

Washington State Pollution Control Hearings Board

PCHB No. 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 Reply to Ecology Answer to Petition for
Reconsideration

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Introduction

This is a response to Ecology's Answer to FOTC Request for Reconsideration of PCHB Case No. 19-060. FOTC asks the PCHB to carefully consider whether Ecology has mis-stated the issues and mis-informed the board in their answer.

Issue 1- Has the LYV GWMA Implementation Executive Team followed through on Ecology's three requirements for LYV GWMA Program certification?

1. Ecology incorrectly states: "FOTC did not raise this issue previously."

In fact, an Oct. 9, 2019 letter from FOTC to Judge Francks (Exhibit 1, Complaint to the WA PCHB) that lists legal issues for PCHB No. 19-060 states on page 10:

FOTC contends that the LYV GWMA should not have been certified as written. Ecology cannot legally certify a GWMA program that fails to meet the requirements in WAC 173-100-100. FOTC further predicts that the three conditions for certification will not be met within the stated time constraints.

In fact, under questioning by FOTC, David Bowen testified on the second day of the PCHB hearing, around 2:31 PM, that there is an implementation team that has only met twice. Around 2:41 Mr. Bowen testified that Yakima County estimated it would take \$70 million to implement the recommended actions in the LYV GWMA Program. He testified that there were requests for only \$271,000 in the 2020 legislative budget and \$358,000 in Ecology's budget for LYV groundwater.

All parties agree, and the Program states, that the Program cannot be implemented sans funding.

In fact, FOTC revisited this issue on page 5 of our closing statement (Exhibit 2, FOTC Closing Statement), where we said:

Of particular interest to the community is the requirement to provide safe drinking water for people who live in the LYV. This objective was not met by the GWMA, or even addressed between 2012 and 2019. (Exhibit R-9, page 230/1803) After a year, the Implementation Committee apparently has delegated this responsibility to David Bowen, Water Quality Section Manager for Central Washington. (Bowen testimony, 2:15:50 Day 2) It is unreasonable to expect a man with so many other duties to give this task the attention it deserves. How long must the people of the LYV wait for safe drinking water?

2. Ecology incorrectly states: "It (Issue 1) has nothing to do with whether Ecology's certification decision was proper."

In fact, Ecology certified the Program subject to three conditions (Exhibit 3, Ecology Certification Letter) because Ecology understood that implementation of the Program would not be automatic, and the Implementation Team would struggle to follow through with the recommended actions.

In fact, under questioning by FOTC, David Bowen testified on the second day of the PCHB hearing around 2:00 PM that Yakima County realized they did not have the right resources to implement the LYV GWMA Program. He testified that the South Yakima Conservation District agreed to serve as lead agency and that the SYCD had a staff of at least three.

WAC 173-100-130 states:

(3) The program shall then be submitted by the groundwater advisory committee to the department which shall certify that the program is consistent with the intent of this chapter.

WAC 173-100-010 states:

. . . The intent of this chapter is to forge a partnership between a diversity of local, state, tribal and federal interests in cooperatively protecting the state's groundwater resources.

The resulting implementation phase is the responsibility of an Implementation Committee that no longer includes representatives from federal agencies, from the Yakama Nation, or from community and environmental groups but does include dairy representation. (Exhibit 2, FOTC Closing Statement, page 16.) The dairy industry is arguably the largest source of groundwater pollution in the LYV. FOTC again questions the wisdom of creating a partnership with polluters.

3. Ecology incorrectly states: "It (Issue 1) is beyond the Board's authority in any case."

WAC 173-100-150 states,

*All final written decisions of the department pertaining to designation of groundwater management areas, certification of groundwater management programs, permits, regulatory orders, and related decisions pursuant to this chapter shall be subject to review by the pollution control hearings board under chapter **43.21B** RCW.*

The law is clear.

Issue 2 - Did Ecology's David Bowen mislead the PCHB. . .?

Ecology misstates this issue when they say, "FOTC's Arguments Regarding the Nitrogen Availability Assessment Are Not Timely and Have Already Been Rejected." (Exhibit 4, Ecology Answer to Request for Reconsideration.)

In fact, the issue is much different from Ecology's paraphrase. Issue 2 centers on false testimony by a government employee. FOTC asked (Exhibit 5, FOTC Request for Reconsideration), "Did Ecology's David Bowen mislead the PCHB when he testified 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. Similarly, land application of biosolids and underground injection wells (UICs) must comply with water quality standards.

Thus, these sources were also considered unlikely to be significant contributors to nitrates in groundwater.’?’

Here is a history of this issue:

October 9, 2019: FOTC sends ELUHO an official complaint that lists the issues agreed upon by Ecology and FOTC. (Ex. 1, FOTC Complaint to WA PCHB)

On page 5 this complaint states:

FOTC contends that the LYV GWMA has simply defined, and otherwise ignored some sources of nitrate pollution in the GWMA target area. The LYV GWMA program does not address these sources as a problem and there are no related goals and objectives, strategies or recommended actions.

Specifically, the LYV GWMA program identifies but does not address or inadequately addresses:

- *Composting operations*
- *Industrial wastewater treatment plants*
- *Municipal wastewater treatment plants*
- *Application of bio-solids to cropland*
- *Atmospheric deposition of reactive nitrogen*
- *Legacy nitrates*

January 27, 2020: David Bowen declares that industrial and municipal wastewater discharges, underground injection wells, and application of biosolids to cropland, were unlikely to be significant sources of nitrate in groundwater. (Ex. 6, Bowen Declaration, page 4)

February 26, 2020: Administrative Appeals Judge Heather Francks sends the parties a letter (Exhibit 7) stating that the Board will grant summary judgement to Ecology as the non-moving party on Issues 1,4,5,6 and 7. Issues 2,3,8,9, and 10 remain for hearing. In bold she states,

This letter does not constitute the Board's final order on the motions, and therefore is not an appealable order pursuant to RCW 43.21B and 34.05.542, nor is it subject to a request for reconsideration.

April 7, 2020: The PCHB Ruling on Summary Judgement (Exhibit 9, page 13) says:

Ecology points to the Nitrogen Availability Assessment, prepared by a well-qualified team of scientists with multiple stakeholder participation, including FOTC. FOTC Motion, Att.7. Ecology also notes that municipal and industrial stormwater are separately regulated by other permits and were excluded from the Nitrogen Availability Assessment for that reason. Ecology also argues that the lead agency, SYCD, is actively pursuing funding and developing a detailed implementation plan as required by the Program.

The Board concludes that as a matter of law, the Program has sufficiently identified and analyzed the sources of nitrate in the groundwater. As a result, Ecology is entitled to summary judgment as a non-moving party and Issue 4 is dismissed.

April 7, 2020: Administrative Appeals Judge Heather Francks sends the parties a letter (Ex. 8) that states in its entirety:

Enclosed is Order on Motion for Summary Judgement in the above referenced matter.

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

April 9, 2020: FOTC responds (Ex. 10) with a question for ELUHO:

Friends of Toppenish Creek has a question. How should we go about petitioning to exclude the Declaration of David Bowen from future hearings regarding PCHB No. 19-060? Our reasons are contained in the attached letter to Judge Francks.

Judge Francks does not respond to our letter (Ex. 11) that begins:

The Friends of Toppenish Creek are concerned that the WA State Pollution Control Hearings Board relied on inaccurate information in the declaration of David Bowen when the PCHB ruled in favor of Ecology on Issue No.4 in Motion for Summary Judgement, PCHB No. 19-060. In blunt terms, Mr. Bowen stretches the truth.

The letter provides a detailed description of nitrate discharges to the LYV aquifers from sources that were omitted in the GWMA Nitrogen Availability Assessment (NAA).

August 17, 2020: FOTC challenges Ecology's Administrative Findings of Fact in our Opening Brief (Exhibit 12, page 14).

For example, the LYV GWMA Program Findings state "Ecology reviewed the Program recommendations finding none that would require adoption of implementation policies, ordinances of programs beyond our existing authority." FOTC listed recommended actions that, according to the Program, required amendment to RCW 90.48, "legislative approval", and amendment of RCW 36.70A.

FOTC unsuccessfully attempted to enter this into the court record during questioning of Mr. Bowen around 3:40 PM on day 2 of the hearing.

September 22, 2020: While working on the FOTC Closing Statement for PCHB Case No. 19-060, FOTC found an erroneous statement by David Bowen. In a spirit of cooperation and good will we sent this information to Mr. Bowen. He did not reply and did not inform the PCHB about his inaccurate testimony. (Ex. 13, Email to David Bowen)

March 19, 2021: The PCHB issues Findings of Fact, Conclusions of Law and Order on Case No. 19-060. (Exhibit 14)

March 27, 2021: FOTC requests reconsideration of the case, in part because Ecology's David Bowen mis-informed and mis-led the PCHB. FOTC provides documentation of significant nitrate discharge to LYV groundwater from facilities with NPDES permits, including municipal and industrial wastewater treatment plants. The request quotes Yakima County officials who promised the GWMA advisory committee that assessment of bio-solid applications and the Port of Sunnyside WWTP would be added to the Program. (Exhibit 15, Petition for Reconsideration)

Significant sources of nitrogen that were not addressed in the GWMA NAA are:

- Over application of manure fertilizer to cropland.
- Outdated, leaking manure lagoons.
- Municipal and industrial wastewater treatment operations.
- Application of bio-solids to cropland.
- Underground Injection Wells (UICs).
- Spills and cleanup sites.
- Abandoned wells.

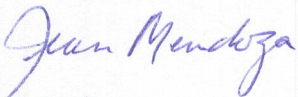
Conclusion

RCW 90.44.400 states:

This legislation is enacted for the purpose of identifying groundwater management procedures that are consistent with both local needs and state water resource policies and management objectives; including the protection of water quality, assurance of quantity, and efficient management of water resources to meet future needs.

The law must be followed in fact. The law is more than lofty aspirations. There must be substance to agency actions. The people of the LYV count on the WA State PCHB to ensure that seven years of work and over \$2.3 million in taxpayer funds have not been wasted.

Respectfully submitted this 2nd day of April 2021.

s/ 

Jean Mendoza

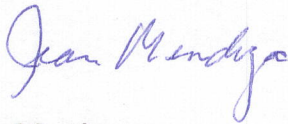
Executive Director Friends of Toppenish Creek
3142 Signal Peak Road
White Swan, WA 98952

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of April 2021, 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:

Washington Department of Ecology
Thomas J. Young Assistant Attorney General Ecology Division
P.O. Box 40117
Olympia, WA 98504-0117
Email: Thomas.young@atg.wa.gov
donna.fredricks@atg.wa.gov

Ladon Linde
Yakima County Commission
129 N. Second St.
Yakima WA, 98901
Email: ladon.linde@co.yakima.wa.us

s/ 

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

Exhibits

Exhibit 1: Complaint to the WA State PCHB, October 9, 2019

Exhibit 2: FOTC Closing Statement to the PCHB, September 25, 2020

Exhibit 3: Ecology Letter of Certification of the LYV GWMA Program, July 29, 2019

Exhibit 4: Ecology Answer to FOTC Petition for Reconsideration, March 31, 2021

Exhibit 5: FOTC Petition for Reconsideration of PCHB Case No. 19-060, March 27, 2021

Exhibit 6: David Bowen Declaration in Support of Cross Motion for Summary Judgement, January 27, 2020

Exhibit 7: PCHB Letter, February 26, 2020

Exhibit 8: PCHB Letter, April 7, 2020

Exhibit 9: PCHB Order on Motion for Summary Judgement, April 7, 2020

Exhibit 10: Emails regarding Order on Motion for Summary Judgement, April 9, 2020

Exhibit 11: FOTC Letter to Administrative Appeals Judge Heather Francks, April 9, 2020

Exhibit 12: FOTC Opening Brief, August 17, 2020

Exhibit 13: Email to David Bowen, September 22, 2020

Exhibit 14: PCHB Findings of Fact and Conclusions of Law and Order in Case No. 19-060, March 19, 2021

Exhibit 15: FOTC Petition for Reconsideration, March 27, 2021