



STATE OF WASHINGTON  
ENVIRONMENTAL AND LAND USE HEARINGS OFFICE

Mailing Address: PO Box 40903, Olympia, WA 98504-0903  
Physical Address: 1111 Israel Rd SW, Suite 301, Tumwater, WA 98501

May 21, 2021

**Sent by Email and US Mail**

Jean Mendoza  
Executive Director  
Friends of Toppenish Creek  
3142 Signal Peak Road  
White Swan WA 98952

Thomas J. Young  
Assistant Attorney General  
PO Box 40117  
Olympia WA 98504

Re: **PCHB No. 19-060**  
**FRIENDS OF TOPPENISH CREEK v. LOWER YAKIMA VALLEY GWMA**  
**ADVISORY COMMITTEE and THE STATE OF WASHINGTON,**  
**DEPARTMENT OF ECOLOGY**

Dear Parties:

Enclosed is the Pollution Control Hearings Board's Order Denying Reconsideration in this matter.

This is a FINAL ORDER for purposes of appeal to Superior Court within 30 days. See Administrative Procedures Act (RCW 34.05.542) and RCW 43.21B.180.

If you have any questions, please feel free to contact the staff at the Environmental and Land Use Hearings Office at 360-664-9160.

Sincerely,

Heather C. Francks, Presiding  
Administrative Appeals Judge

HCF/le/P19-060  
Encl.

**CERTIFICATION**

On this day, I forwarded a true and accurate copy of the documents to which this certificate is affixed via United States Postal Service postage prepaid or via delivery through State Consolidated Mail Services to the attorneys of record herein.

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

DATED 5/21/21, at Tumwater, WA.

**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

ORDER DENYING RECONSIDERATION

**BACKGROUND**

Appellant Friends of Toppenish Creek (FOTC) filed an appeal with the Pollution Control Hearings Board (Board) challenging the State of Washington, Department of Ecology's (Ecology) certification of the Lower Yakima Valley Groundwater Management Plan. On March 19, 2021, after a full hearing on the appeal, the Board issued Findings of Fact, Conclusions of Law and Order (Order). The Order affirmed Ecology's certification of the Lower Yakima Valley Groundwater Management Plan.

On March 29, 2021, FOTC filed Friends of Toppenish Creek Petition for Reconsideration (Petition). On March 31, 2021, Ecology filed Respondent State of Washington, Department of Ecology's Answer to Petition for Reconsideration (Answer).<sup>1</sup>

---

<sup>1</sup> Friends of Toppenish Creek submitted a Reply to Ecology's Answer to Petition for Reconsideration which the Board did not consider because the Board's rules do not allow for a reply to an answer to a petition for reconsideration. WAC 371-08-550.

1 FOTC presented two grounds for the Petition:

- 2 1. The Lower Yakima Valley Groundwater Management Implementation Executive  
3 Committee had not fulfilled the conditions for certification listed in Ecology's July  
4 2019 Letter of Certification.
- 5 2. The summary judgment declaration of Ecology's David Bowen misinformed the  
6 Board as to sources of nitrates in the water in the lower Yakima Valley and resulted  
7 in the Board granting summary judgment dismissing Issue 4. This decision led to the  
8 exclusion of evidence at hearing regarding the accuracy of GWMA research and  
9 nitrate sources.

10 In its Answer, Ecology argues that the Petition should be denied. As to FOTC's first  
11 ground, Ecology argues that FOTC did not raise this issue previously, it has nothing to do with  
12 whether Ecology's certification decision was proper, and it is beyond the Board's authority as it  
13 relates to a compliance matter. *Answer at 1*. Ecology further argues that the second ground for  
14 reconsideration should also be rejected because it relates to a legal issue dismissed on summary  
15 judgment on April 7, 2020, and it does not rely on any new evidence or arguments the Board has  
16 not previously considered. *Answer at 1*.

## 17 ANALYSIS

18 A party may file a petition for reconsideration of a final Board decision. WAC 371-08-  
19 550. The Superior Court's Civil Rules guide the Board in reviewing a petition for  
20 reconsideration, except when in conflict with the Board's practice rules. WAC 371-08-300(1),  
21 (2). Civil Rule (CR) 59(a) sets forth the grounds for reconsideration of superior court decisions.

1 The grounds include irregularity in the proceedings, misconduct of the prevailing party, accident  
2 or surprise, newly discovered evidence that could not with reasonable diligence have been  
3 discovered and produced at trial, lack of evidence or reasonable inference from the evidence to  
4 justify the verdict or the decision, or that the decision is contrary to law. CR 59(a). The Petition  
5 does not address Civil Rule 59(a) or how FOTC's arguments meet any of the grounds for  
6 reconsideration in the rule.

7 FOTC's first ground for reconsideration relates to compliance after certification. This  
8 appeal challenges whether Ecology's certification was proper, not whether, after certification, the  
9 implementation committee has complied with the certification conditions imposed by Ecology.  
10 Future compliance issues are beyond the scope of this appeal.

11 As to FOTC's second ground for reconsideration, the Board considered FOTC's same  
12 arguments in summary judgment briefing and at hearing about nitrate sources such as municipal  
13 and industrial wastewater, and biosolids that should have been included in the Nitrogen  
14 Availability Assessment. Ecology regulates these sources of nitrates through other mechanisms  
15 such as NPDES permits. None of this information is new. A petition for reconsideration is not  
16 an opportunity to reargue the case.

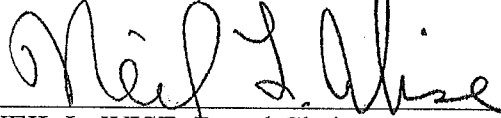
17 After careful review of the record, the Board finds that FOTC's arguments do not satisfy  
18 any of the grounds for reconsideration under CR 59 (a). For these reasons, the Board enters the  
19 following:

1 **ORDER**

2 Appellant Friends of Toppenish Creek's Petition for Reconsideration is **DENIED**.

3 SO ORDERED this 21<sup>st</sup> day of May, 2021.

4 **POLLUTION CONTROL HEARINGS BOARD**

5 

6 NEIL L. WISE, Board Chair

7 

8 CAROLINA SUN-WIDROW, Member

9 

10 MICHELLE GONZALEZ, Member

11 

12 

---

  
13 HEATHER C. FRANCKS, Presiding  
14 Administrative Appeals Judge