

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 Petition for Reconsideration

Table of Contents

I	Introduction.....	1
II	Issue 1.....	2
III	Issue 2.....	3
IV	Conclusion.....	9
	Certificate of Service.....	11
	Exhibits.....	12

I. Introduction

On March 19, 2021 the WA State Pollution Control Hearings Board (PCHB) ruled against the Friends of Toppenish Creek (FOTC) on all issues in PCHB Case No. 19-060. This is a petition for reconsideration of that ruling, authorized by WAC 371-080-550.

Although the issues are complex, FOTC will focus this request on two main problems with the PCHB decision. We believe the PCHB would have ruled differently with better information. We apologize for our ineptitude in presenting evidence to the board in September 2020.

The two issues we will pursue are:

1. In September 2020, after 14 months, and again in March 2020, after 18 months, the LYV GWMA Implementation Executive Committee had not fulfilled the three conditions for certification in Ecology's July 2019 Letter of Certification. *Ex. 1*
2. Ecology's expert witness, David Bowen, mis-informed and mis-led the PCHB when he defended a decision by unnamed persons to ignore nitrogen leaching from Underground Injection Control Wells (UICs), Bio-solids, and Municipal or Industrial Wastewater. *Ex. 2*. Because the PCHB trusted Mr. Bowen's testimony to be honest, the PCHB ruled against FOTC on Issue 4 in summary judgement on April 7, 2020. *Ex. 2*. This led to exclusion of evidence regarding a. the accuracy of GWMA research, and b. a comprehensive review of all nitrate sources during the September 2020 hearing.

II. Issue I

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

Facts & Arguments:

A. The Certification Letter, *Ex. 1*, required the Executive Team to name a lead entity and develop a Scope of Work to implement the goals and recommendations of the LYV GWMA Program.

The Executive Team met twice in 2019 and has not met since then. *Bowen testimony*. The South Yakima Conservation District (SYCD) agreed to serve as the lead entity for implementation. *Bowen testimony; Ex. 2*. SYCD is a small agency, currently with a staff of one plus clerical support. *Ex. 4, Mendoza Declaration*. It is impossible for one man to perform all his usual duties for the SYCD and also lead the Executive Team. To date there is no published Scope of Work.

B. The Certification Letter, *Ex. 1*, required the Executive Team to submit a prioritized implementation schedule to Ecology on or before May 31, 2020.

According to Ecology testimony at the September 2020 PCHB hearing, *Bowen testimony*, this has not been accomplished. Emails obtained by public records requests suggest that the SYCD created an informal priority list that was not approved by the Implementation Executive team, because that group had ceased meeting. That list omits provision of safe drinking water to impacted residents. *Exhibit 5, page 2/9*.

C. The Certification Letter, *Ex. 1*, required the Executive Team to seek funding and provide safe drinking water to the people in the LYV whose wells have nitrate levels above safety standards.

The Executive Implementation Team has not delivered safe drinking water to impacted LYV residents. According to David Bowen, *Bowen testimony*, he was working on this problem in September 2020. Mr. Bowen has since moved on to another division at Ecology. This is alarming since Ecology has known about unsafe drinking water since 2002 and the LYV GWMA had a stated goal of providing safe drinking water eight years ago in 2012 when meetings began. Danger to public health was the prime motivation for creation of a GWMA in 2012, and this goal has been steadily and continuously ignored by officials. Why do they disdain us so much?

III. Issue

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."

FOTC postulates that this misinformation caused the PCHB to rule, "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."

The Law

According to RCW 9A.72.010 (1) "Materially false statement" means any false statement oral or written, regardless of its admissibility under the rules of evidence, which could have affected the course or outcome of the proceeding.

Facts & Arguments

1. Mr. Bowen mis-informed in his Declaration in Support of Cross Motion for Summary Judgement *Exhibit 3*, when he said that "The (LYV GWMA Advisory) Committee met approximately 120 times over the course of 7 years." In fact, the GWAC only met 62 times over the course of 7 years. *Ex. 4, Mendoza Declaration*
2. In 2015, the WSDA signed an agreement with Yakima County to deliver a Nitrogen Loading Assessment (NLA) for the LYV according to an agreed upon Scope of Work. *Ex. 5, page 458/1803*. According to WSDA, "The Nitrogen Loading Assessment is a mass-balance model." *Ex. 5, page 460/1803*
3. The WSDA and Yakima County did not deliver an NLA. Instead, the agencies delivered a Nitrogen Availability Assessment (NAA) that a. was not a mass balance study, and b. did not evaluate the following sources of nitrogen contamination of the groundwater – compost operations, municipal wastewater treatment plants, industrial wastewater treatment operations, application of biosolids to cropland, underground injection wells, abandoned wells, runoff from agricultural operations, stormwater runoff, and accidental spills/cleanups. *Ex. 6, Nitrogen Availability Assessment*

4. The LYV GWMA Advisory Committee (GWAC) never approved the NAA due to concerns about the accuracy of the data. *Ex. 4, Mendoza Declaration*
5. Although the technical committee may or may not have decided to remove these sources from consideration, the technical committee never informed the GWAC of this plan. Ecology has provided no documentation of discussions within the technical committee regarding this decision. *Ex. 4, Mendoza Declaration*
6. Yakima County promised the GWAC in public meetings that there would be an assessment of nitrates from bio-solids. The county did not follow through on this promise. Here are excerpts from GWAC Meeting Summaries.
 - a. April 20, 2017: *Vern (Vern Redifer, Director of Public Services for Yakima County) added that Peter Severtsen of the Department of Ecology is preparing a separate analysis of bio-solids for the NAA because none had been included earlier.*
 - b. May 18, 2017: *The group had learned through the comments made by members that biosolids and land application of wastewater (that has nitrogen loading) had not been included in the Nitrogen Availability Assessment (NAA). The Department of Ecology is working on a biosolid piece and the Port of Sunnyside is working on land application of wastewater piece for inclusion in the NAA.*
 - c. November 2, 2017: *Vern stated that an analysis of biosolids would be included in the next draft of the NAA. The lack of analysis on compost was also raised. Gary (Gary*

Bahr, WSDA representative to the GWMA and NAA author) stated that this was being looked into by WSDA.

7. A 2012 EPA estimate of nitrogen sources in Yakima County found that application of biosolids to cropland, almost entirely within the LYV, resulted in an average of 186,423 lbs. of nitrogen to the land surface every year from 2005 to 2009 with a maximum of 419,174 lbs. in 2007. *Exhibit 7, page 14.*

Table 3: Amount of Biosolids Utilized in Yakima County

	2005	2006	2007	2008	2009
Total Lbs Nitrogen/year applied	58,305	105,669	419,174	175,300	173,667
# acres biosolids applied	346	831	2994	1982	1381
# fields biosolids applied	11	28	63	41	59

8. Mr. Bowen stated in his Declaration in Support of Cross Motion for Summary Judgement, “Municipal and industrial wastewater discharges, which are regulated by NPDES permits that require compliance with water quality standards, were not considered a significant source.”
9. There are monitoring wells on LYV dairies that have NPDES permits, with nitrate readings over ten times the safety standard of 10 mg/L. *Exhibit 10, pages 3/13 & 12/13.* Possession of an NPDES permit does not ensure that no leaching takes place.
10. The Port of Sunnyside has an NPDES permit. Port of Sunnyside reports show high levels of nitrates in groundwater monitoring wells beneath that facility. David Bowen was aware of these readings. He signed the Port of Sunnyside NPDES permit in 2019. *Ex. 8*

- a. The Port of Sunnyside is authorized to apply wastewater to 398 acres of land via spray irrigation. *Exhibit 8, page 9/61*
 - b. The Port of Sunnyside is authorized to apply up to 432 lbs. of nitrogen per acre per year or a total of 172,000 lbs. of nitrogen per year. *Exhibit 8, page 10/61*
 - c. From 2008 to 2013 Port of Sunnyside mid-field monitoring well 7 had a mean nitrate concentration of 18.4 mg/L with a maximum reading of 38.7 mg/L. *Exhibit 9, page 26/69*
 - d. From 2008 to 2013 Port of Sunnyside mid-field monitoring well 8 had a mean nitrate concentration of 34.1 mg/L with a maximum reading of 176 mg/L. *Exhibit 9, page 26/69*
 - e. According to Ecology's Water Quality PARIS data base, there have been 30 enforcement actions against the Port of Sunnyside since 2015.
11. The LYV GWMA Program lists the following sources of nitrogen as potentially available for transport to groundwater:

Table 4 – Estimated nitrogen available per acre from all sources at the low, medium, and high ranges

Source		Area (acres)	Low Scenario (lb/ac/yr)	Medium Scenario (lb/ac/yr)	High Scenario (lb/ac/yr)
Irrigated Agriculture		85,775	0-58	0-148	0-284
CAFO	Pens	2,096	67	480	892
	Lagoons	210	1,354	7,448	13,542
	Residential On-site sewage	398	223	403	662
	Large On-site sewage	3	195	209	225
	Commercial On-site sewage	30	163	173	183
	Residential fertilizer	4,381	4.7	11.7	18.6
RCIM	Small scale farms	2,096	4.3	10.7	17.1
Atmospheric deposition		87,082	1.53	2.05	6.15

This estimates Residential Fertilizer application at 20,000 to 84,000 lbs. nitrogen per year, and Small-Scale Farms application at 8,000 to 36,000 lbs. nitrogen per year.

12. The LYV GWMA Program included residential fertilizer and small-scale farms as significant sources but excluded biosolids and wastewater treatment spray fields, both with higher annual applications of nitrate. This does not make sense.
13. Ecology was aware of a clean-up action plan at the Bee-Jay Scales site in Sunnyside, under Washington's Model Toxics Control Act Regulations. *Exhibit 11*. Ecology never brought this spill to the attention of the GWAC. Spills and hazardous waste sites were not assessed in the LYV GWMA Program or in the GWMA NAA, as recommended by WAC 173-100-100 (2).
14. NPDES permits do not prohibit the discharge of nitrates to groundwater. NPDES permits simply regulate how much nitrate can be discharged. There are NPDES permits for food processing and other commercial operations in the LYV that authorize discharge of nitrogen and other pollutants. According to Ecology's Water Quality Permitting and Reporting Information System some of these businesses are: Con Ag Packing & Storage, Windy Point Packing Co., the USDA Research Station, Del Monte Plant 122, and the City of Grandview POTW. *Ex. 4 Mendoza Declaration*
15. The NAA simply did not address leaching from abandoned wells as recommended by WAC 173-100-100 (2), even though Ecology's expert on abandoned wells, Avery Richardson, spoke with three of the GWMA Work Groups – RCIM, Regulatory and EPO; and the

GWMA organized a meeting specifically to address abandoned wells. *Ex. 4, Mendoza Declaration*

IV. Conclusion

The Friends of Toppenish Creek make this petition to the WA State Pollution Control Hearings Board on behalf of the people who live in the Lower Yakima Valley. For the most part we are honest hardworking citizens and immigrant workers who do our best to survive amid agricultural chemicals and pollution. Safe drinking water is essential for our survival and we look to state and local government to protect this resource.

If our nation's enemies want to learn how to destroy faith in government, they can take lessons from the LYV GWMA. Ten years ago, agencies told the public that the GWMA would address problems with communication, egregious pollution, and unsafe drinking water. The GWMA failed to do so but officials will not admit this.

Despite vague promises, and after ten years, there is still no government program to provide safe drinking water. Even worse, as we have shown in this petition, the WA State Dept. of Ecology and others downplay the problem and do not acknowledge or address the real and imminent danger to people's health.

PCHB Case No. 19-060 gives the PCHB an opportunity to defend honesty in government. Please do so, for the people who live in Washington State today and for the children to come.

Respectfully submitted this 27th day of March 2021.

s/ *Jean Mendoza*

Jean Mendoza

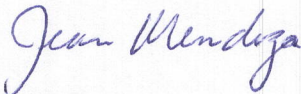
Executive Director Friends of Toppenish Creek
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CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of March 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:

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s/ 

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Exhibits

Exhibit 1. Ecology Letter Certifying the LYV GWMA Program, July 29, 2019. Available at [DOE-Certification-Letter \(yakimacounty.us\)](#)

Exhibit 2. PCHB Ruling on Motion for Summary Judgement. Attached

Exhibit 3. Declaration of David Bowen in Support of Ecology's Cross Motion for Summary Judgement, January 29, 2020. Attached

Exhibit 4. Mendoza Declaration, March 26, 2021. Attached

Exhibit 5. LYV GWMA Program, Volume IV, Available at [GWMA Volume IV - Member Contributions \(yakimacounty.us\)](#)

Exhibit 6. LYV GWMA Nitrogen Availability Assessment, June 2018, Available at [Nitrogen Availability Assessment | Yakima County, WA](#)

Exhibit 7. EPA Nitrogen Screening Analysis, June 2012. Attached

Exhibit 8. Port of Sunnyside NPDES permit. Attached

Exhibit 9. Port of Sunnyside Fact Sheet. Attached

Exhibit 10. EPA Yakima Dairies Consent Order Update – 2014. Available at <https://www.epa.gov/sites/production/files/2017-12/documents/lower-yakima-valley-groundwater-fact-sheet-december-2014.pdf>

Exhibit 11. Bee Jay Scales Clean Up Action Plan. March 8, 2013. Attached.