials and substances proposed for entry into said waters shall be provided with all known, available, and reasonable methods of treatment prior to entry. Notwithstanding that standards of quality established for the waters of the state would not be violated, wastes and other materials and substances shall not be allowed to enter such waters which will reduce the existing quality thereof, except in those situations where it is clear that overriding considerations of the public interest will be served.

Arguments:

A. Nitrates accumulate in the vadose zone beneath sources and wait for recharge that carries these pollutants to the aquifer. The amount of recharge determines the rate of leaching to the aquifer. The amount of nitrogen stored in the vadose zone determines how much nitrogen ultimately reaches the aquifer. The Program fails to estimate the amount of nitrogen that currently travels into the vadose zone every year and fails to describe changes in LYV recharge and discharge that result from conservation measures and modernized farming practices.

B. Water resource management policies and/or practices that may impact the recharge of the LYV GWMA target area include:

1. The Detailed Implementation Plan (DIP) for the Yakima River Basin³¹
2. The Yakima County Voluntary Stewardship Program (VSP)³²
3. The Yakima River Basin Enhancement Program (YRBWEP) plans for groundwater storage³³
4. Water conservation programs such as increased use of drip irrigation and soil moisture sensors.

The Program fails to assess and describe the impact of these policies/practices on LYV aquifer recharge and groundwater quality.

C. The Program fails to adequately describe these elements in WAC 173-100-100 (e): delineation of aquifers, aquitards, hydrogeologic cross sections, porosity, horizontal and vertical permeability, water table contours by aquifer, distribution and quantity of aquifer recharge and

31 Exhibit A-107 Detailed Implementation Plan Yakima River Basin WRIs 37, 38 & 39 – September 10, 2007

32 Exhibit A-105 Yakima County Voluntary Stewardship Work Plan – October 2017

33 Exhibit A-108 Groundwater Storage Potential in the Yakima River Basin: A Spatial Assessment of Shallow Aquifer Recharge and Aquifer Storage and Recovery. Ecology Pub. No. 19-12-003 – 2019

distribution and quantity of discharge.

Issue 8: Does the LYV GWMA program violate WAC 173-200-030, Anti Degradation Policy by allowing continued pollution of the LYV ground water?

The Law: The WA State Department of Ecology has the duty and authority to protect the waters of the state, including groundwaters. RCW 43.21A.010, RCW 43.21A.020, RCW 43.21A.064

WA State Antidegradation Policy, WAC 173-200-030(2)(A), states

Existing and future beneficial uses shall be maintained and protected and degradation of groundwater quality that would interfere with or become injurious to beneficial uses shall not be allowed.

Arguments: Water quality in the LYV is worsening.^{34, 35} Officials and the public have acknowledged the problem since at least the year 2000.³⁶ Stakeholders chose formation of a GWMA to solve the problem in 2011 and the LYV GWMA took shape in 2012. There is little in the resulting Program that has not been attempted over the past 30 years.^{37, 38, 39}

Nitrate levels in LYV monitoring wells are among the highest in the nation.^{40, 41, 42, 43} Nitrates

34 Exhibit R-4 Initial Ambient Monitoring Well Report PP - June 2019

35 Exhibit A-126 *Potential Groundwater Monitoring Stations Yakima Groundwater Management Area* PGG – December 2, 2013, page 7

36 Exhibit A-92 *Quality of Ground Water in Private Wells in the Lower Yakima Valley, 2001-02*, Valley Institute for Research and Education – December 2002

37 Exhibit A-96 *Protecting Groundwater, A strategy for Managing Agricultural Pesticides and Nutrients*, Ecology No. 91-42 – April 1992

38 Exhibit A-99 *WA State Interagency Groundwater Committee*, Ecology Pub. No, WQ-96-07 – March 1997

39 Exhibit A-84 *Toward 2010 An Environmental Action Agenda*, Ecology Publication 90-01-00 – July 18, 1990

40 Exhibit A-74 LYV Dairy Cluster Fact Sheet, EPA – 2014

41 Exhibit A-91 *Nitrate Trends in the Central Sumas-Blaine Surficial Aquifer*, Ecology Pub. No. 08-03-018 – July 2008

42 Exhibit A-101 *Analysis of Groundwater Nitrate Concentrations in the Lower Umatilla Basin Groundwater Management Area*, Oregon DEQ No. 12-WQ-019 – February 23, 2012

43 Exhibit A-103 2014 Idaho Nitrate Priority Areas – 2014

in drinking water pose a substantial risk to human health.^{44, 45, 46}

The LYV GWMA was unduly influenced by the dairy industry and consequently failed to adequately address groundwater pollution from dairies. The dairy industry obtained veto power over LYV GWMA decisions,⁴⁷ manipulated the agenda,⁴⁸ and screened out crucial information.

There is no funding to implement the Program. The LYV GWMA Funding Work Group did not meet until 2017 and then only met three times. The Funding Work Group did not complete the group's assigned tasks as outlined in the LYV GWMA Work Plan.⁴⁹

The Program does not address over-application of manure to cropland or leakage from aging manure lagoons. The Program does not address nitrate leaching from composting operations, biosolid applications to cropland, underground injections wells (UICs), permitted discharges from wastewater treatment plants and food processing plants and accidental spills.

Ecology has legal tools to address groundwater pollution and does not use them. Ecology allowed a National Pollutant Discharge Elimination Permit for Concentrated Animal Feeding Operations (CAFOs) to lapse from 2011 to 2017.⁵⁰ Less than ten out of fifty LYV dairies have the permit.⁵¹ Ecology's definition of AKART (All Known and Reasonable Technologies) for manure lagoons does not include synthetic liners. Ecology does not require groundwater monitoring around LYV sites with the potential to pollute.⁵²

44 Exhibit A-61 ATSDR *Toxicological Profile for Nitrate & Nitrite* – July 2017

45 Exhibit A-62 IRIS *Assessment Plan for Nitrate and Nitrite* – September 2017

46 Exhibit A-161 FOTC Research on Nitrate Related Health Issues – July 16, 2018

47 Exhibit R-9 Volume IV Member Contributions LYV GWMA – June 2019, page 195 or 215/1803

48 Exhibit A-169 Emails re Attorney Presentations – 2015

49 Exhibit A-23 LYV GWMA Work Plan – February 2013

50 Ecology <https://ecology.wa.gov/Regulations-Permits/Permits-certifications/Concentrated-animal-feeding-operation>

51 Ecology <https://apps.ecology.wa.gov/paris/Inspection/FacilityEnforcement.aspx>

52 Exhibit A-112 *"Lessons Learned" Report for Response to the Lower Yakima Valley Dairy Mortality Event February through April 2019* - July 10, 2019

Issue 9: Did Ecology exceed discretionary authority by certifying the LYV GWMA program which does not meet the requirements in RCW 90.44.410 and WAC 173-100-100?

The Law: Certification says that the LYV GWMA Program meets criteria in WAC 173-100-100 which must implement RCW 90.44.410. The Program does not meet these criteria.

Arguments:

The Program did not adequately engage a broad range of stakeholders.⁵³ The LYV GWMA Advisory Committee could not ensure that the Program was *technically and functionally sound* because the leadership did not share sufficient information and because the leadership failed to provide data analysis.⁵⁴

The Program does not address future needs; does not identify water resource management policies and/or practices that may impact recharge; does not describe what will happen if no action is taken.

The Program Problem Statement is based on a Nitrogen Availability Assessment (NAA) that ignored major sources of pollution and manipulated data.^{55, 56, 57, 58} Data manipulation was so extreme that the NAA calculated application of 60lbs. nitrogen per acre in the spring for apple orchards and calculated a residual of 90lbs. of nitrogen per acre in the fall after harvest.⁵⁶

The plan for Program Evaluation lacks deadlines and criteria for evaluation. At least four of the

53 Exhibit R-9 Volume IV Member Contributions LYV GWMA – June 2019, page 195 or 215/1803

54 Exhibit R-9 Volume IV Member Contributions LYV GWMA – June 2019, page 195 or 215/1803

55 Exhibit 116 EPA Comments on the Nitrogen Availability Assessment – July 30 2017

56 Exhibit 117 FOTC Comments on the Nitrogen Availability Assessment -April 2017

57 Exhibit 118 EA Engineering Comments on the Nitrogen Availability Assessment – April 27, 2017

58 Exhibit 119 Yakima Farm Bureau Comments on the Nitrogen Availability Assessment – April 26, 2017

Program’s Recommended actions rely on implementation of Best Management Practices (BMPs) to bring LYV groundwater nitrates to safe levels. There must be evaluation of BMPs.

If BMPs are to be relied upon for protection, some form of monitoring and enforcement must be included to ensure that the BMP plans are actually implemented and followed. ARD v. Shelton. Western WA Growth Management Hearings Board, No. 98-2-0005 (1998)

The only situation in which BMPs are evaluated for effectiveness within the LYV GWMA target area is the ongoing work being performed by the EPA on the dairy cluster.

Issue 10: Do the Powers and Duties described in Chapter 43.23 RCW authorize the WA State Department of Agriculture to “construct GWMA administrative program” as stated in LYV GWMA program recommended action #41?

The Law: RCW 43.23.030 states:

The director of agriculture shall exercise all the powers and perform all the duties relating to the development of markets, for agricultural products, state and federal cooperative marketing programs, land utilization for agricultural purposes, water resources, transportation, and farm labor as such matters relate to the production, distribution and sale of agricultural commodities including private sector cultured aquatic products as defined in RCW 15.85.020.

RCW 43.23 (035 through 300) delineates WSDA authority.

An administrative agency’s authority to act is limited to that which it is authorized to do by the Legislature. Rettkowski v. Ecology, 122 Wn.2d 219, 858 P.2d 232 (1993).

Arguments: WSDA lacks authority to construct and/or administer a GWMA Program. The law says nothing about WSDA constructing administrative programs to address environmental issues, addressing pollution from residential, commercial, industrial, or municipal sources, or addressing public health issues. This Recommended Action was added by Yakima County after the LYV GWAC discussion of potential actions. The GWAC never discussed the legitimacy of designating WSDA to construct an “administrative program”.

Challenge to Ecology's Administrative Finding of Fact

An unchallenged administrative finding of fact is a verity before a reviewing court. Postema v. PCHB, 142 Wn 2d 68, 11 P.3d 726 (2000)

1. The *Lower Yakima Valley Groundwater Management Area Program Findings*⁵⁹ contain factual errors. For example, that document states:

Ecology reviewed the Program recommendations finding none that would require adoption of implementation policies, ordinances or programs beyond our existing authority.

This conflicts with statements in Appendix J of the Program⁶⁰:

#14 Administrative, page 216 (Recommended Action 58):

Require facility process improvements in waste treatment and food processing plants to reduce nitrogen and total discharge volume requires Amendment to state Water Pollution Control Act (RCW 90.48)

#4 Agriculture, page 219 (Recommended Action 49):

Amend the Dairy Nutrient Management Act to extend WSDA's authority to manure application on properties other than those owned by dairies, providing more complete disclosure of Nutrient Management Plans requires legislative approval.

#8 Agriculture, page 219 (Recommended Action 56):

Make shallow (1, 2, 3 foot) soil testing reports prerequisites for funding, lending or building permits requires Amend GMA (RCW 36.70A)

2. There are serious inaccuracies with David Bowen's Declaration in Support of Cross Motion for Summary Judgement including a statement that *municipal and industrial wastewater discharges, which are regulated by NPDES permits that require compliance with water quality standards, were not considered a significant source.*^{61,62,63}

59 Exhibit R-10 LYV GWMA Program Findings – 201960 Exhibit R-9, page 213, (219/231)

61 Exhibit 141 Port of Sunnyside NPDES Permit No. WA0052426, S1A.4.d.a Interim Soil Nitrate Limitations – Jan. 12, 2016

62 Exhibit 142 Port of Sunnyside Fact Sheet for NPDES Permit No. WA0052426 July 11, 2014

63 Exhibit 143 Port of Sunnyside National Pollutant Discharge Elimination System Waste Discharge Permit No. WA0052426 – July 1, 2019

V. Conclusion

The Program is a “paper tiger” that only pretends to address and solve Yakima nitrate problems. The Program encourages polluters in the LYV to go about business as usual because the Program does not acknowledge the existence of the severest pollution.

FOTC respectfully asks the WA State PCHB to instruct Ecology to de-certify the LYV GWMA Program and to implement effective, legally mandated measures to protect the LYV aquifers.

Respectfully submitted this 17th day of August 2020

s/

Jean Mendoza

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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of August 2020, I served one true and correct copy of the foregoing on the following individuals using e-mail, as stipulated by the parties in the above-captioned matter:

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