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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 WRITTEN CLOSING
ARGUMENT

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. Plaintiff Friends of Toppenish Creek introduced virtually no evidence at trial to show that Ecology's decision was erroneous. In fact, the vast majority of the Friends' evidence was not relevant to the issues in the case. To the extent the Friends did introduce relevant evidence, Ecology responded and rebutted it. As a result, the Board should reject the Friends' appeal.

II. ARGUMENT

As David Bowen testified, the statute involved here, RCW 90.44.410, must be read in conjunction with Ecology's implementing regulations, WAC 173-100. As Mr. Bowen testified, the statute does not require that Ecology certify groundwater management programs. Certification is only required by Ecology's regulation. Per the regulation, Ecology is required

1 to certify that the program is “consistent with the intent of this chapter.” WAC 173-100-120(3).
2 Here, the Program is consistent with the intent of the regulations because it establishes a
3 partnership between a variety of stakeholders and identifies numerous, consensus-based,
4 management recommendations to protect and improve groundwater quality in the Lower
5 Yakima Valley. Thus, Ecology properly certified it.

6 The evidence submitted by Friends of Toppenish Creek at hearing did not directly
7 address Ecology’s certification. Instead, Friends focused on three alleged concerns. First,
8 Friends contended that the Nitrogen Availability Assessment completed by the Groundwater
9 Advisory Committee failed to consider all alleged sources of nitrate. Second, Friends
10 contended that the network of monitoring wells established by the Committee did not include
11 an adequate sampling regime and did not include wells in the area of the so-called dairy
12 cluster. Third, Friends contended that the various state agencies involved in the process had
13 provided inaccurate information to the Committee.

14 None of these concerns, however, is relevant to the actual issues in the case. As a result,
15 the Board properly excluded most of the Friends’ evidence. The Board already concluded on
16 summary judgment that the Nitrogen Availability Assessment adequately addressed all
17 significant sources of nitrate. None of the issues in the Prehearing Order relate to monitoring,
18 nor do any of them challenge the information provided by the agencies to the Committee. In
19 any case, neither the statutes nor the regulations require a Nitrogen Availability Assessment or
20 a monitoring network. As Melanie Redding testified, this Program is the only one that
21 establishes a monitoring network at all. Because the Friends failed to support the actual issues
22 in the case with any competent evidence, the Board should dismiss its appeal. Ecology
23 addresses each issue briefly below.

24 **A. The Program Adequately Addresses Water Resource Management**

25 The first two issues relate to alleged non-compliance with RCW 90.44.410(1)(d) and
26 (e), both of which concern water resource management. For the reasons Ecology has

1 previously articulated, these statutes do not directly apply to the Program because the Program
2 focuses on protecting and enhancing water quality, not on ensuring adequate water supply for
3 the future. The Board must read the statute in conjunction with the regulations, and the
4 regulations make clear that the Program need not address every issue mentioned in the statute.
5 Instead, per WAC 173-100-100, the Committee tailored the Program to the specific needs of
6 the area. The testimony at hearing supported not addressing water supply issues in detail
7 because, as both Mr. Davenport and Mr. Elliott testified, the issues involved are different, the
8 people involved are different, and the County is addressing water supply issues in other
9 forums.

10 Friends offered no testimony to demonstrate how further detail on water supply issues
11 would improve the Program. The only testimony that emerged on this point came from
12 Mr. Davenport, who opined that the Program properly excluded a general consideration of
13 water quantity, but that some issues related to water use—in the sense of water movement and
14 irrigation—could be relevant to water quality. However, Mr. Bowen testified that the Program
15 does address those aspects of water use because it contains a number of recommended actions
16 that address irrigation practices. These recommendations—such as developing irrigation
17 management plans—ensure that water use does not push contaminants through the root zone
18 into groundwater. Mr. Bowen and Ms. Redding further identified where in the Program it
19 addresses water supply needs, aquifer recharge, population, and where it cites to additional
20 studies on those points. Friends offered no contrary evidence. In fact, Friends admitted they
21 were not aware of the Vaccaro study (Hearing Ex. R-14) that addresses water supply issues in
22 detail. The Program thus fully complies with the statute and nothing further is required.

23 **B. The Program Complies with the Antidegradation Policy**

24 The next issue is whether the Program complies with the antidegradation policy in the
25 state water quality standards. Here again the Friends offered no evidence to show that the
26 Program would degrade water quality. To the contrary, as Ms. Redding testified, the Program

1 is consistent with the antidegradation policy because it is expected to improve, rather than
2 degrade, water quality. The Program contains a number of recommended actions that, if
3 implemented, will protect and improve water quality in the Lower Yakima Valley. The Friends
4 offered no evidence to dispute this conclusion, but rather appeared to argue that the Program
5 did not do enough to protect water quality. As discussed above, the Friends argued primarily
6 that the Program should have addressed more sources of nitrate and should have included a
7 more robust monitoring system. Not doing enough, however, in the context of a voluntary,
8 consensus-based Program intended to improve water quality, is not a violation of the
9 antidegradation policy. As the Hearing Officer stated at one point, the issue in this case is not
10 whether a different Program would be better, but instead is whether this Program complies
11 with the law. The Friends introduced virtually no evidence addressing that key point. Thus, the
12 Board should dismiss this issue.

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

14 The next issue is whether Ecology exceeded its authority by certifying the Program. As
15 discussed above, certification is required by Ecology's regulation, not by the statute. The
16 regulation only requires that Ecology certify the Program as consistent with the intent of the
17 statute. Ecology did so, as described in the testimony of David Bowen.

18 In raising this issue, Friends do not appear to be challenging the validity of Ecology's
19 regulation. Rather, Friends appear to be arguing that Ecology exceeded its authority because,
20 according to them, the Program is scientifically flawed. However, the Friends introduced
21 virtually no scientific evidence demonstrating any flaws in the Program. With respect to the
22 monitoring Program, for example, Ms. Redding testified that the Legislature recently funded
23 monitoring 170 wells in the GWMA, which establishes the most robust and comprehensive
24 groundwater monitoring network in the state. This monitoring network will include a number
25 of existing wells in the vicinity of the dairy cluster, regardless of the fact that those wells were
26 not drilled especially for the Program. Thus, Friends' contention regarding the adequacy of the

1 monitoring network is misguided. This issue, which appears to be simply a reiteration of the
2 Friends' other arguments, should be dismissed.

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

4 Lastly, Friends challenge Recommendation No. 41, which they contend the Department
5 of Agriculture does not have authority to implement. This challenge appears to be based on a
6 misunderstanding of the recommendation. According to the testimony of Gary Bahr, the
7 Department of Agriculture does have authority to carry out the recommendation and, in fact, is
8 already doing so. The Friends base their challenge not on the language of the recommendation
9 itself, but instead on the summary language below the recommendation, which says that
10 Agriculture will develop a groundwater management program. This summary language,
11 however, as the testimony at hearing revealed, is not a good description of the
12 recommendation. Agriculture is not developing an entire groundwater management program.
13 Instead, Agriculture is exploring ways in which fertilizers and manure may be better managed,
14 an activity that is well within its authority and expertise. Because Friends' challenge to this
15 recommendation is based on a misunderstanding, this issue should be dismissed.

16 **III. CONCLUSION**

17 For the reasons stated above, the Board should affirm Ecology's certification of the
18 Program. The Program is an extraordinary accomplishment that contains a wealth of
19 information, scientific work, and recommended actions that will help improve groundwater

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1 quality in the Lower Yakima Valley. The issues raised by the Friends are unsupported by any
2 relevant evidence, are without merit, and should be rejected.

3 DATED this 25th day of September, 2020.

4 ROBERT W. FERGUSON
5 Attorney General

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1 **CERTIFICATE OF SERVICE**

2 I certify under penalty of perjury under the laws of the state of Washington that on
3 September 25, 2020, I caused to be served Respondent State of Washington, Department of
4 Ecology’s Written Closing Argument in the above-captioned matter upon the parties herein as
5 indicated below:

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7 FRIENDS OF TOPPENISH CREEK
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10 NORM CHILDRESS
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16 DATED this 25th day of September, 2020, at Olympia, Washington.

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18 _____
19 DONNA FREDRICKS, Legal Assistant
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