ENVIRONMENTAL HEARINGS
Pollution Control Hearings Board
Shorelines Hearings Board

Telephone: (360) 664-9160
FAX: (360) 586-2253
Email: eluho@eluho.wa.gov
Website: www.eluho.wa.gov

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

March 19, 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 Finding of Fact, Conclusions of Law and Order 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.

You are being given the following notice as required by RCW 34.05.461(3): Any party may file a petition for reconsideration with the Board. A petition for reconsideration must be filed with the Board and served on all parties within ten days of mailing of the final decision. WAC 371-08-550.

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

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 3/19/21, at Tumwater, WA.

Lynn Leuke

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 FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

I. INTRODUCTION

On August 28, 2019, Friends of Toppenish Creek (FOTC) filed an appeal before the Pollution Control Hearings Board (Board), challenging the State of Washington, Department of Ecology's (Ecology) decision to certify the Lower Yakima Valley Groundwater Management Area Program (Program).

The Board in this matter was comprised of Board Chair Neil L. Wise, and Members Carolina Sun-Widrow and Michelle Gonzalez. Administrative Appeals Judge Heather C. Francks presided for the Board. Ms. Jean Mendoza, FOTC's Executive Director, *pro se,* represented FOTC. Senior Counsel Thomas J. Young represented Ecology. The Lower Yakima Valley Groundwater Management Advisory Committee (GWAC) did not participate in this matter.

The Board entered a Prehearing Order on October 15, 2019, establishing the legal issues for this case. Prior to hearing, the parties moved for partial summary judgment. The Board granted partial summary judgment to Ecology on Issues 1, 4, 5, 6 and 7 in the April 7, 2020, Order on Motion for Summary Judgment. The Board also granted partial summary judgment to Ecology on Issues 2 and 3 solely as to the application of WAC 173-100-100 on the grounds that the regulation is guidance and does not set enforceable requirements. The remainder of Issues 2, 3, 8, 9 and 10 proceeded to hearing.

2. Does the Lower Yakima Valley Groundwater Management Area (LYV GWMA) program meet the requirements of RCW 90.44.410 (1) (d) and WAC 173-100-100 (1)(h)?

3. Does the Lower Yakima Valley Groundwater Management Area (LYV GWMA) program meet the requirements of RCW 90.44.410 (1)(e) and WAC 173-100-100 (1)(e)?

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

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?

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 hearing took place August 24-25, 2020, over Zoom videoconference. The Board received sworn testimony of witnesses, admitted exhibits, and heard argument on behalf of the parties. The parties submitted closing briefs September 25, 2020. Based upon the evidence presented, the Board makes the following:

II. FINDINGS OF FACT

1.

This case involves Ecology's certification of the Program developed to reduce nitrate levels in the groundwater in the Lower Yakima Valley (LYV).

Nitrate Contamination in the Lower Yakima Valley Groundwater

2.

Groundwater is a primary source of drinking water for residents of the LYV. *Bowen Testimony; Mendoza Testimony.* Between 1990 and 2008, studies of the LYV groundwater showed the presence of nitrates in excess of 10 mg/L safe drinking standards. *Bowen Testimony; Ex. R-9, Vol. I, p. 1.* A preliminary assessment conducted in 2010 showed that over 2,000 people in the LYV are exposed to nitrate levels in excess of safe drinking standards through their drinking water. *Id., p. 16.* More recently, a 2017 study which sampled 150 private domestic wells found that 20% of the wells consistently exceeded drinking water standards. *Id., p. 1.*

3.

Sources of nitrate in the LYV groundwater include irrigated agriculture; livestock and concentrated animal feeding operations (CAFOs); residential, commercial, industrial, municipal sources; and atmospheric sources. *Ex. R-3* (Nitrogen Availability Assessment); *Ex. R-9, Vol. I, p. 19.*

4.

Nitrate from such sources enters groundwater through recharge. Groundwater recharge is a hydrologic process where water moves downward from the land surface to groundwater.

Recharge is the primary method through which water enters an aquifer. *Ex. R-9, Vol 1, p. 38.* Because nitrate is soluble in water, it moves readily through subsurface soils with precipitation or any other source of recharge water. This process is known as nitrate leaching. *Id., p. 15.* Rates of recharge are affected by factors such as irrigation practices and precipitation rates. *Redding Testimony.*

5.

Consuming water with nitrate levels above drinking water standards can cause negative health effects. The primary health effect associated with nitrate exposure is the formation of methemoglobin, which reduces the ability of red blood cells to carry oxygen. This can result in a condition known as methemoglobinemia to which children and infants are particularly susceptible. *Ex. R-9, Vol. I, p. 15.*

Creation of a Groundwater Management Area

6.

The U.S. Environmental Protection Agency (EPA) joined with state and local agencies and facilitated public meetings in December 2008, February and October 2009, and June 2010 to address health risks posed by nitrate contamination in the LYV groundwater. On January 25, 2010, EPA issued a finding in support of the use of Safe Drinking Water Act Section 1431 which authorized sampling of groundwater in the area. Sampling was conducted by EPA in February and April of 2010. *Ex. R-2, p. 1.* EPA found that contamination of the LYV groundwater may present an imminent and substantial endangerment to human health. *Ex. R-1, p. 1*

7.

As a result of the EPA-facilitated meetings, in February 2010, Ecology, along with four county, state and federal agencies, published a report: *Lower Yakima Valley Groundwater Quality Preliminary Assessment and Recommendations Document*. The report summarized the groundwater nitrate issue in the LYV. *Ex. R-2*, p. 1. The report identified a number of regulatory options for addressing the elevated nitrate concentrations including establishment of a Groundwater Management Area (GWMA). *Id.*

8.

In June 2011, Yakima County submitted a request to Ecology to form the LYV GWMA. *Ex. R-1.* The purpose of a GWMA is to guide the development of site-specific groundwater management programs to protect groundwater quality or quantity. WAC 173-100-010. Ecology accepted and approved Yakima County's request. On November 15, 2011, Ecology issued an order designating the LYV GWMA with Yakima County as lead agency. *Ex. R-2.*

LYV groundwater advisory committee

9.

The LYV GWAC was created along with the GWMA to develop a program that would reduce nitrate levels in the groundwater. *Ex. R-9, Vol. I, p. 1.*

10.

The GWAC, formed in 2012, included more than 20 members identified and appointed by Ecology. The GWAC included representatives of groups affected by groundwater quality, including local, state, and federal government agencies; local citizens; farmers, dairy producers,

and agronomists; irrigation and conservation districts; and environmental groups. *Ex. R-9, Vol. I, pp. iii-iv.* The GWAC and its workgroups met regularly over seven years to address issues raised by members. *Ex. R-9, p. 1.* The environmental group FOTC was a member of the GWAC, and its executive director, Mendoza, actively participated in the meetings and chaired the regulatory framework workgroup. *Mendoza Testimony.*

11.

Over the course of seven years, the GWAC held public meetings generally every other month and meeting notes were provided. *Ex. R-12.* In addition to the scheduled public meetings, workgroups within the GWAC met individually to address issues within their narrower purview. *Id.* Many of the GWAC members participated in over 100 meetings during the development of the Program. Decisions at GWAC meetings were made by seeking consensus amongst the GWAC members. *Bowen Testimony.* During meetings, recommended actions could be proposed to the GWAC for discussion so that members had the opportunity to pose questions or raise challenges. *Bahr Testimony.* When consensus could not be reached, decisions were made by a minimum of 75% majority of the quorum with an option for parties voting in the minority to complete a minority report. *Ex. R-9, Vol. I, p. 5.* The minority report provided the GWAC members an opportunity to express differing opinions regarding aspects of the Program. *Ex. R-9, Vol. IV, p. 4.* FOTC submitted the sole minority report, which was included in the final version of the Program. *Ex. R-9, Vol. IV.*

12.

Any data considered by the GWAC was first evaluated by the data collection, characterization and monitoring workgroup for credibility and validity. Standards of credible data and valid scientific protocols are set by Ecology. *Redding Testimony.*

The GWAC Initiatives

13.

The GWAC identified a number of initiatives to accomplish its goals: education and public outreach; best management practices (BMPs); groundwater monitoring; a deep soil sampling program; identification of nitrogen sources; and a geographic information system. *Ex. R-9, Vol. I.* Since its inception in 2012, the committee accomplished several actions in pursuit of these initiatives: a compilation of BMPs for agriculture and livestock activities; the collection of deep soil samples from 175 fields within the GWMA; the installation of 30 monitoring wells for monitoring of long-term ambient groundwater quality; and the completion of a nitrogen availability assessment to identify sources of nitrate. *Id.,p. 2.*

Deep Soil Sampling

14.

Deep soil samples were collected anonymously from agricultural fields in the GWMA. A total of 175 fields were sampled at one-foot increments down to six feet below land surface. Additionally, each farmer was asked to fill out a survey about crop, water, and nitrogen practices. The South Yakima Conservation District (SYCD) and Landau Associates performed four rounds (Fall 2014, Spring 2015, Fall 2015, and Spring 2016) of deep soil sampling on

agricultural land in the GWMA. *Ex. R-9, Vol. I, p. 77.* All participants volunteered to participate in the Program, subject to the condition that the physical location of sampling was anonymous and undisclosed. Because of the anonymity of the data and the inability to track soil nitrate concentrations from one field over time, there are limitations on how this data can be used. *Id.; Redding Testimony.* The Program recommends establishing in the future a multi-year deep soil sampling system in collaboration with farmers so that surface land-use practices can be correlated with soil nitrogen content. *See, Redding Testimony; Ex. R-9, Vol. I, p. 91* (Recommended Action #24).

Monitoring Well Network

15.

The GWAC decided that establishing an ambient groundwater monitoring network was a priority to establish a baseline of groundwater quality conditions and to track nitrate concentration changes over time. *Ex. R-9, Vol. I, p. 74.* The two most highly ranked Recommended Actions in the Program were: first, the installation of ambient groundwater monitoring wells within the GWMA and, second, the collection of data from those monitoring wells. *Id., p. 87.* The foundation of this monitoring network is a network of 30 purpose-built wells (monitoring wells) completed at the water table. The water table is targeted since little data from this zone exists and because concentration changes associated with land use management changes will occur there first. Additionally, the goal was to install a sufficient number of wells to adequately represent groundwater conditions across the GWMA and to locate the wells using a random location method. Pacific Groundwater Group identified the

preliminary well drill sites and ranked them statistically. In 2018, the wells were installed in Yakima County public rights-of-way as close to the identified location sites as possible. *Ex. R-7.* Other agencies were responsible for monitoring wells within the Dairy Cluster, an area within the GWMA that includes multiple dairies. *Bahr Testimony; Ex. R-7, p.1.* Melanie Redding, an Ecology hydrogeologist who participated in the GWAC, testified that as the well monitoring project proceeds, she expects to obtain data from the Dairy Cluster wells. *Redding Testimony.* The Initial Ambient Monitoring Report was presented to the GWAC on June 20, 2019. *Ex. A-14.*

16.

A quality assurance project plan (QAPP) was developed for groundwater monitoring efforts. The QAPP specifies how samples will be collected, which includes the data quality objectives, the station quality objectives for various sampling efforts, the analytical data quality objectives, the quality control checks, and the data validation and usability requirements. All samples must be analyzed by an accredited laboratory. *Ex R-9, Vol I, p. 73.*

Nitrogen Availability Assessment

17.

In 2015, the GWAC approved a Nitrogen Availability Assessment (NAA), which was completed by the Washington State Department of Agriculture (WSDA). *Ex R-9, Vol I, p. 19.* The purpose of the NAA was to identify the surface-level sources of nitrates, which the GWAC would then address. *Bowen Testimony.* The Program's recommended actions are tailored to address each source of nitrate identified by the NAA. *Id.* The NAA was subject to peer review

by Melanie Redding, and two other licensed hydrogeologists from the Department of Health. *Redding Testimony.*

The Program

18.

The Program is the totality of the GWAC's completed work, including the committee's decisions, recommendations, and accomplishments. *Ex. R-9, Vol. I, p. 1.* After the first three phases of the Program were completed, the GWAC finalized a list of recommended actions ranked by priority. From an initial list of more than 250 recommended actions, the GWAC adopted for implementation the final list of 64 recommended actions by a voting process in which most of the GWAC members placed a value between -3 and +3 to each recommended action initially proposed. *Bowen Testimony.* Recommended actions were ranked and prioritized according to the score they received. The finalized 64 recommended actions addressed each identified source of nitrate in the GWMA. Each recommended action was assigned to a likely lead agency responsible for overseeing its implementation. *Id.*

19.

The recommended actions of the Program are listed in order of their rank. The bolded text contains the language of the action agreed upon by the GWAC. The un-bolded text below each recommended action is additional commentary that elaborates upon the immediately preceding action. *Bowen Testimony; Ex. R-9, Vol. I, pp. 87-98.*

Recommended Action #41

20.

Recommended Action #41 states:

> **Identify and support opportunities, including education research institutions for private, public and industry investment in technology and management of fertilizers and manures, including separation of solid and liquid wastes. (17 – WSDA)**
> WSDA construct GWMA administrative program.

Ex. R-9, Vol. I, p. 94.

21.

FOTC argues that WSDA lacks authority to construct or administer a GWMA program or to address environmental issues, pollution or public health issues. *Mendoza Testimony.* Gary Bahr, the representative for WSDA testified that WSDA's role (as described in the bold language of the recommendation) is to work with others to educate farmers about options for manure management. *Bahr Testimony.* Ecology responds that the supplemental language below Recommended Action #41 was not meant to suggest that WSDA would administer the Program as a whole but rather that it would develop a program for implementing the various GWMA-related duties to which WSDA is assigned, such as educating farmers about proper application of manure to fields. *Bowen Testimony.*

Water Supply

22.

FOTC argues that the Program failed to sufficiently address water supply as required by RCW 90.44.410(1)(d). The GWAC relied on scientific data in developing the Program,

including a 2016 report by Yakima County that described in detail land and water use in the area and included mitigation strategies to address future water supply needs, and a 2010 preliminary assessment by Ecology of the hydrogeology of the area. *Exs. R-14, R-9, Vol. III, p. 3.* The 2016 report, entitled *Assessment of the Availability of Groundwater for Residential Development in the Rural Parts of Yakima County, Washington,* identified sources and estimated the amount of water that should be designated for future development. *Ex. R-14, p. 3.* The 2010 preliminary assessment relied upon by the Program, entitled *Lower Yakima Valley Groundwater Quality: Preliminary Assessment and Recommendations Document,* discussed water supply in a variety of contexts, including how well depth impacts the volume of water available for withdrawal. *Ex. R-9, Vol. III, p. 3.*

23.

In addition to the incorporation of these reports in the Program, water supply issues were discussed by committee members during GWAC meetings when the GWAC workplan was still in development. *Davenport Testimony.* During those discussions, it was determined that other state or federal programs were already in place to address water supply issues in the Yakima Basin. *Id.; Bowen Testimony.* Given the presence of these other water supply-related programs, the GWAC determined that focusing on supply would be unnecessarily duplicative considering the Program's water quality-related mandate of reducing nitrate levels and the limited resources available. *Bowen Testimony.*

24.

Water supply is also addressed in the Recommended Actions section of the Program. For example, Recommended action #44 states, "**Perform an engineering study of water supply**." The supplemental text that follows states:

> "Possible alternatives: 1) Discontinue use of contaminated shallow wells. Build new 1,500-foot community wells. 2) Rebuild, repair, or replace poorly constructed wells. 3) Construct a potable water line from nearby developed area into deadhead water stations at central rural location (permit potable water collection at deadhead water stations). 4) Offer incentives to drill deeper wells or connect households on private wells near community water systems to connect to a community water system (Nitrate Treatment Pilot Program – June 2011)."

Ex. R-9 Vol. I, p. 95.

25.

Multiple objectives were developed by the GWAC related to drinking water systems, including:

- Assessing feasibility of expanding public water supply systems;
- Considering options to encourage expansion of public water supplies with contaminated groundwater; and
- Assisting residents that have contaminated water supplies with access to safe and reliable water supplies.

Ex. R-9 Vol. I, p. 7.

26.

Water Management

FOTC argues that the Program failed to sufficiently address water management as required by RCW 90.44.410(1)(e). The Program identifies and discusses the potential impacts of irrigated agriculture on nitrate leaching within the GWMA. Specifically, the Program explains

nitrate leaching through the mechanism of recharge, and how excessive irrigation water can leach nitrate into the groundwater. *Ex. R-9, Vol. I, pp. 15, 23.* Additionally, the Program contains an extensive discussion of the hydrogeology of the GWMA, including a description of the aquifers, groundwater recharge rates, groundwater flow, soil types, hydraulic conductivity, and precipitation. *See Ex. R-9, Vol. I, pp. 35–50.*

27.

Many of the recommended actions also implicate water resource management practices or policies. *Ex. R-9 Vol. I, p. 87; Bowen Testimony.*

- Recommended action #6 – seeking to establish and facilitate technical exchange regarding BMPs for irrigated agriculture.
- Recommended action #10 – seeking to design and implement pilot studies focused on innovative farm techniques which reduce nitrogen loading to crops and monitor results.
- Recommended action #11 – seeking to provide financial assistance for implementation of irrigation management plans
- Recommended action #20 – seeking to continue research of water management with application of agricultural nutrients.
- Recommended action #23 – seeking to monitor changes occurring in agricultural operations. Evaluate whether those changes positively affect improvement in groundwater quality.

28.

Policies for handling water, such as the development of BMPs for irrigation practices, must be informed by data on water quality. Thus, data generated from the Program will inform future best practices for irrigation management plans or other water resource management policies. *Davenport Testimony.*

Ecology's Role in Setting Water Quality Standards

29.

Ecology is authorized to establish groundwater and surface water quality standards within a GWMA. RCW 90.44.400. Ecology's water quality standards are generally guided by chapter 90.48 RCW, the Water Pollution Control Act, and chapter 90.54 RCW, the Water Resources Act of 1971. These standards are used to establish numeric criteria to measure and prevent degradation. *Ex. R-9, Vol. I, Table 3, p. 12.*

30.

The goal of the antidegradation policy is to ensure the purity of the state's groundwaters and to protect the natural environment. WAC 173-200-030. This policy precludes degradation which would harm existing or future beneficial uses of groundwater (drinking water, irrigation and support of wildlife habitat). Ecology's *Implementation Guidance for Ground Water Quality Standards* includes its antidegradation policy. *Ex. R-13, pp. 17-20.* Ecology's Implementation Guidance contains an antidegradation policy designed to improve ambient groundwater quality through credible data collection and the implementation of BMPs. *Id.*

31.

FOTC argues that the Program violates the antidegradation policy because the nitrate levels in some parts of the GWMA are getting worse. Ecology contends that the antidegradation policy does not directly apply to the Program as the Program is a planning document that identifies various voluntary actions that may be undertaken to improve or protect groundwater quality. If the activities described in the Program involve a discharge to state waters, then they would be required to comply with the antidegradation policy. Redding testified that the Program will absolutely improve water quality when the recommendations are implemented. *Redding Testimony.*

Certification

32.

The Program was drafted by Yakima County and technically reviewed by Ecology. Yakima County conducted a non-project SEPA review of the GWMA program. *Ex. R-10, p. 1.* Yakima County made a determination of non-significance (DNS) and there were no appeals of that DNS. *Ex. R-10, p.1.* Ecology and Yakima County held a joint public hearing and heard public comments on the GWMA program. *Bowen Testimony.* The public comment period was open from February 25, 2019, through March 27, 2019. *Ex. R-8.* Notices of the public comment period were published twice in local newspapers. Twenty-six comments were received during the public hearing and comment period. Responses to comments were prepared by Ecology and Yakima County. *Id.* On June 20, 2019, the GWAC approved the Program before submitting to Ecology for certification. *Ex. R-5*; *Bowen Testimony; Davenport Testimony.*

33.

On July 20, 2019, Ecology conditionally certified the program. *Ex. R-6.* The conditions required the GWAC to: (1) identify a new lead agency to implement the Program (Yakima County withdrew as lead); (2) submit a prioritized implementation schedule, and (3) seek funding and opportunities to provide immediate assistance to residents within the Groundwater Management Area whose drinking water nitrate levels are consistently above the safe drinking water standard. *Ex. R-6, p. 2.*

34.

These conditions were subsequently completed or are in-progress. First, South Yakima Conservation District agreed to be lead agency in place of Yakima County. Second, development of the prioritized implementation schedule is in progress but delayed due to the COVID-19 pandemic. Third, Ecology is currently conducting a study of water supply alternatives. *Bowen Testimony.* At the time of certification, the implementation of recommended actions was subject to the availability of future funding. *Ex. R-9, Vol. I, p. 3.* Numerous parties continue to seek funding for the Program from the Legislature. *Bowen Testimony.*

Implementation of the Program

35.

The GWAC was in operation until the Program was certified by Ecology, after which the GWAC was dissolved and an implementation committee became responsible for implementing the Program's recommended actions. *Bowen Testimony.* Led by South Yakima Conservation

District, the implementation committee is currently operating and includes representatives from Yakima County, Yakima Health District, Department of Health, WSDA, Irrigation Districts, WSU Extension, Agricultural Producers, and Ecology. *Ex. R-9, Vol. I, p. 99.* The implementation committee may perform functions necessary to achieve the goals of the Program, such as seek funding, collect water quality data from the ambient groundwater monitoring wells installed in 2018, or other various steps necessary to carry out recommended actions. *Ex. R-9, Vol. I, p. 100.*

36.

The Program uses an adaptive management approach during the implementation phase, where modifications to the initial recommendations are based on the results obtained through environmental monitoring. *Ex. R-4.* The ambient groundwater monitoring system will provide baseline data used to monitor nitrate levels. Sampling over time will determine whether the Program is improving the quality of the LYV groundwater and guide effective implementation. *Redding Testimony; Ex. R-9, Vol. I, p. 72.*

37.

Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such. Based on the foregoing Findings of Fact, the Board enters the following:

III. CONCLUSIONS OF LAW

1.

The Board has jurisdiction over the subject matter and parties in this case pursuant to RCW 43.21B.110. The Board reviews the issues raised in an appeal *de novo*. WAC 371-08-

485(1). The Board generally makes findings of fact based on the preponderance of the evidence. WAC 371-08-485(2). The appealing party has the initial burden of proof in cases that do not involve penalties or regulatory orders. WAC 371-08-485(3).

Water supply (Issue 2)

2.

Under Issue 2, FOTC argues that the Program as certified by Ecology does not adequately address future water supply needs and therefore fails to meet the requirements of RCW 90.44.410(1)(d), which provides in pertinent part:

> (1) The groundwater area of sub-area management programs shall include:
> (d) Projection of water supply needs for existing and future identified user groups and beneficial uses.

3.

Ecology argues that the Program complies with the statute and appropriately addresses water supply. Ecology asserts that the prospect of addressing water supply more directly within the Program was not approved by the GWAC because water supply in the area was already being addressed by other government entities, and the focus of the GWAC was on the quality of the water supply.

4.

Although the Program's focus was primarily on water quality, water supply was also adequately addressed. Specifically, the GWAC relied on water supply data in development of the Program, and discussed and voted on water supply issues. Moreover, many of the

recommended actions address water supply. *Findings of Fact (FOF) 22-25.* The Board concludes that the Program meets the requirements of RCW 90.44.410(1)(d).

Water management (Issue 3)

5.

In Issue 3, FOTC argues that the Program does not meet the requirements of RCW 90.44.410(1)(e), which states in pertinent part:

> (1) The groundwater area or sub-area management programs shall include:
> (e)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.

6.

Ecology argues that the Program complies with RCW 90.44.410(1)(e) and adequately addresses water management.

7.

The Program addresses water management in multiple contexts. The Program identifies and discusses the potential impacts of irrigated agriculture on nitrate leaching within the GWMA. Additionally, many of the recommended actions address water management issues that pertain to the safe yield and quantity of water available for future appropriation. *FOF 27.* The Board concludes that the Program meets the requirements of RCW 90.44.410(1)(e).

Antidegradation (Issue 8)

8.

FOTC claims that the Program violates antidegradation policy. The antidegradation policy as described in the Ground Water Quality Standards states in relevant part that "[d]egradation of ground water quality that would interfere with or become injurious to beneficial uses shall not be allowed." WAC 173-200-030 (2)(a)*; Ex. R-13, p. 17.*

9.

FOTC's argument appears to be that the Program does not sufficiently protect existing and future beneficial uses of the LYV groundwater. FOTC states that the Program violates the antidegradation policy by failing to stop lawful activities, such as fertilizer application to croplands, over which Ecology has no permitting authority. However, FOTC provides no evidence that the Program itself authorizes or shields any permitted or unpermitted discharge into state waters such that the quality of those waters might be degraded. To the contrary, multiple recommended actions, when implemented, will reduce nitrate levels in groundwater. *FOF 27, 30.* The Board concludes that the Program does not violate the antidegradation policy.

Ecology Certification (Issue 9)

10.

This issue appears to be somewhat of a catchall. FOTC claims under Issue 9 that Ecology exceeded its authority by certifying the Program under RCW 90.44.410 and WAC 173-

100-100.[1] Ecology argues that the Program was certified consistent with the intent of the groundwater management regulations.

11.

WAC 173-100-100 provides in part that "[t]he program for each groundwater management area will be tailored to the specific conditions of the area. The following *guidelines* on program content are intended to serve as a general *framework* for the program to be adapted to the particular needs of the area." (Emphasis added).

12.

In the Board's earlier ruling on partial summary judgment, the Board found that because the regulation is guidance to be implemented as a framework, it does not set out enforceable requirements. *Order on Summary Judgment.* Instead, as the plain terms of WAC 173-100-100 suggest, the choice of which elements to include and what level of detail to include is within each groundwater advisory committee's discretion, tailored and adapted to the specific conditions and needs of a particular area.

13.

As the certification provided for in WAC 173-100-120 requires only that Ecology certify "the program is consistent with the intent of this chapter," that is, chapter 173-100 WAC, the Board concludes that the Program complies with WAC 173-100-100 and therefore Ecology's certification pursuant to WAC 173-100-120(3) was proper.

[1] FOTC did not move for partial summary judgment on Issue 9 and therefore it remained for hearing. The Presiding Officer denied Ecology's cross-motion on Issue 9 as untimely.

14.

As for FOTC's claim that Ecology exceeded its discretionary authority by certifying the Program under RCW 90.44.410, the Board previously ruled the Program complied with RCW 90.44.410(1)(b), (f), (h), and (m). *Order on Summary Judgment.* As discussed above, the Board concludes that the Program also complies with RCW 90.44.410(1)(d) and (e). The Board therefore concludes that the Program satisfactorily complies with RCW 90.44.410 and WAC 173-100-100, and Ecology did not exceed its discretionary authority by certifying the Program.

Recommended action #41 (Issue 10)

15.

FOTC argues that the powers and duties described in chapter 43.23 RCW do not authorize the WSDA to "construct GWMA administrative program," and thus the quoted supplemental text of Recommended action #41 is improper. The relevant statute provides that the director of agriculture "shall exercise all the powers and perform all the duties relating to the . . . land utilization for agricultural purposes, water resources, . . . as such matters relate to the production, distribution and sale of agricultural commodities." RCW 43.23.030.

16.

Ecology testified that the supplemental language below Recommended Action #41 was not meant to suggest that WSDA should construct its own GWMA program separate from the Program, but rather to implement the various agriculture related duties to which they are assigned within the Program, such as educating farmers about properly applying manure to fields. *FOF 21.*

17.

The Board concludes that collaborating with other agencies to implement the Program aimed at addressing groundwater nitrate levels in an area which includes agricultural production is within the powers and duties of WSDA. Therefore, the Board concludes that the WSDA action described in Recommended Action #41 of the Program is authorized.

18.

Overall, the Board concludes that the 64 recommendations approved by the GWAC in the Program provide a technically sound set of best management practices, education and outreach efforts, technology based actions, and inter-agency coordination initiatives to address the reduction of nitrate levels in groundwater within the GWMA. Ecology certified the Program subject to three conditions. The Program represents a commitment by a diverse group of stakeholders to undertake a variety of coordinated actions to protect and improve the groundwater quality in the LYV. The Board concludes that after many years of dedicated community involvement by a diverse group of stakeholders including FOTC, the Program was properly certified by Ecology

19.

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such. Having so found and concluded, the Board enters the following:

IV. ORDER

The Board **AFFIRMS** Ecology's certification of the Lower Yakima Valley Groundwater Management Area Program.

SO ORDERED this 19th day of March, 2021.

POLLUTION CONTROL HEARINGS BOARD

NEIL L. WISE, Board Chair

CAROLINA SUN-WIDROW, Member

MICHELLE GONZALEZ, Member

HEATHER C. FRANCKS, Presiding
Administrative Appeals Judge